DEFENCES

Battered women and duress

PATRICIA EASTEAL, KATE HUGHES and JACKI EASTER

report on a recent social security fraud case in which a battered woman pleaded duress to charges of social security fraud.

The case of *Winnett v Stephenson* (ACT Magistrates Court, unreported, 19 May 1993) is noteworthy in a number of respects. Although its potential value as a precedent is limited, it has the potential value for further instructing lawyers and judges about battered women and how the objective test for duress can be redefined for such women. It also illustrates the educative role of publications such as the *Alternative Law Journal* since the solicitor involved, Kate Hughes, read about battered woman syndrome in a 1992 issue[1] and decided to lead it in evidence.

The case is particularly timely given the recent media and political attention to both the judiciary's sentencing practices and the need for judicial training about gender-based issues. The latter is almost always proposed in the context of classes or workshops; yet, expert testimony within the court itself can fulfil an education function, as will be shown.

The case and the defence

Shirley Stephenson was accused of seven counts of imposing upon the Commonwealth, contrary to s.29B of the *Crimes Act* 1914 (Cth). It was alleged that she had obtained two unemployment benefits and rent assistance from the Department of Social Security at a time when she was employed (the amount was approximately $45 000). The matter was defended on the basis of duress.

The defendant admitted to the acts but gave evidence that throughout the relevant period she was subject to constant threats of death and acts of violence by her (ex) *de facto* spouse. This violence escalated over time and correlated with her decrease in income. When she obtained employment and wanted to stop receiving the dole, the defendant alleged that her partner abused her and threatened her (with covert references to death) if she did. Although she left the violent relationship in 1989, the batterer followed her and continued to threaten her with death. As a consequence, at his insistence she signed up for the dole in another jurisdiction, in her maiden name. By consent, the matter was dealt with summarily in the ACT Magistrates Court.

Duress and the use of expert testimony

To raise duress, the defence has to show that the defendant's will was overborne by threats of death or serious bodily violence, whether to herself or to another, *'provided that an average person of ordinary firmness of mind, of like age and sex, in like circumstances',*[2] *would have yielded in the same way* (our emphasis). If, however, it appears that the accused person failed to avail herself of an opportunity reasonably open to her for her will to be reasserted, the defence will not be available. Again, this depends on *whether 'an average person of ordinary firmness of mind, of like age and sex, in like circumstances, involving like risks in respect of the alternatives open, would have availed [her]self of the opportunity in question'* (our emphasis).[3]

Expert evidence was necessary in order to show that what constitutes reasonable behaviour for a battered woman differs from reasonable behaviour as defined by a white middle class male standard. Defence counsel called the evidence of a criminologist (Patricia Easteal) in order to assist the court in understanding how a woman of 'ordinary firmness of mind' would respond in the experiential context of domestic violence, that is, the objective element of the test for duress.

Kate Hughes led Dr Easteal through a ten minute enumeration of her credentials as an expert on the subject of battered women and battered woman syndrome which included educational achievements, academic research, publications, and prior work with refuges and battered women.

The first question was: 'What are the set of characteristics which identify the battered woman syndrome?' At this point the magistrate questioned the relevance of duress to the defence. Kate Hughes referred him to *Runjanjic and Kontinnen v R* (1991) 53 A Crim R 362 and read the pertinent paragraphs relating to the need for expert testimony to describe battered woman syndrome, an entity beyond the comprehension of the average lay person (at 368).

Convinced of the legal relevance, defence counsel was permitted to continue questioning. It is significant that Dr Easteal did not testify about the defendant and her particular history. Instead, she discussed the possible effects of living in a violent situation, in particular the following:

- the cycle of violence and how it works to generate terror;
- that learned helplessness is a psychological response to particular environmental cues and its consequences on constraining choice making;
- that the notion that all battered women are physically isolated housewives is a false myth although emotional isolation may develop due to their inability to disclose;
- that a battered woman, no longer living in the violent situation, could continue to evidence the lack of decision making, high passivity and dependence, and low self-esteem characterised by Walker[4] as components of battered woman syndrome if the batterer is still making threats;
- the idea that due to her own shame, fear of the basher's retribution, and perception of the antipathy of police (and other practitioners), the victim is often reluctant to seek police protection.

The relevance of the last point was objected to by the prosecutor. The magistrate, however, admitted this evidence as going to the objective element of the 'second limb' of the duress defence, that is whether an average person in the same circumstances as the defendant would fail to avail herself of an opportunity reasonably open to her to reassert her will.

The fact that a non-medical expert's evidence was admitted is a precedent in this area and may go some way to allaying the anxieties of those feminists concerned with the medicalising of women's experiences.[5] Instead of the defendant's individual psychology, Dr Easteal stressed the societal variables and the on-going violence that can contribute to the situational response of battered woman syndrome.

A clinical psychologist's evidence was also heard. This related specifically to the defendant whom he testified 'exhibited the indicia of battered woman syndrome': the subjective element of the test for duress.

The magistrate's decision and his in-court education

In the decision the magistrate stated that up to the close of the defendant's personal testimony he was sceptical about her evidence and the likelihood that an ordinary person would have failed to take opportunities available for escape. However, the expert testimony made him rethink his scepticism: 'Many of my reasons for scepticism appear to be explicable by the symptoms of battered woman syndrome'. The significance of this statement is that it implies that the expert evidence assisted him to understand the defendant's behaviour both in relation to the offences and to her credibility as a witness.

Given that newly acquired knowledge, he concluded that:

- expert evidence was relevant, and

  in light of that evidence, he could not be satisfied beyond reasonable doubt that the defendant's mind was not overborne by the threats or that a person of like age and sex in similar circumstances would not have done the acts or would have availed themselves of opportunities of retreat.

The information was therefore dismissed and the defendant was discharged. Of particular significance in this decision is that a magistrate learned that reasonable behaviour for a battered woman may not be the same as it is for others: a lesson for the judiciary in understanding that what they, as white middle class males see as reasonable, is limited by their own narrowly defined perceptions. Another breakthrough was the acceptance of non-medical expert evidence about battered woman syndrome. All in all, this was a notable case which hopefully will act as a precedent or as a model in other similar situations. Certainly an essential first step for non-gender based 'justice' is to enable the judiciary to understand the battered woman's experience.

Patricia Easteal is Senior Criminologist, Australian Institute of Criminology, Canberra.

Kate Hughes is a solicitor with the ACT Legal Aid Office.

Jacki Easter is a Canberra law student.

References

1. Easteal, P., 'Battered Woman Syndrome: What is Reasonable?' (1992) 17(5) *Alt.LJ*, 220-3.
2. *R v Lawrence* [1980] 1 NSWLR 122 at 143.
3. See *R v Lawrence* [1980] 1 NSWLR 122 at 143 for further explanation.
4. The only research aside from P. Easteal's referred to in the evidence was work by Dr Lenore Walker, *The Battered Woman*, Harper and Row, 1979, and *Terrifying Love*, Harper and Row, 1990.
5. See the debate between Easteal and Stubbs in (1992) 3(3) *Current Issues in Criminal Justice*, pp.356-9.

Necessity and prison escape

BILL WALSH discusses a New South Wales case where the judge allowed a prison escapee's defence of necessity to go to the jury.

Graham Gene Potter was convicted of murder in New South Wales in 1982 and was sentenced to life imprisonment. Since his conviction, Potter has consistently maintained his innocence and has been seeking a judicial inquiry into his conviction under s.475 of the *Crimes Act* 1900 (NSW). On 30 June 1990 Potter escaped from Bathurst Goal in New South Wales in a non-violent manner with another inmate. The two escapees travelled by taxi from Bathurst to another country town, Lithgow, where they were arrested on the following day.

In October 1992 Potter stood trial before Judge Peter Dent QC and a jury in the District Court of New South Wales for the offence of Escape from Lawful Custody. Potter's trial was significant in that the defence of necessity was raised by the accused and the trial judge allowed this defence to be put before the jury. This is believed to be the first occasion in Australia that the defence of necessity has been allowed to be considered by a jury in relation to a prison escape.

Since his initial conviction in 1982 Potter worked continuously on material in an endeavour to secure a judicial inquiry into his conviction so as to prove his innocence. In 1987 his family purchased a computer to assist him in preparing material to prove his innocence. Evidence was given by Potter and prison staff that Potter worked 'exhaustively' on his case and that he was 'obsessed' with proving his innocence. Potter said in evidence at the trial that, for three years from 1987 to 1990, he worked 10-14 hours a day, seven days a week on his case. One senior prison officer at the trial said Potter used his computer 'incessantly'. Prison staff, in their evidence at the trial, described Potter as a model and trusted prisoner.

In April 1990 a directive was issued by the then Minister for Corrective Services, Michael Yabsley, to the effect that only computers for 'approved educational purposes' were to be used by prisoners in gaols in New South Wales. The directive did not allow the use of a computer for legal research or research to help prove one's innocence. Potter applied for an exemption but was refused. To make matters worse, an inmate in the cell opposite Potter's own, continued to use a computer for educational purposes. The prison chaplain, Reverend Howard Knowles, in his evidence, described it as a 'terrible blow' for Potter to have his computer removed from him and to be denied an exemption to the policy, particularly when there was a prisoner in an opposite cell being allowed to use a computer. Reverend Knowles said that this was a 'gross injustice' and described the exceptions to the policy as 'unfair'.

Other evidence, unchallenged by the Crown, was presented in relation to a number of other frustrations or stress factors, which were operating on Potter in the period prior to his escape. These included the loss of some of his research mater-