

**CRITICAL ANALYSIS OF EXPERT EVIDENCE USED IN
SUPPORT OF THE BATTERED WOMAN SYNDROME
DEFENCE**

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To my parents

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Summary

The South Africa criminal law allows the battered woman to raise a battered woman syndrome defence in the context of non-pathological criminal incapacity. However, there is a need of expert evidence to support such defence for it to succeed in the court of law. Hence, this paper scrutinizes the task of expert evidence in support of the battered woman syndrome in order to reach the extent of its effectiveness. Nevertheless, such evidence is not indispensable but without it, the court hardly gets persuaded resulting into the failure of the defence.

The meaning of battered woman syndrome is articulated in the paper as well as the fact that battered woman syndrome defence falls under the defence of non-pathological criminal incapacity. The origin and development of the non-pathological criminal incapacity has also been discussed by comparing it with pathological criminal incapacity which emanates from mental illness while the former does not originate from a mental illness. Psychiatrist are in a better position to understand the latter while psychologists are in a better position to understand the former, hence it is advisable if the court pays more attention or attach more weight to the evidence given by the psychologists if this defence is to succeed and have a brilliant future.

Moreover, the possible defences available to the battered woman have been mentioned as well as the cases that used non-pathological criminal incapacity as a defence particularly with regard to the battered woman syndrome defence. Both cases that were successful and unsuccessful have been elaborated. However, the cases that failed with the defence are in large numbers than the successful ones.

Although expert evidence is essential to support the battered woman syndrome defence, it is unjustly and unfairly applied on the battered woman who is an accused person in the court leading to the failure of the defence. In short the use of expert evidence has failed in its application as the two professions, law and medicine has failed to make this defence work as they have not reached an agreement concerning the battered woman syndrome defence.

In addition, the paper looks at the obstacles linked with the battered woman syndrome defence as well as offering suggestions to be put in place in order to make the use of expert evidence achievable. This can only be done if both the lawyers and mental health professionals come to

terms with each other where they are able to understand the battered woman syndrome and the actions which led to the situation where battered woman finds herself as an accused person.

Finally, the paper concludes that expert evidence has failed tremendously in its application leading to the failure of the battered woman syndrome defence in the context of non-pathological criminal incapacity. Consequently a lot still needs to be done to protect the women who face numerous obstacles; both personal and legal as they do not face justice in court and everyone must take part to put an end to battering of women which is inhuman and morally wrong.

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List of abbreviations

BWS-Battered Woman Syndrome.

DSM-IV-Diagnostic and Statistical Manual of Mental Disorders.

PTSD-Post Traumatic Stress Disorder.

Chapter 1: Introduction

1.1 Introduction

In today`s world, battering of women is universally and it does not spare any country including South Africa. Contrary to all clinical, sociological, scientific and practical efforts to combat battering, women are still being battered by their partners, spouses and husbands; hence they suffer physical, emotional, mental and sexual abuse. Domestic violence and battering of women goes hand in hand as the consequences on the victims are more or less the same and both occur inside homes. Generally, men are the perpetrators of the abuse and women as the victims in the hetero sexual domestic relationship.

The women who face this kind of conduct are referred to as battered wife/woman and the cycle of the battering which is physical and psychological condition that they are forced to endure is known as battered wife syndrome.¹ In return of suffering the abuse, these women tend to kill their batterers/abusers hence they are charged with murder .However, in South Africa Criminal law, these battered women can raise a battered woman syndrome defence in the context of non-pathological criminal incapacity. Nevertheless, there is a need of expert evidence to support the defence.² This thesis intends to scrutinize the role of expert evidence and to the extent to which it contributes to make the battered woman syndrome defence more effective.

1.2 Aim of study

This paper will focus on the task of expert evidence as applied in the court of law to sustain the battered wife syndrome defence. The objective is to find out the effectiveness of expert evidence in making the battered wife syndrome defence to succeed and the flaws thereof.

1.3 Research question

Does the expert evidence really make it possible for the battered woman to succeed with the battered woman syndrome defence in the context of non-pathological criminal incapacity? Does

¹ What is battered woman syndrome? <http://www.corrections.govt.nz/policy> [accessed 2012/03/08].

² P.Carstens & J.Le Roux "The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband" 2000 SACJ 180.

it mean that whenever expert evidence is used the battered woman mechanically succeed with the defence? This thesis is a response to this situation.

1.4 Research assumption

My view is that, although there is a need of expert evidence to support the battered wife syndrome defence to succeed, the expert evidence is unjustly applied on the battered wife contributing to the failure of the defence.

1.5 Importance of the topic

This topic will look at the loophole associated with the expert evidence and find the solutions to make the battered wife syndrome defence succeed.

1.6 Literature review

Sufficient information has been written concerning battered wife syndrome defence and the requirement of expert evidence to support it. Available number of cases has also been reported by the courts which will be discussed in chapter 5 in support of and against the defence. Substantial material has been produced to make the people understand the battered wife syndrome defence so that it can be reasonably applied. However, little has been done to achieve the purpose of their work; I hope this paper will offer solutions so that the expert evidence is fairly used in court to make the defence of battered wife syndrome succeed.

1.7 Research methodology

1.7.1 Desk /comparative research

Adequate time was also spent comparing different articles that have been written on battered wife syndrome defence and the need of expert evidence to support the defence. In so doing, this helped me to reach the extent of success of expert evidence in supporting the defence and what still needs to be done. By comparing different articles, I would be able to know what the majority think on the effectiveness of expert evidence with regard to the battered wife syndrome defence.

1.8 Outline of chapters

Chapter 2 will give a detailed understanding of the battered woman syndrome.

Chapter 3 will illustrate the category where the defence of battered woman syndrome falls.

Chapter 4 will describe other probable defences that can be raised by a battered woman.

Chapter 5 will present cases in favour of and against the defence.

Chapter 6 will examine the use of expert evidence in supporting the battered woman syndrome defence.

Chapter 7 will explain the complications associated with the battered woman syndrome defence as well as offering suggestions to be put in place in order to make the use of expert evidence more successful in support of the battered woman syndrome.

Chapter 8 will sum up the findings.

Chapter 2: Understanding the Battered Woman Syndrome (BWS)

2.1 Introduction

A broad knowledge of battered woman syndrome is very important in order to understand every area pertaining to it including its cycles, symptoms, characteristics of both an abuser and female victims but also to achieve the defence when raised in the court of law. The battered woman syndrome was initially conceptualized as “learned helplessness” a condition used to explain a victim’s inability to protect herself against the batterer’s violence that developed following repeated actions and first rose to prominence in the 1970’s when it was used as a legal defence for abused women who murdered their husbands in a pre-meditated fashion.³

The defense lawyers used the syndrome to explain premeditation as follows; that the woman could not leave the relationship due to learned helplessness nor could they fight back when actually being attacked. In the face of growing violence, the woman's hope was that the only way she could secure herself and her children was to get rid of the partner when he was more vulnerable, for example, while sleeping.⁴

2.2 The Constitution jurisprudence on the Battered Woman Syndrome defence

Evaluation of a battered woman, the battered woman syndrome, the non-pathological criminal incapacity and the need of expert evidence can not go without considering the constitution first, as doing so; the topic will have a boundless value. The constitution is defined as a set of basic laws or principles for a country that describe the rights and duties of its citizens and the way in which it is governed.⁵ The South African constitution was promulgated on 18 December, 1996 and commenced on 4 February 1997. Since the constitution adoption; South Africa is faced with a lot of constitutional confrontations.⁶

³MA.Dutton, “Critique of the battered woman syndrome” http://www.aets.org/article_138.htm [accessed on 2012/03/10].

⁴ Ibid.

⁵ Macmillan English Dictionary for advanced learners” 2002.

⁶ The Constitution of the Republic of South Africa, (hereafter “the 1996 Constitution”)

Chapter 2 of the constitution deals with the Bill of Rights which regulates the relation between the state and an individual and also the relation between individuals or private persons. The relationship between the citizen and an individual is referred to as “vertical” relation whereas the relationship between private persons is referred to as “horizontal” relation. For the objective of this paper the vertical application of the Bill of Rights is more of importance as it concerns the state as opposed to the accused.⁷

In terms of section 8 (1) the Bill of Right applies to all law including any legal norm, irrespective of whether it is a statutory provision or a rule in terms of common law or customary law may be challenged once it is established that it infringes a right in the Bill of Rights. If any of these laws infringes a right, it will be declared invalid and unconstitutional.⁸ Section 8 (3) and section 39 (2) is very relevant in this study as these sections deal with the direct and indirect application of the Bill of Rights to develop the common law respectively.⁹ Reference will also be given to section 173 of the constitution which states that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into accounts the interests of justice.¹⁰

Section 8 (3) states that when applying a provision of the Bill of Rights to a natural or juristic person a court in order to give effect to the Bill of Rights must apply or if necessary develop the common law to the extent that the legislation does not give effect to that right and that may develop rules of the common law to limit the right.¹¹

Section 39 (2) states that when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹²

Hence, there are two instances when the common law is required for development in terms of the above sections, firstly, when a rule of common law is inconsistent with a constitutional provision

⁷GP,Stevens,(2011)**The role of expert evidence in support of the defence of criminal incapacity**,LLD thesis, University of Pretoria,Pretoria,viewed **yymdd**<http://upetd.up.ac.za/thesis/available/etd-1102201-163556/> at 87-90.

⁸Section 8(1) of the Constitution.

⁹ Supra note 7.

¹⁰ Section 173 of the Constitution; see also supra note 7.

¹¹ Section 8(3) of the Constitution; see also supra note 7.

¹² Section 39(2) of the Constitution; see also supra note 7.

and secondly, when a rule of common law is not inconsistent with a specific constitution provision but may fall short of its spirit, purport and objects.¹³

The defence of non-pathological criminal incapacity has very little statutory reference and recognition. It could be shown that section 78 (2) of the Criminal Procedural Act does not adequately give effect to an accused's right to adduce and challenge evidence in terms of section 35 (3) (i) of the Bill of Rights because of the fact that there is no obligation on a court to refer the an accused for observation in terms of section 79 of the Criminal Procedural Act when reliance is placed on the defence.¹⁴

Consequently, when interpreting section 78 (2) of the mentioned Act, it does not currently promote the spirit, purport and objects of the Bill of Rights as the role of expert evidence in support of this defence is uncertain and indistinguishable. In addition the need of expert evidence is not indispensable in order to rely on this defence hence an accused's right to fair trial and more specifically, the right to adduce and challenge evidence is prejudiced.¹⁵

Such being the case, the defence of non-pathological criminal incapacity in the context of battered woman syndrome defence falls under the common law and there is obligation on the court to develop the common law just like in the way the court applied this, in the case of *Carmichele v the Minister of safety and security and another*.¹⁶In this case there were issues of fundamental importance to develop the common law of delict with regard to the “interests of the community” imposing a legal liability on the authorities as this would encourage the police and prosecuting authorities to act positively to prevent violent attacks on women.

The constitutional court made important findings that both the high court and SCA are obliged to have regard to the provisions of section 39(2) of the constitution when developing the common law.¹⁷ The *Carmichele* revolution is a landmark decision in the sense that it opens the door for development of existing common law that may fall short of the spirit, purport and objects of the Bill of Rights.

¹³ Supra note 7 at 103.

¹⁴ Supra note 7 at 99.

¹⁵ Ibid.

¹⁶ *Carmichele v the Minister of Safety and Security and another* 2002 (1) SACR 79(CC); see also supra (n 9).

¹⁷ Ibid.

Hence, the defence of non-pathological criminal incapacity is steamed up with disagreement and uncertainty together with the approach towards expert evidence in support of this defence. As it will be indicated in chapter 6 and 7 this defence has not been consistent due to the vagueness. For this reason, it could be argued that the common law principles relating to this defence fall short of the spirit, purport and objects of the Bill of Rights.

Owing to the fact that the defence of non-pathological criminal incapacity and the role of expert evidence in support thereof is mainly common law based, the focus should be placed on attempting to develop the common law rules pertaining to this defence in order to harmonize it with the spirit, purport and objects of the Bill of Rights as the law relating to the defence of non-pathological criminal incapacity in the context of battered woman syndrome is in desperate need of development.¹⁸

Reference will also be made to section 9 of the constitution which states that everyone is equal before the law and has the right to equal protection and benefit of the law¹⁹ and it could be argued that the accused person in this case the battered woman who raise the defence of non-pathological criminal incapacity does not enjoy equal benefit and protection of the law due to the vagueness and uncertainty relating to this defence.²⁰

Reference will also be made to section 12 (1) (c) of the Constitution, this right specifically relates to battered women who kill their abusive spouses and states that everyone has the right to freedom and security of the person and to be free from all forms of violence from either public or private sources.²¹ As well as section 12 (1) (d) which states that every person has a right not to be tortured in any way²², this section can play as a mitigating factor during sentencing after hearing the battered woman syndrome evidence in that the battered woman was abused over a prolonged period and was subjected serious human right violations.²³

However, section 36 (1) of the constitution provide for the limitation of the rights and a common platform between the court and legislature and provides a template not only for the courts but

¹⁸ Supra note 7.

¹⁹Section 9 of the Constitution.

²⁰ Supra note 7 at 104.

²¹Section 12 (1) (c) of the Constitution.

²²Section 12 (1) (d) of the Constitution.

²³ Supra note 7 at 110.

more importantly for the legislature.²⁴This section states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including:²⁵

- (a) the nature of the right
- (b) the importance of the purpose of limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose and
- (e) less restrictive means to achieve the purpose.

2.3 Domestic violence

Domestic violence is defined as an adult member of the household using physical force against another member which includes physical abuse, sexual abuse, emotional abuse, intimidation and harassment implicated on the victim as a result of the relationship that exist between the victim and the batterer.²⁶ As a result of the domestic abuse, many women experience humiliation, shame, paralyzing fear, the threat of murder and thoughts of suicide.²⁷The Domestic Violence Act, 1998 (hereafter referred to as the Act) has made provision for victims of abuse of apply to the court for a Protection Order against the abuser.²⁸Unfortunately, the application form is long and written in a language that is technical and confusing for many victims. The unintended consequence is that many victims either leave court without completing the application, or submit incomplete forms, or forms with incorrect information (which results in unsuitable orders being made by the presiding magistrate).²⁹

²⁴ Supra note 7 at 116-117.

²⁵Section 36 (1) of the Constitution.

²⁶Battered women: "understanding domestic violence"<http://www.candy-brown.suite101.com/batter...>

²⁷ Ibid.

²⁸ The Domestic Violence Act 118 of 1998; see also Gobodo-Madikizela and Foster "The Aftermath of Domestic Abuse' in Psychology and the Law (2005) (eds Tredoux et al) pp.364-383 AND Larisa Panieri Peter "Domestic Violence" in Psycho-legal Assessment in South Africa (2006)9ed Kaliski) 146-161.

²⁹ Supra note 26.

2.4 Battered woman syndrome

Research has indicated that many battered women experience a group of symptoms that has come to be called Battered Woman Syndrome. “Battered woman syndrome is a woman’s presumed reactions to a pattern of continual physical and psychological abuse inflicted by her partner, spouse or husband.³⁰ According to Walker who conducted the battered woman’s research at Colorado for over 400 battered women shown that the particular symptoms seen in abused women are actually a syndrome, a clinical diagnosis which develops from the abuse, rather than being the cause of it. With regard to the interviews Walker conducted, he discovered that the women believed they were helpless in trying to escape the abusive relationships and that they felt they had no control over what was happening in their lives.³¹

A woman begins to develop battered woman syndrome following the repetition of a three-stage cycle.³² The first stage of the cycle is the tension-building period in which the relationship begins to face some amount of difficulty, and includes minor violence against the woman. During this stage, a woman may become complaisant to try to soothe her partner. The second stage involves an explosion of violence against the woman, which begins a woman's feeling of isolation and helplessness. In the third stage, the batterer shows remorse and loving contrition.³³

As the cycle repeats itself, women become more and more convinced that escape is impossible. Eventually they will begin to suffer from learned helplessness, a condition of passivity caused by the woman's recognition that she has no power to stop or escape her partner's random acts of violence. The battered woman learns to cope with each individual attack against her, rather than focusing on changing her circumstances as a whole.³⁴

Such being the case, battered woman syndrome has a physical and psychological condition, the condition is the basis for the battered woman defence that has been used in cases of physically and psychologically abused women who have killed their abusers.³⁵ Battered woman syndrome

³⁰ Lenore E.A Walker, 1995, “Understanding the Battered woman Syndrome” at 30-35

³¹ Nov 5 by Louisey “Because as long as we don’t understand it, it will keep on happening” <http://www.louisey.wordpress.com/2010/11/0/> [accessed 2011/18/09].

³² What is battered woman syndrome? <http://www.corrections.govt.nz/policy/> [accessed on 2012/03/08].

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

has also been defined as post-traumatic stress disorder according to DSM-IV which is a psychological condition that results from exposure to severe trauma and also explains why a battered woman victim may react, because of flashbacks and other intrusive experiences resulting from prior victimization.³⁶

2.5 Why battered women remain in an abusive relationship

There a number of reasons as to why battered woman stay in the abusive relationship with their batterers.

- Due to fear which is a reason for not leaving as the battered women are most at risk during leaving or after having left an abusive relationship.³⁷
- Due to lack of resources which makes them to stick to the perpetrators as most of the times the family ties and friendship have been destroyed leaving the victim isolated psychologically and financially reliant on the abusive partner.³⁸
- Due to lack of finances and Economic reality, the economic reality for women particularly those with children is often a bleak one as the economic dependence on the abuser is a very real reason for remaining in the relationship.³⁹
- Children is also one of the major reason in staying behind as being a single parent is a strenuous experience under the best of circumstances and for most women, conditions are often from fair and just when it comes to receiving either equal custodial access or fully custody of their children from the court system. But also the abuser may threaten to take the children away from us if we make attempts to leave.⁴⁰
- Guilt feelings is also another reason as the idea of leaving can produce feelings of guilty.⁴¹
- Reform promises, the abuser promises it will never happen again and the battered woman always believes him.⁴²

³⁶ Supra note 2.

³⁷ KN.Grundy, "Why battered women don't leave"<http://www.heart-2-heart.ca/./page4.htm>[accessed on 2012/03/10].

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

- Religious attitudes and values, religious viewpoint reinforce the commitment to marriage as many faiths hold that the husband is responsible for the welfare of his family hence this may be a powerful reason for staying in a destructive relationship.⁴³
- Societal doubts concerning battered women, many people turn a deaf ear to marital violence and believe that what goes on behind closed doors is a private matter.⁴⁴
- Love for spouse, most battered women tend to stay in the abusive relationship as they enter a relationship for love and that emotion does not simply disappear easily or in the face of difficulty and after a battering the abuser is often extremely penitent.⁴⁵
- Sex role conditioning, most men are still taught to be the protector and the family provider, so to leave and abandon them is like admitting failure on part of the battered woman.⁴⁶

2.6 Battered woman syndrome defence

Advocates of battered woman syndrome argue that BWS defence is essential to force the recognition that battered women's actions are a normal response to an abnormal situation. They make three general assumptions in promoting this defence:⁴⁷

(1) social context evidence based on a psychiatric theory that explains a woman's behaviour and evidence of a pattern of abuse are necessary to understand why a battered woman acted in self-defence when she killed her partner;

(2) Battered women who kill their abusive partners suffer from battered women's syndrome;

(3) A woman's status as a battered woman alone does not justify killing her abusive partner.

Supporters rely on BWS defence in hopes of capitalizing on the broad acceptance of the psychological theory and its successes in helping acquit these women.⁴⁸

⁴² Ibid.

⁴³ Supra note 37.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ HallieLudsin, 2003 South African Criminal law and Battered Women Who Kill: Discussion Document 1 Research report written for the Centre for the Study of Violence and Reconciliation.

⁴⁸ Ibid.

2.7 Elements of Battered woman`s syndrome defence

Supporters of BWS regard battered woman syndrome as a special form of defence; seemingly it would require the victim to first provide some evidence that she is a battered woman suffering from BWS. Once this condition is met, she is required to prove that any reasonable battered woman would have believed that lethal force was necessary to defend against an unlawful attack likely to cause death or serious bodily harm. Evidence of a pattern of abuse and all social context evidence would necessarily be admissible.⁴⁹

2.8 Advantages and disadvantages of using BWS

The principal advantage of using BWS as the psychological basis for a legal defence is that BWS is widely accepted by courts around the world and also accepted in South African Criminal law. As a result, BWS is treated as a credible scientific theory upon which courts can rely and it gives advocates a model from which to work. Secondly, BWS refutes many sexist assumptions that blame the woman for falling victim to abuse.⁵⁰

The disadvantage of relying on BWS as a basis for a legal defence is that BWS creates new myths about battered women, the theory is also susceptible to narrow application by courts and it does not accommodate change in the scientific community.⁵¹

2.9 Condemnation of using the BWS defence

Opponent of this BWS suggest that the following:

Firstly, they suggest that there is no single profile of a battered woman, "Battered woman syndrome" signals a particular area of testimony or type of case. One advantage of a short-hand label is ease of communication. The disadvantage is related: "battered woman syndrome" has become a stereotype that often does not fit the current state of knowledge concerning battering and its effects. Further, the stereotypic image of "battered woman syndrome" is often clouded by other stereotypes such as those based on race, culture, social class, and sexual orientation.⁵²

⁴⁹ Supra note 47.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² MA.Dutton, "Critique of the battered woman syndrome." http://www.aaets.org/article_138.htm [accessed on 2012/03/10]

Additionally, there is no single profile of the effects of battering although "battered woman syndrome" suggests that the psychological impact of battering is defined by a common set of symptoms. Nevertheless, battered women's reactions to violence and abuse vary and they include emotional reactions such as fear, anger, sadness, changes in beliefs and attitudes about self, others, and the world such as self-blame, distrust, generalized belief that the world is unsafe and symptoms of psychological distress or dysfunction such as depression, flashbacks, anxiety, sleep problems and substance abuse. Consequently, a particular battered woman's reactions may or may not meet criteria to warrant a clinical diagnosis.

Secondly, that the term battered woman syndrome is vague, there is no clearly defined set of criteria to define "battered woman syndrome." If the label "battered woman syndrome" is reserved only for battered women with specific types of reactions such as posttraumatic stress disorder, then using it instead of the diagnosis term is confusing especially since battered woman syndrome is not a recognized diagnostic term in the Diagnostic and Statistical Manual of Mental Disorders.⁵³

Thirdly, posttraumatic stress disorder, compared to other psychological reactions to battering, is not uniquely relevant for understanding legal or other domestic violence-related issues. PTSD can result from exposure to domestic violence and it may be relevant for explaining a victim's fear or other behavior in a specific situation. Conversely, there is no basis to suggest that PTSD has exclusive or even greater relevance, for either legal or clinical issues, than do other types of psychological reactions to battering. Importantly, the absence of PTSD does not signal the lack of other posttraumatic stress reactions nor does it negate the reasonableness of a battered woman's fear.⁵⁴

Fourthly, the relevant information relied upon for expert testimony in legal cases, advocacy, and clinical interventions involving battered victims extends beyond the psychological effects of battering. The various purposes of expert testimony advocacy and clinical intervention typically require information in addition to the battered victim's psychological reactions to battering.

⁵³ Ibid.

⁵⁴ Ibid.

This information includes an analysis of the dynamics of violence and abuse, the battered victim's strategic responses to violence like what she did in attempting to resist, avoid, escape, or stop the violence, the short- and long-term outcome of those efforts and the social and psychological context in which the battering occurred like cultural and ethnic factors, economic factors, social network, the battered victim's prior traumatic experiences, the response of the police and other institutions to the battering. For that reason, the body of knowledge that forms the foundation of expert testimony, advocacy, or clinical intervention cannot be adequately defined by a single construct or diagnosis, including battered woman syndrome.⁵⁵

Finally, the term battered woman syndrome creates an image of pathology; battered woman syndrome language creates a stereotyped image of pathology. A woman characterized as suffering from battered woman syndrome may be viewed as unsound, damaged, disordered, or abnormal in some way. Although it is true that many battered victims suffer negative effects of battering, syndrome language necessarily places the emphasis on pathology, not on the whole picture that also includes the battered woman's strengths and efforts, as well as other's responses to the circumstances.⁵⁶

Remarkably, a battered victim's normal reaction of fear or anger can be the most important issue for explaining her state of mind at the time of an alleged crime or for understanding her motivation for other behavior. Further, it may be essential to explain the apparent absence of fear, for example, by considering how cultural factors influence the manner of emotional expression. Expert witnesses' attempt to refocus attention away from pathology after having invoked the concept "battered woman syndrome" can be confusing and appears contradictory and the term "battered woman syndrome" may inadvertently communicate to the jury or judge the misguided notion of an "abuse excuse."

2.10 Conclusion

Battered woman syndrome has been written over and over again but the community is still left in the dark when it comes to understanding battered woman syndrome and domestic violence. Additionally to this shocking reality, are numerous myths concerning battered women and their

⁵⁵ Supra note 52.

⁵⁶ Ibid.

abusers. At this point, researchers, psychologists, and society are taking steps to better educate and prevent further abuse, but still have a long road ahead of them.

Consequently battered woman syndrome is a serious issue, which is clouded by many misunderstandings. Both BWS and domestic violence are immoral and unexcused actions, which we as a society must attempt to terminate. “Battering is currently the leading cause of injury in South African women and these women face numerous obstacles, both personal and legal, through their journey in the court system. It is impossible to achieve a simple solution to end violence against women but we must join the fight to end the suffering that they are forced to endure.

Chapter 3: Non Pathological Criminal incapacity as a possible defence in the circumstances of BWS

3.1 Introduction

Non pathological criminal incapacity is regarded as credible defence to be raised by the battered woman who is accused of murdering her batterer. Such being the case the battered woman syndrome defence falls under this category.⁵⁷ This defence is not codified and relies almost exclusively founded on case law. So this chapter will assess at how this defence is applied and linked with the battered woman syndrome when the victim has murdered her abusive husband.⁵⁸

3.2 The meaning of non-pathological criminal incapacity

The literally meaning of non-pathological criminal incapacity refers to situations in which X alleged that at the time of the act he lacked criminal capacity, but that this lack of capacity was not a manifestation of a pathological mental disturbance or not tied to mental illness.⁵⁹

The non-pathological criminal incapacity was first developed in 1981 as a defence following the case of *S v Chretien* where the accused was acquitted on the basis of his lack of intention due to his level of intoxication. The court concluded that the intoxication could impair either his intention or criminal capacity or the voluntariness of his conduct. However, the rest of the cases will be discussed in chapter 5.⁶⁰

3.2.1 Formal requirement of non-pathological incapacity defence

The onus is on the state to prove capacity of the act of the accused beyond reasonable doubt.

As soon as the state has presented prima facie evidence then there is an onus to rebut on accused.⁶¹

- On a preponderance of probabilities.

⁵⁷ Supra note 2.

⁵⁸ Supra note 7 at 85.

⁵⁹ CR.Snyman Criminal Law (2008) at 164-169.

⁶⁰ DA.Louw "Recent Developments in the defence of non-pathological criminal incapacity" in Psychological Assessment (2006) (ed Kaliski) at 50.

⁶¹ Professor Pieter Carstens Class notes 2011.

- To provide a basis for this defence.
- Through expert evidence.

3.3 Pathological criminal incapacity as compared to non-pathological criminal incapacity

Pathological criminal capacity emanates from a mental illness while non-pathological criminal incapacity does not emanate from mental illness as mentioned above and this include severe emotional stress,youthfulness,intoxication,provocation and the battered woman syndrome.⁶²

According to Snyman, there are two tests to be understood when it comes to pathological and non-pathological criminal incapacity. Where a person suffers from mental illness he describes it as pathological or biological leg of test and where the person is incapable of his cognitive and conative functions he describes it as psychological leg of test.⁶³ In addition between the two, the defence of non-pathological criminal incapacity is by far the most controversial and clouded with numerous irregularities with specific reference to the need of expert evidence as well as the continued debate relating to the continued existence of this defence within the current criminal justice system.

3.4 Capacity as a requirement for criminal liability

Before a person can be said to have acted with culpability(guilty mind),he must have had criminal capacity which is often simply referred to as capacity and a person will only have the capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct.⁶⁴

In South African criminal law, for someone to be held criminally liable, the person must possess necessary criminal capacity at the commitment of the crime/offence.⁶⁵

If the person does not have such required capacity at the commitment of the crime then will not be held liable due to the recognition of criminal capacity as an element or prerequisite for a

⁶² Supra note 59.

⁶³ Supra note 59 at 170-176.

⁶⁴ J.M.Burchell, Principles of Criminal Law (2005) at 358-363.

⁶⁵ Ibid.

crime leading to acquittal of the conviction as capacity is recognized as a prerequisite for criminal liability.⁶⁶

There are two mental abilities required for capacity:

- The ability to appreciate the wrongfulness of the act (*cognitive* – ability to distinguish between right and wrong)
- The ability to act in accordance with such an appreciation (*conative*/ self-control and power of resistance)⁶⁷

Onus on the state to prove capacity beyond reasonable doubt, persons are responsible for their criminal conduct only if the prosecution proves reasonable doubt, that at the time the conduct was perpetrated they possessed *criminal capacity* or, in other words, the psychological capacities for *insight* and for *self-control*.⁶⁸

3.5 The nature of the defence of non-pathological criminal incapacity

This defence is of a temporary nature and exists in situations where the accused's alleged incapacity was of a relatively brief duration not originating from a pathological mental disturbance. The proponents of this defence always advocates that the accused committed the act while she was for a relatively brief period incapable, because of an emotional breakdown of directing her acts in accordance with her appreciation of what was right or wrong.⁶⁹

Consequently, in order to rely on the defence of non-pathological criminal incapacity it is not necessary to prove that the accused's inability was the result of any specific cause or pathological state. The only requirement that needs to be satisfied is that the court should be convinced on the evidence as a whole that, at the time of the act, the accused was incapable of appreciating the wrongfulness of her act or acting in accordance with such an appreciation, irrespective of the cause of the inability.⁷⁰ The cause of this incapacity is attributed to emotional

⁶⁶ Supra note 64.

⁶⁷ Supra note 61; also see Snyman at 170 and S v Laubscher 1988(1) SA 163(A) in context of the distinction between cognition and conation.

⁶⁸ Supra note 64 at 358-351.

⁶⁹ Supra note 2 at 181.

⁷⁰ Supra note 7 at 124.

collapse, stress, total disintegration of the personality, shock, fear, tension or anger hence these attributes may increasingly strains her powers of self-control.⁷¹

It is put forward that a general defence of criminal incapacity will not only create legal certainty but will provide a more judiciary sound approach to the application of the defence of criminal incapacity.

3.6 Defence not to easily succeed

As it considered that anyone using this defence may abuse the defence and try to run away from justice and can easily raise it, the court approaches the defence with great care and does not give a blind eye on this defence to succeed. As it may be difficult to refute by the state who bears the onus of proof in the case hence viewing the defence with great caution in order to scrutinize the evidence in support of such defence and to really reach an extent of proving beyond reasonable doubt that the accused (victim of battering) must be acquitted of the murder charge.⁷² The court in *S v Kensley* stated that the fact that the accused was not able to control himself will not lead to an acquittal and that the evidence upon which the defence is founded will be treated with circumspection.⁷³

3.7 The call for expert evidence to support this defence

With regard to the cautionary rule in assessing the defence, the courts have shown that in order for the defence to succeed there is a need of expert testimony to support it.⁷⁴ This means that when the accused goes on trial she must propose a psychiatrist and a psychologist to maintain her defence; if she does not involve the expert evidence then she can not easily succeed with the defence. So this defence goes hand in hand with expert evidence for it to survive hence expert evidence being vital in the successfulness of this defence. However, it is not clear whether the expert evidence is obligatory. The need for expert assistance and evidence is accordingly determined not by the criminal incapacity itself but by the cause of incapacity.⁷⁵

⁷¹ Supra note 69.

⁷² Supra note 7 at 181-182.

⁷³ *S v Kensley* 1995(1) SACR 646(A).

⁷⁴ Supra note 72 at 182.

⁷⁵ Supra note 7 at 120.

3.8 Conclusion

Although non pathological criminal incapacity is considered as a valid defence in South African criminal law, the defence has failed in many cases as it will be illustrated in chapter 5. This suggests that there is still a long way to go in order to make the defence successful with regard to the battered woman syndrome defence which is raised in its context. Is the expert evidence to blame for the failure of this defence? I strongly believe it is to blame as the expert evidence is improperly evaluated when a battered woman is involved, this will be discussed in chapter 6.

Chapter 4: Other potential defences that can be raised by the battered wives

4.1 Introduction

There are a lot of possible defences available to the battered woman, it is just a matter of how these defences are raised and argued in order to succeed on behalf of the victim of battering who has murdered her abusive partner. Some of the defences will be explained together with their requirements as well as the advantages with regard to battered woman while others with the requirements alone.

4.2 Non Pathological automatism

4.2.1 Requirements of the defence

For non-pathological automatism/Sane automatism the requirements are the same as the ones of non-pathological criminal incapacity mentioned above and there is no need for repetition. However, according to the *ratio decidendi* in recent case law (*Henry, Kok, Macdonald* and *Eadie*), the following is also important:⁷⁶

- There must be evidence of an extraordinary/significant trigger leading to the automatism (*S v Henry/S v Macdonald*).
- The courts view the defence with circumspection and this defence will not easily succeed (*S v Kok, S v Henry, S v Macdonald* and *S v Eadie*).
- What is of importance are the actions of the accused immediately before and after the incident (*S v Henry, S v Kok* and *S v Macdonald*).
- A distinction is made between true amnesia and psychogenic amnesia, the former excludes criminal liability and the latter does not excludes criminal liability (*S v Henry*)
- What will however be assessed is the loss of control and not the loss of memory (*S v Henry*).
- There is not a material difference between sane, non-pathological automatism and non-pathological incapacity (*S v Eadie*).

⁷⁶ Supra note 61.

4.3 Private defence/Self defence

Private or self defence as justification against unlawfulness available to abused women who kill their abusive partners and spouses-facts and circumstances of each case fall to decide outcome (*Engelbrecht/Steyn*).⁷⁷

To determine whether private defence is present or if it is another ground of justification, there are two questions to be asked

Is there an unlawful human attack somewhere on somebody's interest?

Does the attacker get what he deserves?

If the answer to both questions is yes, then it is private defence.⁷⁸

4.3.1 Requirements of the defence

- The requirements of private defence are the following:
- There must be omission/commission.
- The attack must be unlawful.
- The attack must be imminent/commenced
- There must be a legal interest
- The attack must be from a third party.
- Reasonable and proportionality, between attack and defensive attack.
- Defendant did not provoke the attack.
- Death or serious bodily harm.⁷⁹

4.3.2 Advantage of private defence on BWS defence

There are several advantages and disadvantages to promoting self-defence as an optimal defence for battered women who kill abusive partners and the primary argument is that self-defence provides a justification for the rational behaviour of women who cannot escape their abusers and who find their lives threatened. Proponents of this defence argue that it best reflects the realities of battered women's experiences and accepts that the batterer should be forced to bear the risk

⁷⁷ Ibid.

⁷⁸ Supra note 61.

⁷⁹ Supra note 47 at 11-17.

that his actions will lead to his own death hence, the State should not be allowed to punish a woman where it has failed to protect her.⁸⁰

4.4 Diminished Capacity/Mitigation

This defence is also known as non-pathological criminal incapacity and excuses either partially or fully a defendant's action when it results from a temporary, severe incapacity that disables the defendant's ability to determine right from wrong or maintain self-control in a particular situation. Society is willing to understand that the action was an abnormal occurrence caused by an abnormal mental situation, unlike responses in anger to a provocation, which is an expected part of human behaviour. The temporary disability mitigates the defendant's blameworthiness.⁸¹

4.4.1 Requirement for the defence

The defence argues that a defendant engaged in unlawful conduct as a result of suffering from a temporary condition, caused by physical or psychological trauma that the mind of an ordinary person would not, in all likelihood, have withstood and that is not likely to recur.

This defence seems to be the most common defence as well as the most successful for battered women who kill their abusive spouses in England, and it is commonly argued by battered women in Australia. In England, women convicted of manslaughter on the basis of diminished capacity have received non-custodial sentences, although not in the majority of cases. Hence, South African battered women can also use this defence as it seems to succeed in other countries.⁸²

4.4.2 Advantage on relying on this defence

The reward of relying on diminished capacity for battered women who kill their abusers, particularly in non-confrontational situations is that it mitigates a charge of murder when no other defence is available and it may allow for non-custodial punishment. Some academics argue that this is the appropriate defence for women suffering from BWS or from any other

⁸⁰ Ibid.

⁸¹ Supra note 47 at 76-77

⁸² Ibid.

psychological disturbance resulting from abuse as it reflects the true nature of their action. At the time they killed, the effect of the abuse diminished their capacity to see right from wrong.⁸³

The weakness of relying on this defence, as with many of the other defences, is that it brands the battered woman as irrational. It treats her as suffering from a mental impairment that caused her to lose control, when in fact she acted in the only rational way left open to her.⁸⁴

4.5 Provocation

This defence is the best known of the excuse defences and it partially excuses a defendant's unlawful act when the victim provoked her into reacting with violence. The limit on this defence depends on the intensity of the emotions the provocation evokes. The stronger the emotion, the more likely the person acted under provocation. In addition, the underlying provoking behaviour that caused a violent response seems to be irrelevant to the analysis beyond determining how much it likely provoked the defendant.⁸⁵

Moreover, the theory behind this defence is that society is willing to accept that a victim's adequate provocation is an external force that removed the defendant's self-control. It recognizes that passionate responses to provocation are human weaknesses and that "emotion hinders the individual's ability to act reasonably. The loss of self-control removes some of the defendant's blameworthiness and the provocation defence places at least some measure of blame on the victim, which removes more of the defendant's blameworthiness."⁸⁶

Through this defence, society is willing to understand certain of the defendant's emotions, while continuing to condemn taking action into her own hands. This defence also recognizes that defendants who respond in extreme emotion are not likely to be deterred from an unlawful act because they lack self-control. In these situations, it is less necessary to punish as harshly in order to deter others, as by definition a person claiming provocation lacks the necessary rationality for deterrence to work.⁸⁷

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Supra note 47 at 64-67.

⁸⁶ Ibid.

⁸⁷ Ibid.

4.5.1 Requirements for this defence

To succeed on a provocation defence, a defendant must prove that she acted in response to a reasonable provocation that did in fact provoke her that a reasonable person would not have cooled off in the interval between the provocation and the fatal blow, and that the defendant actually did not cool off. However, battered women who kill their abusive partners can have great difficulty accessing the provocation defence. Several elements create large obstacles for these women.⁸⁸

4.5.2 Advantage of this defence

The principal advantage of using the provocation defence for battered women who kill their abusive partners seems to be that it provides a defence for battered women when self-defence is unavailable, mostly for women who kill in non-confrontational settings or those believed to have used excessive force. Because courts often treat battered women who kill in non-confrontational settings as unreasonable, this defence accepts she may have lost self-control and thus will not be per se excluded from it.

This defence also recognizes that a woman's reaction to abuse was in fact reasonable, even if not justifiable. It accepts that a "normal" person in the shoes of the battered woman could have been similarly provoked into killing her batterer. The provocation defence, unlike putative self-defence, is accepted universally.⁸⁹

4.6 Warranted excuse defence

This defence is one of the three theoretical excuses that could be developed as a defence for battered women who kill their abusive partners. Under this defence, a defendant's actions may be excused where they were caused by an emotional response to illegal conduct on the part of the victim that resulted in loss of control. The defendant's act could be understood because she was responding to an illegal action, which reduces her blameworthiness, although the defendant's behaviour remains unlawful. The defendant's blameworthiness is reduced further by the victim's

⁸⁸ Ibid.

⁸⁹ Ibid.

culpability. This defence would require the underlying provoking act to be illegal. It could be treated as either a full or partial excuse.⁹⁰

The theory of this defence is that a defendant may be excused for 'punishing' a victim for conduct the State also finds objectionable. A woman who killed her rapist after the rape ended could use this defence to partially excuse her unlawful act because the State could have punished the victim for the same conduct.

4.6.1 Requirements of this defence

The requirements for a warranted excuse would be that the defendant's action must be caused by an emotional response against another, for the other's illegal conduct. The defence does not specify what type of emotional response is required, which means fear could be included. There is no reasonableness requirement. All that matters is that the defendant has actually responded emotionally, although presumably the response must have been strong.

Proponents might be assuming that any response to illegal conduct is inherently reasonable to some extent. The main proponent of this theory suggests that there would be an imminence requirement, as the justification for considering all emotional responses to illegal conduct is that "sincere, spontaneous emotion" will counter inferences of cold, calculated planning.⁹¹

4.6.2 Advantage of this defence on BWS

The main advantage of this defence is that it removes the subjective judgment of what behaviour would cause a person to lose self-control; instead it assumes that all illegal behaviour could cause a person to lose control. The defence further allows a defendant to respond to illegal conduct in fear, rather than simply in anger and a woman's actions in killing her abuser would appear rational given that the law could also have punished the behaviour.⁹²

A strict imminence requirement would be read into this defence. Battered women who kill their abusers in non-confrontational situations would have the same difficulty accessing this defence as they would under the provocation defence. Furthermore, courts could turn to the provocation

⁹⁰ Supra note 47 at 78-79.

⁹¹ Ibid.

⁹² Ibid.

doctrine to interpret this defence, which could create the same barriers battered women encounter under provocation.⁹³

4.7 Necessity Defence

Necessity defence is another defence that battered women who kill their abusers may be able to utilize when the need arises. This is an independent defence in which a person is allowed to act in a way that is otherwise unlawful if compliance with the law would cause more harm than breaking it. It is a choice of the lesser of the two evils. What differentiates necessity from self-defence is that the victim under the necessity defence is not unjustly or unlawfully threatening the defendant and the victim can legally resist the defendant's actions. Furthermore, the defence seems intended to cover instances where the harm is to the victim's property, not to his or her person.⁹⁴

4.7.1 Requirements of the defence

Necessity defence requires a defendant to prove that she had a legal interest being threatened with imminent harm and that her unlawful action was intended to defend against that threat. The necessity defence typically only applies if natural causes or something other than someone's unlawful act created the necessity.

For example, if a storm threatened to destroy a boat anchored in a lake, the owner would be justified in docking the boat illegally on someone else's dock if it would likely stop the boat from being destroyed. If the boat damages the dock, the boat owner may be obligated to compensate the owner of the dock but would be acquitted of trespassing charges.⁹⁵

4.7.2 Advantage on BWS defence

Supporters of BWS believe that the defence allows a battered woman to defend herself when the necessity of a response arises, rather than waiting until the harm actually occurs. However, without the removal of the requirement that the necessity arises from something other than unlawful conduct, battered women who kill their abusers cannot use this defence. Furthermore,

⁹³ Ibid.

⁹⁴ Supra note 47 at 49-50.

⁹⁵ Ibid.

even if battered women relied on this defence, its realistic application would be nearly the same as self-defence.

Once the requirement that something other than an unlawful act created the necessity is removed, battered women will be able to use this defence. Proponents of a reformed necessity defence hope to create the same result as reforming the imminence requirement in self-defence to a necessity requirement. This reform seems likely to accomplish very little, as it would make the necessity defence no different from self-defence. If self-defence remained an option, it would be difficult to determine when to use self-defence or this defence.⁹⁶

4.8 Conclusion

It is submitted that these defences can be easily raised thus why the court treat them with great caution and if these defences are applied and well argued in court then they can easily succeed on behalf of the accused person. The inadequate presentation of these defences will lead to the failure of their achievement. Hence, the defence lawyer has to prepare himself adequately in order to succeed with the defences.

⁹⁶ Ibid.

Chapter 5: Cases in support and against BWS

5.1 Introduction

This chapter will look at cases that have contributed positively on BWS defence as well as those cases that have contributed negatively. It is well known that the defence of non-pathological criminal incapacity is founded on case law. Most of the cases provide uncertainty of this defence while some really make the door open to still accommodate the defence and make it accessible to battered women victims.

5.2 Cases in support of BWS defences

With regard to the defence of temporary non pathological criminal incapacity, it succeeded in the following cases, *S v Wiid*, *S v Nursingh* and *S v Moses*.⁹⁷

In *S v Wiid*, the expert witness on behalf of the accused testified that the accused experienced a state of anxiety which resulted in her to lack criminal responsibility at that time and that she could not be able to distinguish between right and wrong. However, the trial court maintained that the accused was able to distinguish between right and wrong and acted intentionally.⁹⁸

Nevertheless, the court of appeal took a different approach and considered the expert evidence and found that there was there was a reasonable doubt whether the accused at the commitment of the offence, had the criminal capacity, and that he/she should be given the benefit of that doubt and the accused was acquitted.⁹⁹ The decision of this case is important as it illustrates the need of expert evidence and that such evidence fulfils an indispensable function when ascertaining an accused`s behavior at the time the alleged crime was committed.

With regard to the defence of sane/non pathological automatism, it succeeded in the case of *S v Arnold*, where the court stated that a defence of severe emotional stress can lead to a state of not being criminally liable hence the accused was acquitted. In this case the accused killed her husband due to emotional storm in her mind, so we can not say she killed her husband

⁹⁷ *S v Wiid* 1990(1)SACR 561(A) see also: *S v Moses* 1996(1)SACR 701(C), *S v Nursingh* 1995(2)SACR 331(D)

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

intentionally, it was the emotional storm of extraordinary nature that triggered her mind leading to automatism.¹⁰⁰

With regard to the defence of private defence it succeeded in the case of *S v Steyn*, where the battered wife killed her husband and was convicted of murder but her defence of private defence succeeded. In this case Miss S killed her husband because the husband has been assaulting her regularly and she was scared of her life that one day the husband may kill her.¹⁰¹

However, the other possible defences mentioned in chapter 4 like provocation and diminished responsibility have very little chance of succeeding as the defence of provocation failed in *Eadie*, *Larsen*, *Francis* and *Calitz* while the defence of diminished capacity only applicable in sentencing and not criminal liability, where the sentence can be reduced, reference is made to *S v Larsen* and *S v Mnisi* where the accused were found guilty of murder but their sentences reduced while in *S v Di Blasi* and (*DPP*) *Venter* the sentence was increased.¹⁰²

5.3 Cases against BWS defences

Accordingly, there are a lot of several cases where the defence of non pathological criminal incapacity failed and which include the following cases: *S v Campher*, *S v Calitz*, *S v Kalogoropoulos*, *S v Potgieter*, *S v Kensley*, *S v Di Blasi*, *S v Francis*, *S v Eadie*, *DPP v Venter*. In these cases all the accused were found guilty and sentenced.¹⁰³

Moreover, the defence of non-pathological automatism failed in the following cases:

S v Laubscher, *S v Potgieter*, *S v Henry*, *S v Macdonald* and *S v Eadie*.¹⁰⁴ In Henry's case the judge noted that it is a trite law that cognitive or voluntary act is an essential element of criminal responsibility and that where the commission of such act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the state to establish this element beyond reasonable doubt.¹⁰⁵

¹⁰⁰*S v Arnold* 1995 (3) SA 256 (C).

¹⁰¹*S v Steyn* 2010(1) SACR 411(SCA).

¹⁰² *S v Larsen* 1994 (2) SACR 149 (A) see also: *S v Mnisi* 2009 (2) SACR 227(SCA).

¹⁰³ *Supra* note 61.

¹⁰⁴ *Ibid*; see also *supra* note 59 at 165-where the supreme court of appeal delivered a judgment that seemed to pull the plug on the defence of non-pathological criminal incapacity.

¹⁰⁵*S v Henry* 1999 (1) SACR 13 (SCA).

Furthermore, the private defence failed in *S v Ferreira* where the court refused the private defence so as not to provide a license to partners to take law in their own hands. Although it failed in *Ferreira*, the court maintained that the defence of private/self defence as a justification against unlawfulness was available to abused women who kill their abusive spouses and partners, however, the facts and circumstances of each case fell to decide the outcome.¹⁰⁶ This defence also failed *S v Engelbrecht*.¹⁰⁷

In addition the defence of provocation can serve to enhance intention according to *S v Calitz*, *S v Engelbrecht*, *S v Francis* and *S v Steyn*. However, the defence of diminished capacity can possibly increase the sentence in terms of *S v Di Blasi* and *DPP v Venter* where the accused were found guilty and their sentence were increased.¹⁰⁸

5.4 Conclusion

As indicated above, it is very clear that the defence of battered woman syndrome failed in a lot of cases where also expert evidence was used. One tend to wonder as one can easily think that whenever expert evidence is involved then the battered woman is going to win the case automatically as the court imply that expert evidence is essential in support of the BWS defence. This is not the case as the court tends to scrutinize the expert evidence unfairly on the part of the battered woman who is an accused person in the court.

I tend to conclude that although the court require the expert evidence, the application of the expert evidence has failed the defence of BWS as it is applied unjustly on the battered woman, the use of expert evidence in support of BWS defence can only succeed if the court start applying it justly and fairly on the accused person. Sometimes my mind would tell me that may be the court knew that expert evidence would be applied unfairly on the victim, so they just wanted to use it as scapegoat, so that the battered woman can get a conviction. However, the problem is not the expert evidence but it is the application of the expert evidence which is the problem as it is clouded with a lot of unfairness as it will be shown in chapter 6.

¹⁰⁶*S v Ferreira* 2004 (2) 454SACR (SCA).

¹⁰⁷*S v Engelbrecht* 2005 (2) SACR 41 (W).

¹⁰⁸ Supra note 103.

Chapter 6: The Role of Expert Evidence in support of BWS

6.1 Introduction

This chapter will scrutinize the role of expert evidence in handling the BWS defence as it seems that two professionals are at war with one another as law and medicine pertaining to the defence of non-pathological criminal incapacity stands the battered woman. Although there is need of expert evidence to support BWS defence, it is unjustifiably applied in court leading to the failure of the defence.

6.2 Section 79 of the Criminal Procedure Act

The requirement of expert evidence is provided by section 79 of the Criminal Procedure Act which states that at least two reports by medical practitioners must be obtained and this involves a psychologist and a psychiatrist to conduct the assessment of the mental health of the accused person.¹⁰⁹ However, this requirement is only provided for pathological criminal incapacity making it a prerequisite for the defence of pathological criminal incapacity such as mental illness while the same is not applicable to the defence of non-pathological criminal incapacity hence not making it a prerequisite when the defence is raised.¹¹⁰

With reference to *S v Van as*, the role of the expert evidence is not to take over or replace the function or duties of the court. The court has to debate and decide on every fact.¹¹¹

In this given case, the court said that there are two aspects of expert evidence which should be noted:

- Where expert expresses an opinion which is based on that of recognized writers or authority in the particular science.
- Where the expert himself conducts experiments and places evidence about the experiments before the courts. It is easier for the court to understand the second one.¹¹²

¹⁰⁹Section 79 of the Criminal Procedure Act 51 of 1977.

¹¹⁰ Supra note 7.

¹¹¹*S v Van As* 1991 (2) SACR 74 (W).

¹¹² Ibid.

6.3 The Role played by a psychiatrist

A psychiatrist is a physician who specializes in the diagnosis, treatment and prevention of mental disorders including substance abuse and addiction. Psychiatrists are uniquely qualified to assess both the mental and physical aspects of psychological disturbance. For this reason, their medical education has given them a full working knowledge of the many causes for a patient's feelings and symptoms and can make a complete, accurate diagnosis and then recommend or provide treatment. Moreover, they are in a better position to understand mental illness as compared to the battered woman syndrome as it does not emanate from mental disorder where a psychologist is an expert in handling cases of BWS.¹¹³

6.4 The role played by a psychologist

A psychologist is someone who studies mental processes and human behavior by observing, interpreting, and recording how people and other animals relate to one another and the environment. In achieving this, psychologists often look for patterns that will help them understand and predict behavior using scientific methods, principles, or procedures to test their ideas.¹¹⁴

As already mentioned above a psychologist plays a vital role when it comes to expert testimony with regard to BWS due to the fact that he studies mental processes and not diagnosing the disease. It is a well-known fact that battered woman syndrome is not a sickness but something that have a severe emotional stress on the victim, such being the case a psychologist has to be given a creditability with regard to expert testimony on the victim of battering who has killed her abusive partner as he is able to recognize the human behavior than a psychiatrist who is good at pathological (sick) matters.

6.5 The rules of expert evidence

However, attention should also be made to the rule of expert evidence which is described below:

- Experts must be specialists
- A title or qualification does not make a person an expert.

¹¹³Choosing a Psychiatrist <http://www.en.wikipedia.org/main-topic/cho> [accessed on 18/09/2011].

¹¹⁴Psychologists: Occupational Outlook Handbook <http://www.bis.gov/./Psychologists.htm> [accessed [20/09/2011].

- Experts must have both theoretical and practical knowledge.
- The expert's field of expertise must be scientifically recognized.
- Expert evidence must go beyond common experience or knowledge.
- Experts must set out the basis or foundation for their opinions.¹¹⁵

6.6 The need for and use of expert evidence in battered woman syndrome defence

It is accepted in South African criminal law that when a woman raises a defence of BWS, there is a need of expert testimony to sustain her defence as she is expected to lay a foundation for her defence of non-pathological criminal incapacity although the state bears the onus of proof.¹¹⁶ The traditional approach of expert evidence in support of the defence of non-pathological criminal incapacity is that it does not fulfil an indispensable function and that the defence can succeed in the absence of such evidence.¹¹⁷ It is however, doubtful whether this defence will ever be victoriously established in the absence of expert evidence and a good example is shown in *S v Campher* where the accused had severe emotional stress, nevertheless she was convicted and sentenced due to the fact that there was no expert evidence on her behalf, hence without expert testimony there will be a total chaos on behalf of the accused hence, this case exemplify the need of expert evidence in order to make the defence of BWS defence to succeed.¹¹⁸

The traditional approach was applied in *S v Laubscher* where the expert witness testified on behalf of the accused that he lacked criminal capacity while the other expert witness testified that the accused did not lack criminal capacity but had diminished capacity and the other expert witness could not be certain that a total disintegration of personality did in fact occur hence the court was reluctant to place too much reliance on the role of expert evidence.¹¹⁹

The court also rejected the expert testimony in *S v Calitz* where the appellant was able to recall quite a lot of detail relating to the assault which was not consistent with the defence of temporary criminal incapacity and the expert witness on behalf of the state testified that the appellant was

¹¹⁵ Alfred .Allan "The Psychologist as Expert Witness" in Psychology and the Law (2005)(eds TREDOUX) 289-294;see also A.Allan&LiriekaMeintjies-Van Der Walt "Expert Evidence" in Psycho -legal Assessment in South Africa (2006)(ed Kalikow) at 346.

¹¹⁶ Supra note 2.

¹¹⁷ Supra note 9; see also supra note 14 at 81&145.

¹¹⁸ *S v Campher* 1987(1) SA 940 (A).

¹¹⁹ *S v Laubscher* 1988(1) SA 163(A).See also supra notes 14 at 145-146.

able to distinguish between right and wrong and acted in accordance with such appreciation and that his act were voluntary and goal directed while the expert witness who acted on behalf of the accused testified that the accused suffered from a temporary mental incapacity with total loss of self-control. The court rejected the expert testimony based on the appellant's recollection of events and held that someone suffering from temporary mental incapacity will not be able to give a detailed description of the events.¹²⁰

In both cases it was held that expert evidence does not play a vital role in support of the defence of non-pathological criminal incapacity, hence is submitted that the traditional approach is outdated and inconsistent with section 35(3) (1) (i) the constitution which guarantees an accused the right to a fair trial which includes the right to adduce and challenge evidence.¹²¹

6.7 Access to statements made by the accused

Statements made by the victim to doctors (psychologist and psychiatrist) during the observation is privileged and protected against discovery as evidence at criminal proceedings except to the extent that it may be relevant in the assessment of the accused's mental state-then it is admissible.¹²²

Section 77, 78 and 79 of the Criminal Procedure Act deals with access to statements made by the accused to a psychiatrist during observation period. Accused when referred for observation, has to be informed that he/she is under no obligation to disclose any information in terms of the regulation 6(4) Mental Health Act.¹²³ Moreover, the accused has also to be advised that the Promotion of Access to Information Act is not applicable to such requests after the commencement of criminal proceedings and that it is only applicable before the proceedings.¹²⁴

¹²⁰ S v Calitz 1990(1) SACR 119(A); See also Supra note 7 at 147.

¹²¹ Supra note 7 at 105-106.

¹²² Supra note 61.

¹²³ Ibid.

¹²⁴ Ibid.

6.7.1 Cases in support and against access to statements made by the accused

With regard to the defence the case of *S v Forbes and another* will be applicable to a battered woman as the court ruled that a statement made by the accused to medical practitioner is excluded on grounds of public policy as it was not freely and voluntarily and did not take up the broader question of public policy.¹²⁵

However, the prosecution will give a hand to *S v Webb*, where the court ruled that medical evidence was admissible and could be tendered in rebuttal of the accused defence.¹²⁶ In addition there are legislations which supports the disclosure of information and this include section 13 of Mental Health Act, section 15 of National Health Care act and the promotion of Access to information act.¹²⁷

The prosecution can also attempt the case of *S v Leaner* where the court ruled that any person who has enquired into the mental condition of the accused may testify on the findings thereof and that no reason why a witness can not be questioned regarding a statement relevant to an accused's mental condition.¹²⁸ *S v Kok* is also another case where the prosecution can run to, as the evidence of the statements made by the accused to the medical practitioner was admissible.¹²⁹

6.8 Reasons of using expert testimony

In the courtroom, expert testimony concerning domestic violence and battering can be offered for various purposes including these:

- To show that the accused is a battered woman.
- To explain a battered woman's state of mind.
- To generally support a claim.¹³⁰

¹²⁵*S v Forbes* 1970 (2) SA 594 (K).

¹²⁶*S v Webb* 1971(2) SA 340(T).

¹²⁷ Mental Health Care Act 17 of 2002, see also; National Health Act 61 of 2003; Promotion of Access to Information Act 2 of 2000, A. Africa "Psychological evaluations of mental state in criminal cases" in *Psychology and the Law* (2005)(edsTredoux et al) at 384-410.

¹²⁸*S v Learner* 1996(2) SACR 347(C).

¹²⁹*S v Kok* 1998(1) SACR 532(N).

¹³⁰ Supra note 52.

- Expert testimony admissible to assist the fact finder in drawing inferences in areas where expert has relevant knowledge or experience beyond that of lay person.
- Where there are stereotypes which may adversely affect consideration of battered woman`s claim to have acted in self defence in killing her mate and expert evidence can assist in dispelling these myths.
- Expert testimony relating to ability of accused to perceive danger from mate may go to issue of whether she reasonably apprehended death or grievous bodily harm on particular occasion.
- Expert testimony pertaining to why accused remained in battering relationship may be relevant in assessing nature and extent of alleged abuse.
- By providing explanation as to why accused didn`t flee when she perceived her life to be in danger.¹³¹

6.9 The undermining belief in psychologist testimony

The major problem with expert evidence is that the court tends to give more weight to expert testimony provided by psychiatrists than psychologist as the latter is undermined in court hence killing the whole defence as psychologists are in a better understanding of BWS as non-pathological incapacity is not caused by a mental illness or mental defect (a scenario in which the psychiatrist is an expert) than psychiatrists.

It is widely known that expert evidence is essential for the BWS defence to succeed but if the experts of understanding the battered woman syndrome are merely ignored in the court of law: Is there justice being done on the battered woman? The answer is obvious no, only if the court could first attach more creditability to expert testimony provided by a psychologist who understands the emotional stress that the victim of battering goes through. It is also generally accepted that psychiatrist does not designate battered woman syndrome as a psychological disorder as the mental state of the accused can not be linked to a known mental illness or defect.

Such being the case, it is really unfair to put more weight on psychiatric evidence as a psychiatrist is not in a position to understand the battered woman syndrome which does not fall in his profession. So how can the court attach more weight to expert evidence provided by a

¹³¹Supra note 61; see also S v Engelbrecht & S v Steyn.

psychiatrist when it does not fall in his profession? This is injustice, unfair and prejudice on the part of the battered woman. This is like taking an architect to present a case in court instead of taking an attorney who is familiar with court techniques. I will regard the attorney as a psychologist and an architect as a psychiatrist, so it is high time the court should start putting more weight to the expert testimony provided by a psychologist as the latter is specialized in dealing with organic brain diseases and the former is specialized in the study of human behaviour.

Attention is made to *S v Kensley* where a forensic psychiatrist made it clear that he was aware of the word criminal capacity but that the word of automatism in relation to persons not suffering from any pathology were legal terms and not psychiatric ones and testified that the accused at the time of committing the crime suffered from no pathology recognized in psychiatry and that the accused had cognition and conation.¹³² In addition to this the battered wife can not afford the financial means to request for the psychiatrist who is favoured by the court to support her defence. Such being the case, the court has to be made aware than a psychologist testimony has more weight than a psychiatrist understand the battered wife syndrome.

Nevertheless, psychologist also has to accept part of the blame for this as they often believe that the testimony they offer is misrepresented in court. Moreover, some of them lack knowledge about the legal system and what is expected of them or are not experts in the field of psychology relevant to the case they are called in or ill prepared or merely fail to communicate effectively with the court.¹³³ On the other hand, lawyers must also accept a substantial part of the blame as many lawyers tend to neglect the law of evidence especially relating to the testimony of experts and they are often unfamiliar with psychology as a field and profession. Consequently they use psychologists who are not strictly speaking experts in the field relevant to their purposes and they fail to provide them with the information necessary to prepare for the case and they present their evidence in chief poorly.¹³⁴

¹³² Supra note 73.

¹³³ A. Allan "The Psychologist as Expert Witness" in *Psychology and the Law* (2005) (eds Tredoux) at 287-320.

¹³⁴ Ibid.

6.10 Unenthusiastic side on relying on expert testimony

In addition to the misunderstanding between judges and expert evidence, a lot of psychiatrists and psychologists tend to act in judicial capacity than in their professional capacity and tend to give expert testimony in favour of the person who has requested it. This means that an expert who has been requested by the court will give opinion in favour of the court, the expert who has been requested by the prosecution will also give opinion in favour of the prosecution and the one for the defence in favour of the defence hence no justice is done as the expert evidence does not reflect true testimony of expert evidence.

As a result these psychiatrists and psychologist tend to be institution liars and they will always base their opinion on the medical practitioners who have already dealt with the same case forgetting that every case has to be dealt differently.¹³⁵

This means that if the former psychiatrists made an error with regard to his/her opinion, the error will repeat itself as the other psychiatrist will still base their opinion on the first one. This can only be improved if each psychiatrist deal with the case in his own opinion and treat each case separately as the battered wife face abuse in different way and react differently.

The advice is that, the psychiatrists and psychologist have to be told that they have to give opinion based on their professional capacity and not based on judicial capacity and this can only be achieved by enacting legislation which will codify the rules of expert evidence and medical professionals need to stick to a code of conduct when presenting as expert witnesses in court and such legislation must establish penalties for medical practitioners who do not act in their professional capacity.

The judges also tend to be institutional liars instead of treating each case differently, they already have the attitude that the defence of non-pathological criminal incapacity can not succeed by giving reference to cases where this defence has failed. For example the *Eadie* case, does not have anything to do with the battered wife due to the fact that, the accused in *Eadie* was not a woman in the first place neither a battered person or suffered abuse, it was only road rage, so

¹³⁵ Supra note 61.

how can the court use the *Eadie* case to eliminate the defence of battered wife, it is totally wrong as the situations are very different.¹³⁶

For that reason, the court when it comes in handling cases concerning domestic violence particularly battered wife the best case to apply and follow is the case of *S v Wiid* where this defence succeeded and made gradual process in terms of the battered wife then regression in several cases mentioned above where the defence failed after the *Wiid* case then progressed again in *Arnold, Nursingh, Moses*. In addition, it is advisable if the court does not link the case of *Eadie* in dealing with battered woman in order to make the defence of non-pathological criminal incapacity to fail as this case deals with road rage, involves a man so it is unfair to apply this case to BWS defence in order to fail it, the supreme court of appeal really delivered a judgment in this case that seemed to pull the plug on this defence, however, the defence resurfaced again in *S v Steyn* with positive results.

6.11 Conclusion

Therefore, it is concluded that when this defence is raised, the defence has to propose for psychologist and psychiatric diagnosis on an accused person in order to succeed with the defence. However, the court must stop attaching more weight to expert testimony provided by psychiatrists and has to start putting more weight to the evidence provided by psychologists who are in a better position in understanding the battered woman syndrome. Battering is real and it is happening each day in South Africa hence the court, lawyers, psychologists, psychiatrist, social workers and the police must put an end to it.

¹³⁶ *ibid.*

Chapter 7: The obstacles associated with BWS defence and Recommendations

7.1 Introduction

Despite the fact that the BWS can be easily accessed, it has been met with a lot hindrances as well as criticism which makes it harder to be achieved as the victim of battering still face legal as well individual battle with this defence. However, the chapter will also suggests steps to be taken to advance the admissibility of expert evidence in support of the battered woman syndrome defence.

7.2 The application of the defence with caution

The defence of non-pathological criminal incapacity raised by a battered woman in terms of BWS defence can not easily succeed as the court treat this defence with great caution as the defence can be easily raised.¹³⁷ Hence, the court especially the judges tend not to understand the battered wife syndrome where abused women tend to kill their abusers. For this reason the abused women who raise this defence are left helplessly in court as judges rule against their favour. Hence, it is advisable for the law commission to make sure that every judge is capable of understanding the battered wife syndrome in order to avoid surprises in court hence in a better position to give a detailed judgment and understand the emotional element of human beings.

7.3 The application of the positive law

Another problem with this defence is the application of the positive law, which is common law as the judges tend to interpret it in their own way as the court is always open to discretion, so the best way is to codify the defence so as to limit the judge to their interpretation to avoid the extinct of the defence.

7.4 The access to accused statements

There is no absolute protection to the statements made by the accused to a psychiatrists or psychologist as the court can order the disclosure of the statements which can be used as

¹³⁷ Supra note 2 at 181-182.

evidence at the criminal proceedings leading to the conviction and sentencing of the accused.¹³⁸ The accused right to privacy as provided by section 14(d) of the constitution is infringed, this section states that everyone has the right to privacy and not to have the privacy of their communications infringed.¹³⁹ The problematic issue is to what extent communications between an accused and the mental health practitioner is privileged and whether statements by an accused during such assessment can be used in a subsequent trial to determine the accused's mental state at the time of the alleged crime. The right to privacy is acknowledged by the common law as an independent personal right that forms part of the "dignitas".¹⁴⁰ The way the lawyer-client relationship is privileged; this should also apply to doctor-patient relationship.

The suggestion is that, the court in determining the guilty of the accused, they are also required to balance the constitutional right to privacy provided by section 14 of the constitution, the right to remain silent/to be presumed innocent until proven guilty provided by section 35 of the South African constitution.¹⁴¹ The court has a duty to respect these rights and know that by ordering disclosure they are infringing the constitutional right of the accused person.

7.5 The role of the society in combating the BWS

The society tend to consider the family matters as private and leave the couples to settle their matter on their own even when they are noticing that the woman is being battered by her abusive husband, they stay idle and do not take any preventative measure to protect the battered woman. Once the woman has killed her abusive husband, they are the first ones to get her convicted and locked up while accusing her of wanting to inherit the wealth of her husband.

This is really terrible hence, the recommendation is that the society has to be taught about the battered wife syndrome so that they can understand it and if possible provide protective measures to the battered wife not to be abused and if the woman has killed her husband to be her witnesses in the court of law that the woman really suffered abuse from the husband and that it was not her intention to murder the husband but due to emotional stress as result of the abuse.

¹³⁸Sean Z.Kaliski and Zabow "Ethical Considerations" in *Psycho-legal Assessment in South Africa* (2006) at 357-375.

¹³⁹ Section 14 of the Constitution, See also Zeffert "Confidentiality in the Courts" 1974 SALJ at 432.

¹⁴⁰ Supra note 7 at 111.

¹⁴¹ Section 35 of the Constitution; see also section 14.

7.6 The battered woman dilemmas

Another major problem is that the battered wife who is charged with the murder of her abusive husband has a lot of dilemmas¹⁴² which include the following:

- In most instances the accused in these circumstances does not have the financial means to afford legal counsel and in most cases has to rely on the services of pro deo counsel.
- As already mentioned above she needs to be evaluated by an expert in the field of psychiatry or psychology to assist her in her defence yet she can not afford their services.
- When her case goes on trial she will face a criminal justice system that is still mainly male dominated.
- The law states that her defence of non-pathological criminal incapacity must be viewed with caution.
- Although the onus is on the state, she must lay a foundation by way of expert evidence in support of her defence.
- There are also prevailing sexist attitudes that prevent individuals and institution from effectively responding to battered women.

With all these dilemmas, it is easy to notice that the battered wife is voiceless and is left with no defence leading to her conviction while she has really suffered the physical, sexual and emotional abuse by her abusive husband hence, something really has to be done to protect these innocent souls by providing free legal aid to them and also by having females psychiatrists, psychologists and judges where the battered woman would find it easier to relate experiences of sexual abuse rather than a male person.

7.7 Memory gaps suffered by battered woman after the events

Furthermore, many battered women have no memory of firing the gun or stabbing, nor do they generally realize how seriously the man has been wounded until sometime after the event. These memory gaps usually coincide with the time at which fear and panic were at its highest hence such gaps leading to contradiction in the woman story when she attempts to give statements to the police after the incident and the prosecution use this to their advantage to knock the

¹⁴² Supra note 136 at 183-184.

credibility of the accused while the accused has been suffering from true amnesia which excludes criminal liability.¹⁴³

Here my recommendation is that the judges, lawyers either for the prosecution or defence, psychiatrists, psychologist to hold a training where they would be able to understand, the memory gaps, the cycles of abuse, the long term effect and the general impact on the battered wife and that the woman remain in the abusive relationship due to social conditioning and limited financial resources only frustrates this feeling of helplessness as women are taught that families must stay together, no matter how bad things may seem, and often have limited financial resources to support themselves and their children. By doing so, the court will be able to give a better judgment based on fairness and justice.

7.8 Other recommendations

7.8.1 Training Advocates and Attorneys

Establishing a training programme for advocates and attorneys working for legal aid and explaining to them the issues that are involved with battered women, the type of evidence required and the arguments that could be made on behalf of abused women who kill.¹⁴⁴

7.8.2 Training Judges

Training of judges on different issues raised by the cases in which an abused woman kills her abusive partner and also training them on the effects of abuse on women and to train them about the gender bias in criminal law. This can contribute to the judges` willingness to develop the common law to accommodate abused women`s experience and this can be the most efficient for them to do the training.¹⁴⁵

7.8.3 Raising Awareness

Awareness campaign by the proponents for abused women to help raise the awareness of lawyers, advocates and the judiciary on the issues involved and the types of defences that could

¹⁴³ Supra note 141 at 187.

¹⁴⁴ Supra note 47.

¹⁴⁵ Ibid.

be used in cases where a woman kill her abuser. This can be achieved by being published in well-known South African legal journals and gaining the interest of the media.¹⁴⁶

7.9 Locating Expert Witnesses

Locating expert witnesses to explain why abused women kill, why they do not leave and the effects of abuse on battered women. Proponents of this defence agreed on the importance of locating expert witnesses with experience dealing with abused women and suggested trying to develop greater witnesses who could testify to the effects of abuse on women.¹⁴⁷

7.10 Expert Evidence must be indispensable for non-pathological criminal incapacity

Expert evidence should be a requirement in support of the defence of criminal incapacity with regard to the BWS defence just like the way the Criminal Procedure Act provide for the psychological and psychiatric evidence for pathological criminal incapacity, it must also do the same with non-pathological criminal incapacity and reform should be affected legislating to make provision for a general defence of criminal incapacity.¹⁴⁸

7.11 Conclusion

As seen above the BWS defence is met with a lot of barriers in terms of how it is presented and argued in the courtroom as well as opponents who try their best to make it null and void through their criticism. Although, there is need for expert evidence to support it, it is still hard for the defence to succeed as it is surrounded with blockade inside and outside the court. I still believe there is still a long way to go for this defence to take its roots unless the society and everyone involved is made aware of battering and its effect.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Supra note 7.

Chapter 8: Conclusion

8.1 Summary of findings

It is submitted that whenever the expert evidence is used, it does not automatically mean that the accused will succeed, it can succeed but the chances will be stumpy. However, in the absence of such evidence any defence relied upon in support of the battered woman syndrome defence will be cumbersome to prove as the absence of such expert testimony will make it impossible for the court to understand how a battered woman`s actions suit within the defences raised. In order for justice to prevail, it is necessary to rely more on psychologist evidence than the psychiatric evidence as the former is a more appropriate mental health professional to evaluate a battered woman syndrome and the defence raised due to the fact BWS does not originate from a mental disease where the latter is a professional.

In addition the term battered woman syndrome needs to be thorough understood in the medical profession particularly with regard to psychological and psychiatric professionals in order for them to present valid expert testimony beyond reasonable doubt in court which will help the battered woman who is the accused on the trial to succeed with the BWS defence leading to her acquittal.

Ultimately, expert evidence serves as a tool by which courts can properly determine the facts before them and is not directed towards a possible acquittal as seen in the above mentioned cases where the defence of non-pathological criminal incapacity still failed despite the availability of expert testimony. Obviously, expert evidence has failed in its application and contributed tremendously to the failure of battered woman syndrome defence.

I therefore, conclude that although expert evidence is essential as implied by the court, the application of the expert evidence has botched the defence of BWS as it is applied unfairly and unjustly on the battered woman, however, the door is still open for the defence to succeed if only the court can give a wide eye to the suggestions mentioned above and start applying it justly and fairly on the accused person.

Lastly, the two professions law and medicine must work together to make BWS defence more successful in its application and both must be aware that this defence in the context of non-pathological criminal incapacity is in a great need of transformation.

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