

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE AS DEFENDANTS IN CRIMINAL PROCEEDINGS: SPECIFIC CONSIDERATIONS AND ISSUES FOR ADVOCATES

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1. INTRODUCTION

Domestic violence victims present with a unique and complex set of issues when they become part of the criminal justice system. Often, they enter that system after many years of abuse and after something has triggered a response in them to those years of abuse; usually physical reprisal or protective behaviours against the abusive partner. The relationship that they have been in will no doubt have been a complex one, about which they may have ambivalent feelings. Whilst they may have been terrorised by an abusive partner, and have hurt or even killed that partner, they might too have feelings of love, guilt and shame associated with the relationship and what has happened.

Navigating the criminal justice system on behalf of such a victim is fraught with legal issues. Whilst there is room for compassion and mercy, these types of cases often present particular challenges for the Courts. This is particularly so where a violent partner has been killed.

This paper will examine some of the relevant legal issues and cases from around Australia in order to examine those concepts.

2. BATTERED WOMEN SYNDROME AND EXPERT EVIDENCE

When representing an accused that has killed her violent partner, it may be helpful to introduce expert evidence on battered woman syndrome (BWS). That evidence can be used in support of self-defence, provocation or used in mitigation in sentence.¹

Generally, Australian courts will only admit expert evidence on BWS from psychiatrists, psychologists or the accused's general practitioner. The difficulty with the Courts' approach is that

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those who may appear to be in the best position to give expert evidence on BWS, such as family violence workers or researchers, may not be considered 'experts' under the relevant provisions of the *Evidence Act*.²

When an expert is called upon to give evidence about BWS, he or she will focus primarily on the social circumstances of the accused. This evidence is formally known as 'social framework evidence'. Such evidence may include a prior history of violence, which is commonly introduced in homicide cases as context evidence, and is therefore not a new concept.³

The main purpose of social framework evidence is to *"assist judges and jurors with understanding the accused's experiences of violence and her beliefs and perceptions about the nature of the threat and the options for responding."* This is important as not all judges and jurors will have sufficient insight into the dynamics of and negative effects of abusive relationships and as a consequence may misinterpret what has happened.⁴

In some cases, it will also be necessary to provide evidence on the psychological impact that the abuse has had on the accused. Here, it is important to bear in mind that research has shown that *"there is no single profile of a battered woman and that women who are subjected to violence experience a range of emotional and psychological problems as a result of the abuse."* Those problems include high rates of depression, suicidal thoughts and actions, post-traumatic stress disorder, alcoholism, and drug dependency and abuse.⁵

Psychological evidence can help explain a woman's behaviour following a homicide that can point to behaviours consistent with guilt or an unwillingness to be frank, for example not remembering what happened, a flat affect or aggressive behaviours.⁶

3. RELEVANT DEFENCES

BWS is not itself a defence, however it has been argued that the syndrome has *"...the potential to assist decision-makers better to understand the circumstances preceding a woman's eruption into lethal violence, it may remove sources of misunderstanding that might make decision-makers inappropriately suspicious of a woman's account of her relationship and it may give some insight into what was happening in the woman's thought processes when she had resort to lethal force."*⁷

The relevant defences that could be utilised to defend a woman who was in a violent relationship and subsequently killed her partner are:

- self-defence;
- excessive self-defence;
- extreme provocation; and

- substantial impairment by abnormality of mind.

Self-defence can also be used in cases where the defendant does not kill their partner but instead causes grievous bodily harm.

(A) SELF DEFENCE

Section 418 of the *Crimes Act 1900* provides the defence of self-defence. This is a complete defence unlike the other defences that could be used. Section 418 states that:

- (1) *A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.*
- (2) *A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:*
 - (a) *to defend himself or herself or another person, or*
 - (b) *to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or*
 - (c) *to protect property from unlawful taking, destruction, damage or interference, or*
 - (d) *to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,**and the conduct is a reasonable response in the circumstances as he or she perceives them.*

This is a two part test as explained by Howie J in *R v Katarzynski* [2002] NSWSC 613 at [23] as follows:

The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct. The second issue is determined by an entirely objective assessment of the proportionality of the accused's response to the situation the accused subjectively believed he or she faced.

That is, the defendant must believe that her conduct was necessary (subjective test) in order to defend herself or another person (for example, children). And, that what the defendant did was a reasonable response (objective test) to the circumstances as she perceived them.

In relation to the first part of the test (the subjective test), the defendant need not have reasonable grounds for her belief that it was necessary to act in the way she did in order to defend herself. It is sufficient if the defendant genuinely holds that belief.⁸

In relation to the second part of the test (the objective test), although what is reasonable is decided objectively, the response considered is the response of the defendant. In making an assessment as to whether that response was reasonable, some of the personal attributes of the defendant will be relevant, as will be some of the surrounding physical circumstances in which the defendant

acted.⁹ Following from this reasoning, in cases where the defendant is a victim of domestic violence matters such as the age of the defendant, the state of her health, the history of domestic violence between the defendant and the deceased may be regarded by the jury.

There are a number of obstacles that women may face in establishing that their actions were carried out in self-defence. First, some jurors may not understand the dynamics of an abusive relationship. In particular, they may question the woman's belief that she needed to resort to the use of force or that she deemed her actions reasonable or proportionate to the threat posed. This is especially so where the woman may be responding to an on-going threat of serious violence and/or the cumulative effects of violence, as opposed to a one-off attack.¹⁰

Second, some jurors may find it difficult to accept that a woman who has experienced domestic violence believes that the use of force is her only way out. Those jurors may question why the woman did not call the police for assistance instead.¹¹

Third, a jury may characterise the actions of battered women as not being 'real' self-defence due to the level of planning involved in attacking their often unsuspecting partner. It is not uncommon for women to arm themselves in advance, as they are usually smaller and physically weaker than their partners, and to wait until their partner's guard is down before attacking them. A typical example of this is where a woman attacks her partner while he is sleeping, even though he poses no imminent threat.¹²

R v Falls (unreported) Supreme Court of Queensland, Applegarth J, 3 June 2010¹³

The Facts:

In 2006 Susan Falls ("the defendant") ground sleeping pills into her husband's food and then shot him in the head while he slept. Two hours later, she reloaded the gun and shot him a second time. She then disposed of his body and claimed that he had disappeared, maintaining this fiction for four weeks during which time she participated in public appeals for information as to his whereabouts. The deceased's body was eventually discovered in dense bushland and the defendant was charged with murder.

The Law:

The defendant had two avenues of defence available to her according to Queensland law: the complete defence of self-defence and the partial defence of 'killing for preservation in an abusive domestic relationship'.

The Evidence:

The defence team provided detailed evidence on the deceased's violence throughout the relationship and the control and dominance that his strategic use of violence reinforced. The goal was to convey to the jury the experience and effects of living a life of being abused.

The only direct witness to the violence was its victim, the defendant.

The defendant gave evidence; providing a detailed account of the serious physical violence that she had experienced from the deceased over the 20 years that they were in a relationship and the lengths she went to hide the violence from others. She gave evidence that the deceased threatened to hurt her parents or her sister and her sister's children if she ever left him. The defendant also gave evidence that the deceased's violence escalated prior to the killing, that is that he was hitting her with a lot more force, his time limits restricting her behaviour were getting tighter, and he told her he would kill one of their children if her mother came to visit on her birthday.

The defence provided indirect corroboration of the violence in the form of evidence from various witnesses (a hairdresser, a day care director, an employee of the defendant, a landlord, a police officer, friends and family of the deceased and a mother at the children's school) about injuries they had seen on the defendant and her attempts to cover up injuries. Neighbours gave evidence that they had been woken up in the night by the deceased yelling at the defendant. The defence presented independent evidence of the threats the deceased made to people who attempted to help the defendant.

The defence also cross-examined the Crown witnesses about the deceased's use of aggression and violence towards people other than the defendant, as well as the family pets and objects and property that got in his way. This evidence supported the defendant's account of the violence towards her but also demonstrated that his violence was his problem.

Two expert witnesses gave evidence for the defendant (both psychiatrists). Rather than focusing on the defendant's responses to the violent acts to which she was subjected, a substantial part of their evidence described the phenomenon of battering as being about the abuser's dominance and control, often control over every aspect of the abuse victim's life. The experts gave evidence that it was typical for abused women to be isolated, to hide their abuse, to lie about the cause of their injuries, to have memory loss because of trauma and to fail to seek medical help. Both experts also described the social framework within which domestic violence took place, for example the limited solutions available to women struggling to deal with extreme violence and that leaving a violent relationship was often not a reasonable option because it was too dangerous. By suggesting that her emotional and behavioural reactions were 'typical' of someone in her situation, the experts were able to 'normalise' her responses to her situation and give her account some plausibility. Both experts emphasized that the defendant was under an objectively serious and escalating threat without reasonable lawful options to deal with it, and also that her psychological trauma and deterioration in thinking as a consequence of surviving severe violence contributed to the killing.

The Decision:

The jury took less than 2 hours to acquit.

(B) EXCESSIVE SELF DEFENCE

Excessive self-defence is a partial defence to murder. That is, it reduces the charge of murder to manslaughter where the defendant satisfies the reasonable belief test, which is the first limb of self-defence, but fails the reasonable response test, which is the second limb.

Excessive self-defence was first confirmed as a partial defence by the High Court in *Viro v The Queen* (1978) 141 CLR 88. However, less than a decade later, it was abolished in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 664. Today, after its revival by Parliament in the *Crimes Amendment (Self-Defence) Act 2002*, the partial defence of excessive self-defence appears in section 421 of the *Crimes Act 1900*, which states that:¹⁴

- (1) *This section applies if:*
 - (a) *the person uses force that involves the infliction of death, and*
 - (b) *the conduct is not a reasonable response in the circumstances as he or she perceives them,*

but the person believes the conduct is necessary:

 - (c) *to defend himself or herself or another person, or*
 - (d) *to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.*
- (2) *The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.*

The application of the defence of excessive self-defence was explained by the Court of Criminal Appeal in *Ward v R* (2006) 166 A Crim R 273 at [41] as follows:

If the jury were satisfied that the stabbing was a deliberate act of the applicant and was committed with the intent to kill the deceased or inflict upon him grievous bodily harm, his Honour was required to direct them that the appellant would be guilty of manslaughter where they found that there was a reasonable possibility that he believed his conduct was necessary in his own self-defence but where they were satisfied beyond reasonable doubt that his response was not reasonable in the circumstances as he perceived them to be.

It has been suggested that a problem with raising this defence in cases such as these is that:

...it may prevent women from being acquitted on the basis of self-defence, due to the existence of an 'easy' middle option. Many women who kill in response to family violence use a weapon, often against their unarmed partner. A jury, presented with the option of returning a verdict of manslaughter on the basis of excessive self-defence, may therefore simply

accept that such a killing was unreasonable and disproportionate, instead of properly considering the reasonableness of her actions in the circumstances.¹⁵

R v Silva [2015] NSWSC 148

Facts:

Jessica Silva ("the defendant") stabbed James Polkinghorne, her de facto partner, in the chest. The defendant pleaded not guilty to murder. The jury returned with a verdict of not guilty of murder but guilty of manslaughter.

At the time of the deceased's death, he was aged 28 and the defendant was aged 22. They had been in a relationship for approximately four years and had lived together for two years. However, for the past two months the defendant had been living back with her parents. The defendant and the deceased had a two year old child at that time.

In early 2012, the defendant and her son travelled to the deceased's father's home in Queensland in order to get away from the deceased. The deceased followed her there. Despite warnings from his father, the deceased violently assaulted the defendant and was told to leave the house by his father.

Particularly during 2012, the defendant made complaints about the deceased assaulting her on a number of occasions. The deceased even admitted to the defendant's brother that he had assaulted the defendant on two or three occasions. In the defendant's ERISP the defendant described the relationship with the deceased as "very abusive" and said: "I dealt with it for so long, I thought I could change him"

At about 10.30am on 13 May 2012, the defendant and her son left the hotel where they were staying with the deceased to visit her parents for Mother's Day. The deceased was not pleased that the offender was leaving but allowed her to go because it was Mother's Day and because she had promised to return after visiting her parents or he would come after her.

There followed a number of phone calls and text messages between the defendant and the deceased. The deceased was clearly upset about the breakup of their relationship and believed that the offender would not be returning to the hotel because she had packed all her clothing and that of the child. The content of the messages and telephone conversations, together with the tone of voice used by the deceased, were increasingly abusive and threatening.

At about 8.30pm the deceased went to the defendant's parents by taxi. The defendant and her brother emerged from the family home to speak to the deceased. He ran across the road towards the defendant shouting "I'm going to fucking kill her, I'm going to fucking kill her". The defendant's

brother tried to get the deceased to calm down. The deceased grabbed the defendant and punched her in the face and ripped her pants.

The defendant's brother intervened and tried to pull the deceased away from the defendant which led to the deceased punching him. He and the deceased struggled together, causing them to fall onto the road with the deceased on top of the defendant's brother punching him.

At some point the defendant shouted that the deceased was trying to kill her brother, which caused her father to come try to pull the deceased off the defendant's brother, without much success.

While later this was taking place on the road, the defendant ran back inside the house and grabbed a knife from the kitchen. She then went back outside to the struggle and stabbed the deceased at least five times in the shoulder, the back of his head and his back.

When asked by police why she stabbed the deceased, the offender said "I wasn't trying to kill him, I was just, I don't know what I was trying, I just, I just didn't want him to hurt me anymore".

The Evidence:

The defendant did not give evidence.

Due to an unrelated police investigation, the accused's phone was being monitored. From phone calls between the defendant and the deceased, evidence was presented of the deceased's escalating threats of violence to the defendant.

The defence led expert psychiatric evidence that the offender was suffering from PTSD, specifically 'Battered Woman Syndrome' when she stabbed the deceased. On sentence, the Court did not accept the diagnosis because of differences in the history given to the psychiatrist and the evidence presented to the court, preferring the evidence over the history taken by the expert witness.

The Court accepted that, at the time of the stabbing, the defendant was highly emotional and hysterical and had become increasingly fearful of the deceased.

The Findings:

His Honour found that the defendant had stabbed the deceased with an intention to inflict grievous bodily harm. This was due to the fact that the defendant believed her act was necessary to defend not only herself but her brother and father. However, the jury found that the defendant's conduct was not a reasonable response in the circumstances as she perceived them, thereby rendering her guilty of the crime of manslaughter by way of excessive self-defence.

Decision:

The defendant was sentenced to imprisonment for 18 months wholly suspended.

(C) PROVOCATION

Section 23 of the *Crimes Act 1900* provides the partial defence of provocation. This means that murder is reduced to manslaughter where that killing was as a result of the loss of self-control that was induced by the deceased's conduct, where the conduct could have provoked an 'ordinary person' in the defendant's position to have lost self-control and therefore form an intention to kill or inflict grievous bodily harm.¹⁶

Section 23 of the Crimes Act 1900 states that:

- (1) *If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.*
- (2) *An act is done in response to extreme provocation if and only if:*
 - (a) *the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and*
 - (b) *the conduct of the deceased was a serious indictable offence, and*
 - (c) *the conduct of the deceased caused the accused to lose self-control, and*
 - (d) *the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.*
- (3) *Conduct of the deceased does not constitute extreme provocation if:*
 - (a) *the conduct was only a non-violent sexual advance to the accused, or*
 - (b) *the accused incited the conduct in order to provide an excuse to use violence against the deceased.*
- (4) *Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.*
- ...
- (6) *For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negated merely because the act causing death was done with intent to kill or inflict grievous bodily harm.*
- ...

In introducing the amendment to s.23 of the Crimes Act 1900, the Attorney- General said that:

The new section 23 says that the conduct may be provocative, in the legal sense, whether it occurred immediately before the act or omission causing death or at any previous time.

Under the new law, it matters not when the provocation occurred. The only question is whether, at the time of the act, the accused had lost self-control. ... The new section 23 makes it clear that any conduct of the deceased towards or affecting the accused may be the basis for provocation. This covers not only blows or beatings inflicted upon the accused but also the situation ... where the deceased has committed incest, for example, upon a daughter of the family. Provided that such conduct affects the accused-it would be deeply disturbing to a wife-it may constitute provocation.¹⁷

Provocation is one of the most criticized defences. It was developed in the 16th and 17th centuries when drunken brawls over honour were commonplace. Responding to a challenge of your honour with an angry response was seen as reasonable and rational in the circumstances. Not to respond with an angry outburst was seen as cowardly.¹⁸ By the 19th century there had been a shift from the idea that you were provoked out of anger to the idea of 'anger as loss of self-control' and the objective test of a 'reasonable man' was introduced.¹⁹ The test has now become that of an 'ordinary person', however, it has been argued that this 'sexless' ordinary person is in fact still a man. It is generally seen as a male response to suddenly lose self-control and become violent to a particular provocative act. Therefore, it is very difficult for women to use the defence of provocation despite the changes that have been made.²⁰ This is due to the fact that generally when women kill their partners it is in the context of a prolonged history of physical abuse and not just one particular provocative act.

As pointed out by Mason J in *Van Den Hoek* (1986) 161 CLR 158 at 166-167, even though anger is generally the emotion that is associated with provocation, other emotions such as fear may also be relevant. His Honour said that:

Traditionally the onset of sudden passion involving loss of self-control characteristic of provocation has been associated with acts or actions which provoke the accused to uncontrollable anger or resentment ... a notion that may be traced back as far as Aristotle. Indeed, the historical concept of provocation as a defence has reflected the ordinary meaning of the word, ie, an act or action that excites anger or resentment. These days, however, judicial discussion of the doctrine places emphasis on the accused's sudden and temporary loss of self control, without necessarily attributing that loss of self-control to anger or resentment, except in so far as it is asserted that the act which causes death was done as a result of passion or, as it is colourfully expressed, 'in the heat of passion'..

R v Russell [2006] NSWSC 722

Facts:

Cherie Russell ("the defendant") was charged with stabbing her de facto husband (Jeffrey Cook) once in chest with kitchen knife. The defendant was indicted on a charge of murder, however the Crown accepted her plea of manslaughter in full satisfaction of the indictment.

The defendant and the deceased had been in a relationship for about 18 months. They lived together for much of that time.

On the afternoon of 18 March 2005, the deceased and the defendant started drinking alcohol and by 6.45pm they were both well affected by alcohol.

At 6.21pm, the defendant telephoned her daughter. The defendant's daughter noticed that the defendant began to sound strange. She could hear the deceased in the background yelling at the defendant. He was saying things such as, "Why is she on the phone?", "She is nothing but a slut", "Get off the phone." The defendant's daughter then said, "I better let you go I don't want you two to fight". The deceased then struck the defendant leaving a cut/red mark on her nose and the right side of her face. The defendant dropped the phone but her daughter heard her scream, "Please don't Jeff, no more". The defendant's daughter then hung up the phone and tried to call her brother who lived in Sydney.

The deceased took a knife and flashed it in the face of the defendant and said "I'll kill you stone dead" and then put the knife down. The defendant then took the knife as the deceased screamed at her, "stab me you bitch, you have not got the balls." The deceased continued to yell and scream. He shouted; "go on, do it, stab me." The defendant then stabbed the deceased once, on the left hand side of his chest towards his back, puncturing his lung and heart. The deceased ultimately died from excessive blood loss.

The defendant initially asserted that the deceased had threatened to stab himself. When later asked what happened the defendant replied, "well I didn't do it".

Shortly after 8.30pm the defendant was arrested and conveyed to the police station. On the way to the police station the defendant asked about the deceased and whether she could see him. The defendant said "he went out the front and he said he was going to kill himself".

At the police station the defendant declined to be interviewed.

The Evidence:

The defendant had an extended history of being exposed to violence; having been in three long-term abusive relationships, including with the deceased.

In 2001 the defendant was hit by a car, as a result of this she suffered brain damage. As a result she was mildly intellectually handicapped and had poor memory and cognitive skills. She was also more easily upset and moved to tears.

The relationship between the defendant and the deceased was characterized by alcohol-induced violence by the deceased towards the defendant. The police attended regularly on the deceased and the defendant for drunken arguments.

Police records showed the deceased had a number of convictions for violent offences as well as complaints to the police by previous partners of serious violence.

The Findings:

His Honour found that when the defendant stabbed the deceased she did so with the intention of causing grievous bodily harm. However, it was done in circumstances where the defendant had been provoked by the deceased. His Honour noted that BWS is a mitigating factor, but not exculpatory.

Decision:

The defendant was sentenced to a non-parole period of three years with no parole.

(D) SUBSTANTIAL IMPAIRMENT

Substantial impairment of the mind (formerly diminished responsibility) is a partial defence to murder. However, it is very rarely used as a defence.²¹ This is probably due to the fact that it only arises where all other issues on a charge of murder, including self-defence and provocation, have been negative by the prosecution and resolved against the defendant (this is not to be taken as suggesting any reversal of onus).

Section 23A restricts “abnormality of mind” to a defendant’s capacity to understand events, an ability to judge whether actions are right or wrong, or exercise self control.²²

Substantial impairment of the mind is set out in s 23A as follows:

- (1) *A person who would otherwise be guilty of murder is not to be convicted of murder if:*
- (a) *at the time of the acts or omissions causing the death concerned, the person’s capacity to understand events, or to judge whether the person’s actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and*
 - (b) *the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.*

...

- (5) *A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.*

...

- (8) *In this section:*
"underlying condition" means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

R v Chen [2012] NSWSC 1000

Facts:

Jian Chen ("the defendant") was charged with stabbed her former de facto partner, Jin Xiang Peng in the neck, groin and scalping his penis. He was found with both wrists and feet bound. She pleaded not guilty to murder, but guilty of manslaughter on the basis of substantial impairment by abnormality of mind, which the Crown accepted.

The defendant and the deceased met in 2003. He told the defendant that he was divorced. The defendant later learnt that the deceased had not divorced his wife, however continued seeing the deceased and later found that she was pregnant.

The defendant and the deceased started a business with the defendant's money as the deceased had no money. The defendant did most of the work in the business whilst the deceased went on overseas trip to China to see if they could open the Chinese market. The defendant funded these trips, paying over \$100,000.

However, their relationship broke down and they agreed to separate. The defendant then felt too depressed to look after their son and agreed that the deceased could take him to China for at least half a year.

The deceased asked the defendant to pay all of their expenses in China, because he could not work and look after their son.

The defendant went to China, where she found their son had been placed in boarding school and was being bullied. The defendant wanted to take her son back to Australia but the deceased had his passport, so she had to leave their son behind at school in China.

On one of the defendant's trips to China to see her son, she went to the deceased's home. When she arrived she could hear their son crying, saying 'please don't daddy. Please don't'. When the deceased opened the door she found their son tied up. The deceased was holding a stick and was about to hit their son. When she went to hold their son, the deceased hit her with the stick on the

head and back. She threatened to call the police and the deceased then let her take their son for two days. He told her that if he didn't get his money soon he would sell their son.

In November 2009 the deceased returned to Australia with their son and told the defendant that she could have their son back.

In February 2011, the deceased came to Sydney. The deceased attended the defendant's house and while there asked the defendant to remove a caveat she had put on the house. She asked him what he would do if she did not remove the caveat and he said that he would take their son again.

The defendant was frightened about what might happen to her son and did not know what to do. She thought there would be no end if she didn't do something. So whilst cooking dinner she put sleeping pills in the soup, which the deceased ate a bowl of.

The deceased fell asleep on the couch, whilst the defendant lay down with their son until he fell asleep at about midnight. Whilst lying there the defendant was remembering her son in boarding school and she realised that she could lose him at any time. She could not think of what to do, so she went and tied the deceased up.

At about 4 or 5 am deceased woke up and the defendant asked him to leave her and their son alone. The deceased was trying to break free and asking her to untie him and he vomited. The defendant's evidence given to one of the psychologist was that at this stage she did not think about killing the deceased.

The defendant remembered thinking "destroy the monster's weapon". She then cut off some of his penis and flushed it down the toilet. After she came out of the toilet she saw the blood on the floor everywhere and rang the ambulance.

At 6:22 am the defendant called 000.

The deceased was taken to hospital but died from his injuries.

The Evidence:

The defendant did not give evidence. Reports were tendered from treating psychiatrists and expert witnesses.

Evidence from psychiatrists established that the defendant suffered from a depressive illness. The histories taken by the psychiatrists showed that the defendant suffered significant psychological abuse and manipulation at the hands of the deceased; that the deceased was cruel to their child, i.e. harming him and using him to manipulate the defendant; that the defendant thought her son was at risk of being kidnapped by the deceased; and, that the deceased emotionally manipulated the defendant into giving him money.

The defendant said she believed the deceased uses his penis to harm women and children, and that something inside of her wanted to destroy his weapon (i.e. his penis) so that he could not harm any more women or children. She stated that she remembered cutting off some of his penis and flush it down the toilet. She also remembers thinking that she had to flush it down so he could not harm anymore women or children.

When the defendant was asked if what she had done was wrong, her response was "yes but at the time he was like a monster to me, all his face was twisted. All the memories. All I saw in my mind, all those poor kids on the street begging for money. [A] was one of them. I knew Peng used his penis to capture women, to have children by them, use the children as tools to squeeze money out of us. Something just urged me to do it, don't let the monster to harm anymore children."

The Findings:

At the time of the stabbing, the defendant's capacity was substantially impaired by an abnormality of mind arising from an underlying longstanding depressive illness.

The defendant's view that the deceased was a serial predator was influenced by her underlying condition.

The defendant believed the deceased presented a serious threat to their son, however, her act was not a sudden impulsive response to the perceived threat as she considered her situation over many hours.

Decision:

The defendant was sentenced to imprisonment with a non-parole period of 3 years and 9 months with a balance of term of 3 years.

4. RELEVANT CONSIDERATIONS ON SENTENCING

There is no separate category of murder or manslaughter concerning family members which attracts a particular range of sentences.²³ In *Knight v R* (2006) 164 A Crim R 126, McClellan CJ said at [26] that:

To my mind there will always be difficulties in attaching precise labels to a particular offence and I would be reluctant to acknowledge that 'an ordinary domestic murder' would be an appropriate description of any offence for the same reason the courts have been reluctant to define the elements which comprise a worst case ...

Similarly, in *Gonzales v R* [2007] NSWCCA 32, Giles JA at [175] said:

I do not accept that a category of family or domestic murders should be devised (see *R v Whitmore* [1999] NSWCCA 75 at [16]). The presently relevant categorisation is as a worst case or a case falling within s 61(1) of the *Crimes (Sentencing Procedure) Act*.

Therefore, each case is looked at individually.

Section 3A of the *Crimes (Sentencing Procedure) Act* 1999 provides that a court may impose a sentence on an offender for the following purposes:

- (a) *to ensure that the offender is adequately punished for the offence;*
- (b) *to prevent crime by deterring the offender and other persons from committing similar offences;*
- (c) *to protect the community from the offender;*
- (d) *to promote the rehabilitation of the offender;*
- (e) *to make the offender accountable for her actions;*
- (f) *to denounce the conduct of the offender;*
- (g) *to recognise the harm done to the victim of the crime and the community.*

The court also looks at the aggravating and mitigating factors which are set out in s 21A of the *Crimes (Sentencing Procedure) Act* 1999 when determining the appropriate sentence. Some of the aggravating factors to be taken into account in determining the appropriate sentence, as set out in s 21A(2), are:

...

- (b) *the offence involved the actual or threatened use of violence,*
- (c) *the offence involved the actual or threatened use of a weapon,*
- ...
- (d) *the offender has a record of previous convictions....,*
- (e) *the offence was committed in company,*
- (f) *the offence was committed in the presence of a child under 18 years of age,*
- (ea) *the offence was committed in the home of the victim or any other person,·*
- (f) *the offence involved gratuitous cruelty,*
- (g) *the injury, emotional harm, loss or damage caused by the offence was substantial,*

...

- (j) *the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,*
- (l) *the victim was vulnerable, for example, because the victim was very young or very old or had a disability....,*

· It has been held that if the victim and offender both live in the same home where the offence was committed then the aggravating factor expressed in s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act* 1999 (that the offence was committed in the home of the victim or any other person) does not apply as an aggravating factor: *Aktar v R* [2015] NSWCCA 123; *Melbom v R* [2013] NSWCCA 210; *NLR v R* [2011] NSWCCA 246

...

Some of the mitigating factors to be taken into account in determining the appropriate sentence, as set out in s 21A(3), are:

- (a) *the injury, emotional harm, loss or damage caused by the offence was not substantial,*
- (b) *the offence was not part of a planned or organised criminal activity,*
- (c) ***the offender was provoked by the victim,***

...

- (e) ***the offender does not have any record (or any significant record) of previous convictions,***
- (f) ***the offender was a person of good character,***
- (g) ***the offender is unlikely to re-offend,***
- (h) ***the offender has good prospects of rehabilitation...,***
- (i) ***the remorse shown by the offender for the offence, but only if:***
 - (i) *the offender has provided evidence that he or she has accepted responsibility for his or her actions, and*
 - (ii) *the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),*
- (j) *the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability;*
- (k) *a plea of guilty by the offender (as provided by section 22);*
- (l) *the degree of pre-trial disclosure by the defence (as provided by section 22A); and*
- (m) *assistance by the offender to law enforcement authorities (as provided by section 23).*

It is apparent from the concluding words of s 21A(1) that the list of aggravating and mitigating factors are not exhaustive.

Nevertheless, powerful subjective features are present when a defendant is sentenced following lengthy or significant abuse. Some examples of principles and findings made on sentence and appeal include:

In *R v Silva* [2015] NSWSC 148, Hoeben CJ at CL said that:

[54] Insofar as the authorities are concerned "It is now well established that when a human life is taken even within the context of domestic violence the courts will not deal leniently with the offender unless the case is exceptional. It is only in the most exceptional case that a non-custodial sentence will be imposed" (*R v Bogunovich* (1985) 16 A Crim R 456); *R v Roberts* (Hunt J, 31 August 1989, unreported); *R v Kennedy* [2000] NSWSC 109 at [56], *R v Melrose* [2001] NSWSC 847 at [27]).

...

[58] By reference to general sentencing principles it is apparent that considerations of specific deterrence are not relevant. That necessarily follows from the findings as to rehabilitation and the unlikelihood of any re-offending.

[59] The principle of general deterrence while still important, should be given less weight because of the exceptional circumstances of this case. The factual circumstances are most unusual with the steady build up of fear on the part of the offender arising from the escalating threats of violence emanating from the deceased as he approached the offender's home.

...

[60] ... The offending was committed under extreme circumstances in the agony of the moment.

...

[63] Taking all those matters into account, I am satisfied that no alternative is appropriate other than a sentence of imprisonment. I do not think in the circumstances of this case that a good behaviour bond would adequately meet the purposes of sentencing set out in s 3A of the Act. In my opinion a sentence of 18 months is appropriate. However, having regard to the mitigating factors to which I have referred and the exceptional circumstances of this case, I have determined that the sentence of imprisonment should be fully suspended.

In *R v Seymour* [2012] NSWSC 1010, Price J said at [45] that:

There are a number of factors that mitigate the objective seriousness of the offence. The offence was not planned, but was committed on the spur of the moment, the offender reacting to the exigencies that she found herself in: s 21A(3)(b) *Crimes (Sentencing Procedure) Act*. She did not reach for or obtain a weapon, but used the knife that she was holding to make a sandwich. There was some provocation by the deceased: s 21A(3)(c) *Crimes (Sentencing Procedure) Act*. The deceased was the original aggressor and without her aggression, the offence would not have occurred. Furthermore, the offender desisted from inflicting further violence upon her mother after the single knife blow.

In *R v Chen* [2012] NSWSC 1000, Schmidt J said at [115] that:

She plainly misses her children and they miss her. That, however, unfortunately is a situation in which many offenders find themselves. Of itself it is not a mitigating factor.

6. CONCLUSION

These cases are very often tragic and defendants usually come to the system after being victims for many years. They need to be treated with care and respect. Shame and embarrassment can be significant impediments to finding out the extent of the abuse suffered. Lawyers must press for full and frank disclosure and then consider the most forensically beneficial ways and times to place this material before the Court. This is sometimes easier said than done. Guarding against vicarious trauma can also be an important issue.

Creativity with approaches and new and challenging techniques need to be considered with each new case.

There is a place for compassion and mercy if evidence is effectively placed before the Courts in such a way that the Court can confidently act on that information. Courts will inevitably be moved by the plight of domestic violence victims. The lawyer's job is to ensure that the best possible case is available to the Court.

ENDNOTES:

- ¹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.94
- ² Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.113
- ³ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.99
- ⁴ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.99
- ⁵ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.100
- ⁶ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 4.101
- ⁷ I Freckleton and H Selby, *Expert Evidence* (online), Thomson Reuters, Pyrmont, 2012, at [10.35.100].
- ⁸ *R v Katarzynski* [2002] NSWSC 613 at [24]
- ⁹ *R v Katarzynski* [2002] NSWSC 613 at [25]
- ¹⁰ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at p.xxvi
- ¹¹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at p.xxvi
- ¹² Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at p.xxvi
- ¹³ Extracted from Sheehy, E., Stubbs, J., Tolmie, A. *Securing Fair Outcomes For Battered Women Charged with Homicide: Analysing Defence Lawyering in R v Falls* [2014] 38 Melbourne U. L. R. 666
- ¹⁴ Judicial Commission of New South Wales, *Sentencing Bench Book*, September 2006 at [40-010]
- ¹⁵ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 3.91
- ¹⁶ Judicial Commission of New South Wales, *Sentencing Bench Book*, September 2006 at [40-010]
- ¹⁷ Hansard, Legislative Assembly, 11 March 1982, p2485–2486
- ¹⁸ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 2.4
- ¹⁹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 2.6
- ²⁰ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) at par. 2.19
- ²¹ <http://theconversation.com/domestic-violence-how-the-law-treats-women-who-kill-a-violent-partner-6983>
- ²² Legislative Council Select Committee on the partial defence of provocation: Inquiry into the partial defence of provocation, *Defences and Partial Defences to Homicide*, July 2012 p.4
- ²³ Judicial Commission of New South Wales, *Sentencing Bench Book*, September 2006 at [30-060]