

The "Defence" of "Battered Woman Syndrome" in Canada

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R. c. Lavallée est le premier arrêt canadien où l'on a réussi à élaborer une défense basée sur le «syndrome de la femme battue». Ainsi, on suggère qu'un nouveau système de défense approprié aux affaires pénales avait été conçu. Mais, cet article propose que le «syndrome» s'agit plutôt des doctrines de légitime défense et de provocation.

R. v. Lavallée is the first Canadian case that successfully erected a defence based upon "battered woman syndrome," which some view as an emerging separate and proper criminal defence. This article instead argues that label falls within the establishment doctrines of self-defence or provocation.

R. V. LAVALLÉE IS THE FIRST CASE in Canada to raise successfully the "defence" of "battered woman syndrome."¹ This comment will examine that "defence" and consider its place in Canadian criminal law. "Battered woman syndrome" has been referred to as a separate "defence"; however, what will here be argued is that it falls within the accepted parameters of self-defence or provocation.²

I. THE FACTS

ON 31 AUGUST 1986, Angelique Lavallée shot and killed Kevin Rust, a man with whom she had lived for three or four years. Rust was unarmed, and he had been shot in the back as he had turned to walk away from Lavallée. Lavallée was charged with second degree murder. She

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1 *R. v. Lavallée* (1988), 52 Man. R. (2d) 274 (Man.C.A.). The case is presently on appeal to the Supreme Court of Canada. [The author submitted this article in November 1989 – The Editor.]

2 Some suggests that "battered woman syndrome" is a separate defence: E. Vaughn & M. Moore, "The Battered Spouse Defense In Kentucky," (1983) 10 N. Kent. L. Rev. 399. In other instances, although a writer may use the phrase "battered woman syndrome defence," what is really meant is that evidence of "battered woman syndrome" goes to establish another traditional defence recognized in criminal law: D. Brodsky, "Educating Juries: The Battered Woman Defence in Canada," (1987) 25 Alta. L. Rev. 461.

was acquitted. The jury accepted that she was acting in self-defence. How can this be? Surely the decision is perverse? It is not. The stark facts of the actual shooting, standing alone, do not tell the whole story that surround the death of Kevin Rust. Angelique Lavallée was a battered woman, and one cannot understand the shooting unless one understands this fact. Lavallée's statement to the police gives a sense of what she was going through:³

Me and Wendy argued as usual and I ran in the house after Kevin pushed me. I was scared, I was really scared.... I went upstairs and hid in my closet from Kevin. I was so scared.... Next thing I know he was coming up the stairs for me.... OK then he turned and he saw me in the closet. He wanted me to come out but I didn't want to come out because I was scared. I was so scared. He grabbed me by the arm right there [points to inside of right forearm], there's a bruise on my face also where he slapped me [points to dark mark on right cheek]....

I was scared. All I thought about was all the other times he used to beat me, I was scared, I was shaking as usual. The rest is a blank all I remember is he gave me the gun.... OK and then he went and I was sitting on the bed and he started going like this with his finger [indicates shaking pointer finger at her] and said something like "You're my old lady and you do as you're told" or something like that. He said "wait till everybody leaves, you'll get it then" and he said something to the effect of "either you kill me or I'll get you" that's what it was. He kind of smiled and then he turned around. I shot him but I aimed out.

Expert evidence on "battered woman syndrome" was also put to the jury, once again, to place the shooting in its proper context. Given all of the circumstances, the jury acquitted.

The Manitoban Court of Appeal set aside the verdict of acquittal and ordered a new trial. In so doing, the Court did not, however, challenge the "battered woman syndrome defence." Rather, the issue leading to reversal was an evidentiary one: Angelique Lavallée did not testify and much of the background evidence to establish that she was a "battered woman" came through the secondhand, hearsay testimony of her psychiatrist. An expert witness, who is permitted to give an opinion, is permitted to give secondhand evidence to show the basis for that opinion. The danger is that the jury will accept that secondhand evidence as fact.⁴ For this reason, in the case at hand, Philp J.A. and

3 Appendix I, "Statement of Angelique Lynn Lavallée," *supra*, note 1 at 284-8.

4 The appeal rests on the decision of *R. v. Abbey*, [1982] 2 S.C.R. 24, where Dickson J., writing for a unanimous court stated:

The danger, of course, in admitting such testimony [secondhand evidence] is the ever present possibility, here exemplified, that the judge or jury, without more, will

Monnin C.J.M. agreed that a stronger caution to the jury was warranted. Huband J., dissenting, although commenting that the defence was "somewhat fanciful", would not have overturned the acquittal.⁵ The case is now on appeal to the Supreme Court of Canada.

For our purposes, let us consider that the facts as rendered by Angélique Lavallée in her statement and reinforced through the testimony of her psychiatrist are the truth; namely, that she was a battered woman. What does this mean, and how is this a "defence"?

II. "BATTERED WOMAN SYNDROME"

A BATTERED WOMAN is defined as:⁶

A woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.

The "syndrome" flows from the cycle of brutality to which the battered woman is subjected. Clinical psychologist Lenore Walker, who pioneered the research on battered women, divided the cycle of violence into three phases:⁷

1. The tension-building stage

During this time, minor battering incidents occur. The woman may handle these incidents in a variety of ways. She usually attempts to calm the batterer through the use of techniques that have proved previously successful.... She resorts to a very common psychological defense called, of course, "denial" by psychologists.

accept the evidence as going to the truth of the facts stated in it. The danger is real and lies at the heart of this case. Once such testimony is admitted, a careful charge to the jury by the judge or direction to himself is essential.... Although admissible in the context of his opinion, to the context that it is secondhand his testimony is not proof of the facts stated.

⁵ *Supra*, note 1 at 284.

⁶ L. Walker, *The Battered Woman* (New York: Harper & Row, 1979) at xv. For other books on "battered women," see: C. Ewing, *Battered Women Who Kill* (Lexington, Mass.: D.C. Heath, 1987), and A. Browne, *When Battered Women Kill* (New York: Free Press, 1987).

⁷ Walker, *supra*, note 6 at 56-70.

2. The acute battering incident

Phase two is characterized by the uncontrollable discharge of the tensions that have built up during phase one. This lack of control and its major destructiveness distinguish the acute battering incident from the minor battering incidents in phase one.... When the acute attack is over, it is usually followed by initial shock, denial, and disbelief that it has really happened.

3. Kindness and contrite loving behavior

Just as brutality is associated with phase two, the third phase is characterized by extremely loving, kind, and contrite behavior by the batterer. He knows he has gone too far, and he tries to make it up to her. It is during this phase that the battered woman's victimization becomes complete.

The "victimization" to which Walker refers amounts to "psychological paralysis" on the part of the woman. She develops a feeling of "powerlessness," becomes "passive," and is "blind" to other options. In short, she is trapped in the relationship. Walker terms this "learned helplessness," which explains why the battered woman does not leave her abuser.⁸

III. EXPERT EVIDENCE

THE ADMISSIBILITY OF EXPERT TESTIMONY on "battered woman syndrome" has pre-occupied American courts for the past decade.⁹ The trend is in favour of admissibility, and a survey of recent cases shows that 22 courts allowed the expert to give evidence, while only in 9 cases was the evidence ruled inadmissible.¹⁰

A preliminary question is, how is the expert testimony on "battered woman syndrome" relevant? In most instances when the battered woman strikes back at her abuser, self-defence is raised. To support such a defence, the evidence of "battered woman syndrome" is relevant in three ways:¹¹ first, expert testimony reinforces the accused's credibility, perhaps giving an "air of reality" to what otherwise might

8 Walker followed her initial research on battered women with a second study involving 435 battered women. The results of this study are contained in L. Walker, *The Battered Woman Syndrome* (New York: Springer, 1984).

9 M. Mihajlovich, "Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense," (1987) 62 *Indiana L.J.* 1253; C. Brown, "Expert Testimony on Battered Woman Syndrome: Its Admissibility in Spousal Homicide Cases," (1985) 19 *Suffolk U.L.Rev.* 877; S. Hauptfuehrer, "Battered Women and Self-Defense: Admissibility of Expert Testimony on the Battered Woman Syndrome in Virginia," (1987) 10 *Geo. Mason U.L.Rev.* 171.

10 V. Mather, "The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony," (1988) 39 *Mercer L.Rev.* 545 at 575.

11 *People v. Kelly*, 478 A.2d 364 (N.J. 1984); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. App. 1979).

be perceived by the trier of fact as a wholly implausible version of events; secondly, the expert testimony on "battered woman syndrome" goes to the state of mind of the accused to show that she honestly believed that she was in imminent danger; and, thirdly, the expert testimony also is relevant to the reasonableness of the defendant's belief that she was in danger of death or serious bodily injury.

The case of Angelique Lavallée underscores why expert evidence on "battered woman syndrome" is so relevant and so important to her defence. Keep in mind, she was armed and Kevin Rust was unarmed and shot in the back. These facts make the defence of self-defence *prima facie* improbable. After all, where was the threat of imminent danger?

In cases where self-defence is raised, evidence of the violent disposition of the deceased generally is admissible, going to show the state of mind of the accused or to establish who was the aggressor.¹² Therefore, the evidence of friends or relatives, who testify as to battering incidents is permitted. A second threshold question, however, is why expert testimony on "battered woman syndrome" is required?

In the United States the admissibility of expert testimony is generally governed by a threefold test:¹³ first, the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; secondly, the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and, thirdly, expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert. In Canada, the threefold test is usually collapsed into two pre-conditions for admissibility:¹⁴ first, the expert opinion must assist the ordinary person; and, secondly, the expert is qualified through experience, education or practice to give the specialized opinion.

How does the evidence of an expert on "battered woman syndrome" assist the trier of fact? Does the ordinary juror need an expert to tell him about the effects of such a battering relationship? Yes. A reasonable juror would ask, why didn't she leave? Misconceived conclusions flow from her staying.¹⁵ She must have exaggerated the beat-

12 *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont.C.A.).

13 *Ibn-Tamas, supra*, note 11 at 632-3, which relied upon *Dyas v. United States*, 376 A.2d 827 (D.C. App. 1977).

14 A. Sheppard, *Evidence* (Toronto: Carswell, 1988) at 373.

15 One writer questions the existence of such misconceptions. He points out that courts and commentators "blindly assume" that jurors will hold these views, there being no research evidence that that is the case (Mihajlovich, *supra*, note 9 at 1263-6).

ings or, if they were so severe, she must be a masochist. The prosecution may raise this incongruity. Included below are the comments of the prosecutor from one American case:¹⁶

Q. And during the time in Miami, did you ever leave him?

A. No, I didn't.

Q. Did you ever call the police?

A. No, I didn't. He told me he would kill me if I called the police.

The prosecutor stressed this theme once again during closing argument: "Maybe she put up with too much too long, although whose fault was that? She could have gotten out, you know." The role of the expert is to dispel these misconceptions:¹⁷

The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings; her "learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways.

The issue of qualification rests on the shoulders of the individual expert. In the case of Angelique Lavallée three experts, including the chief medical examiner for the province, testified on "battered woman syndrome"; therefore, it certainly appears that, within the Canadian medical community, there is sufficient familiarity and expertise on the subject.

The third tier of the American test for admissibility of expert evidence goes to the reliability of the expert's opinion. American courts commonly apply the *Frye* test, in that the scientific deduction " must be sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁸ This test has been severely criticized for being too restrictive and not being flexible enough to accommodate new developments in science.¹⁹ It remains open whether the *Frye* test has been accepted in Canada.²⁰ As a general proposition Canadian

16 *Ibn-Tamas, supra*, note 11 at 634.

17 *Kelly, supra*, note 11 at 377.

18 *Frye v. United States*, 293 F. 1013 at 1014 (D.C. Cir. 1923), cited in *McCormick On Evidence*, 3rd ed. (St. Paul, Minn.: West, 1984) at 605.

19 *McCormack, ibid.* at 604-610.

20 See the dissenting opinion in *R. v. Medvedew* ((1978), 43 C.C.C. (2d) 434 at 447 (Man. C.A.)), where, in reference to the *Frye* test O'Sullivan J.A. commented: "I do not know whether that test has been adopted in Canadian Courts or not but to me it makes sound sense and expresses a view in accord with the principles of the common law."

Courts do not seem to apply any "standard test"; instead, the admissibility of expert testimony is based on the simple requirement that the evidence "be helpful" to the court.²¹ Even if we apply the more rigid *Frye* test, expert testimony on "battered woman syndrome" passes the muster of admissibility. The New Jersey Supreme Court, in a thorough review of "battered woman syndrome," outlined three ways to assess the "general acceptance" of a new field of research:²² first, by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; secondly, by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and, thirdly, by judicial opinions that indicate the expert's premises have gained general acceptance. Under all three avenues of "acceptance" "battered woman syndrome" is gaining recognition.²³

IV. SELF-DEFENCE

THE DEFENCE OF SELF-DEFENCE is premised upon necessity. The law recognizes that a person is justified in using force against an attacker in order to preserve him or herself from the attack.²⁴ The difficulty that arises in many battered women cases is that the necessity to kill blurs when the attacker is asleep or otherwise harmless when killed.²⁵ *Angelique Lavallée* is a case on point. In these circumstances, how can the defence of self-defence be maintained?

First, we must clarify the self-defence provision relied upon. In *Lavallée*, Scott J. put to the jury the entire section 34 of the Criminal

21 J. Sopinka and S. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 308.

22 *Kelly, supra*, note 11 at 380.

23 *Supra*, notes 6 and 8: studies on the "syndrome." *Supra*, note 10: judicial acceptance in the United States of such expert testimony. For a critique of the methodology underlying the studies of battered woman syndrome, see Mihajlovich, *supra*, note 9; and, D. Faigman, "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent," (1986) 72 *Virginia L. Rev.* 619.

24 For a discussion of the concepts of "justification" and "excuse" in criminal law, see J. Dressler, "Justifications and Excuses: A Brief Review of the Concepts and the Literature," 33 *Wayne L. Rev.* 1155 (1987); and, N. Omichinski, "Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense," 33 *Wayne L. Rev.* 1447 (1987).

25 C. Ewing, in his study of battered women who kill, found that in 18 out of 87 cases the killing took place while the batterer was asleep or nearly asleep (*supra*, note 6 at 34).

Code.²⁶ Section 34(1) applies where the force used is "not intended to cause death or grievous bodily harm." It is difficult to see how this section could apply in the shooting of Kevin Rust. In her statement to the police, Angelique Lavallée did say, "I didn't want to shoot him. I was too scared."²⁷ The fact is that she did shoot him. Combine this with the fact that she was scared. Is it reasonable for her to shoot to miss her abuser? Surely this would only invite a severe beating. It is more logical that she fired to end the abuse; that is, to kill Kevin Rust. Section 34(2) is the more appropriate provision:

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and,

b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Section 34(2) involves a subjective and an objective arm. The trier of fact is concerned with both the *honesty* of the accused's belief in the need to kill and with the *reasonableness* of that belief. Dickson J. in *Brisson v. R.* summarized the scope of s. 34(2) in this way:²⁸

Section 34(2) affords justification where there was an intention to cause death but under circumstances where objectively it was reasonable that the person accused believed he was going to be killed and subjectively he did so believe.

"Battered woman syndrome" and evidence of a past history of violence go to the credibility of the accused's honest belief that she was in danger. The more difficult issue is whether this belief ever can be seen as reasonable.

In s. 34(2), a purely objective test for reasonableness is not used. The reasonableness of the accused's acts is tested from the perspective of the accused.²⁹ Martin J.A. explained:³⁰

26 G. Brodsky, "Battered Spouse Syndrome: A Defence Counsel's Perspective," (1987) 5, No 1 Crown Counsel's Rev. 1 at 3. Brodsky is the defence counsel involved in the *Lavallée* case.

27 *Supra*, note 1 at 287.

28 *Brisson v. R.* (1982), 69 C.C.C. (2d) 97 at 119 (S.C.C.).

29 K. Kinports, "Defending Battered Women's Self-Defense Claims," (1988) 67 Oregon L. Rev. 393.

30 *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 at 108-9 (Ont.C.A.).

The accused's subjective belief that he was in imminent danger of death or grievous bodily harm and that his action was necessary in self-defence was, however, required to be based on reasonable grounds. In deciding whether the accused's belief was based upon reasonable grounds the jury would of necessity draw comparisons with what a reasonable person in the accused's situation might believe with respect to the extent and the imminence of the danger by which he was threatened, and the force necessary to defend himself against the apprehended danger.

What a reasonable man would believe or do in the circumstances was, accordingly, a relevant consideration in deciding whether the accused's subjective belief was based upon reasonable grounds.

The history of prior violence impacts upon what a reasonable person would believe. Take the following hypothetical:

X is terrified of Y.
Y has beaten X in the past.
X is told that Y is looking for X to "get him."
X sees Y approaching towards him on the street.
X shoots Y.
Y is unarmed.

Without the background, the shooting of an unarmed man in the street and without warning could not possibly be reasonable. Knowing the background gives the shooting a more "reasonable" quality, because we now understand what was going through the accused's mind. We now understand *all the circumstances of the shooting*. The common law has long recognized the need for such an understanding. Over 100 years ago, Stephen C.J. in *R. v. Griffin* observed:³¹

But in deciding a question of the kind that arose in this case, all previous threats and language – and even the character and habits of both parties – are as I conceive matters for consideration. For what better tests of design, if not of a well-founded apprehension, and a belief in fact entertained, reasonable or unreasonable, can we apply?

That view was confirmed in the oft cited Canadian case of *R. v. Cadwallader*, which saw the prosecution of a fourteen-year-old boy for the killing of his abusive father:³²

The appellant in this instance is a 14-year-old boy, who barely remembers his mother.... Incidents punctured this boy's life with his father, especially in the two years prior to the tragedy and particularly in the summer and fall of 1964 which worried and frightened this boy. Such an incident, [that is, the threat to kill the boy] previously referred to, occurred in the course of a conversation with his father a

31 *R. v. Griffin* (1871), 10 N.S.W.Sup.Ct.R. 91 at 101.

32 (1965), [1966] 1 C.C.C. 380 at 388 (Sask.Q.B.).

few days only before the tragedy. On the afternoon of the fateful day the boy was lying down on his bed, he was not well and was worried. His angry father was coming up the stairs with a 30-30 to kill him. The boy was trapped and he reacted in the only way it seems to me that an ordinary person would under the circumstances. Can one adequately visualize the fear, terror and confusion which would grip any man, let alone a 14-year-old boy in a situation such as this.

True, in *Cadwallader* the father was armed and was advancing up the stairway to the boy's room. In contrast in non-confrontational situations, for example where the attacker is asleep, there is no apparent "imminent" danger that requires a response in self-defence. In *R. v. Whynot*, the accused killed her common law husband while he slept. Prior to going to sleep he had threatened to "deal with" the accused's sixteen-year-old son. Evidence at trial also showed that he was a very violent man. The accused raised s. 37 of the *Criminal Code*, protection of another. The Nova Scotian Court of Appeal ruled that that defence should not have been put to the jury. Hart J.A., in writing for the court, stated, "in my opinion no person has the right, in anticipation of an assault that may or may not happen, to apply force to prevent the imaginary assault."³³ Such is a narrow construction on the need to resort to force. The common law has long recognized *anticipatory* self-defence where reasonable.³⁴ Nor need the use of force be in *immediate* response to an attack or assault. In *Zecevic v. D.P.P.*, three judges of the High Court of Australia observed:³⁵

The weakness in the appellant's case was the fact that he went to his own flat after the deceased threatened him and, *after an interval of time had elapsed*, re-emerged at the scene of the shooting. However, if the jury believed the appellant, it is not inconceivable that it might have adopted a view of the facts which would have favoured him in his defence of self-defence. *The issue should have been left to the jury.*

A reasonable person would leave the abusive relationship. Battered women, who suffer from "learned helplessness," are unable to do so, and a reasonable recourse for such a trapped person is to kill her abuser. The time chosen is entirely reasonable; they act when it is effectively possible to carry out the killing. It is unreasonable to demand that they wait to respond to a vicious attack, when they must confront their enraged and more powerful abuser. For these women, a situation of necessity is reached. Accordingly, it is entirely appropriate

33 *R. v. Whynot* (1983), 37 C.R. (3d) 198 at 218 (N.S.C.A.).

34 *R. v. Antley* (1963), [1964] 2 C.C.C. 142 (Ont.C.A.).

35 *Zecevic v. D.P.P.* (1987), 71 A.L.R. 641 at 655 (H.C.) [emphasis added]; see also *The People v. Hundley*, 693 P.2d 475 (Kan. 1985).

for the jurors to consider what a "reasonably prudent battered woman" would have done.³⁶

Don Stuart, in his treatise on Canadian criminal law, summarized the judicial attitude in Canada towards self-defence as one of "flexibility."³⁷ It is my view that evidence of "battered woman syndrome," combined with evidence of past abuse, is part of *all the circumstances* that must be taken into account to determine the reasonableness of the claim of self-defence, and there is no need for the creation of a distinct "battered woman syndrome defence".³⁸ Let the jury decide, given all of the circumstances, whether the woman *honestly* believed she had to kill and whether that belief was *reasonable*.³⁹

V. PROVOCATION

PHILP J.A., WRITING FOR THE MAJORITY in the Court of Appeal, besides setting aside the verdict of acquittal and ordering a new trial, advised the Crown "to consider that the more appropriate charge to proceed with is that of the included offence of manslaughter."⁴⁰ No further explanation was given. There was evidence that Angélique Lavallée had been drinking, which could raise intoxication and thereby reduce the charge to manslaughter, but her statement to the police belies the suggestion that she was so drunk as to negate the specific intent for murder. Furthermore, in suggesting manslaughter, Philp J.A. implicitly rejected the defence of self-defence raised, which resulted in the acquittal. In Canadian law, once self-defence is rejected, perhaps because the force used was excessive or unreasonable, there is no middle ground, and this leads to a verdict of murder and the imposition of the mandatory ten-year period of imprisonment.⁴¹ Manslaughter is not available. It is argued that this is unfair; nevertheless, it is the law.⁴²

36 *The People v. Hodges*, 716 P.2d 563 (Kan. 1986).

37 D. Stuart, *Canadian Criminal Law*, 2nd ed. (Toronto: Carswell, 1987) at 408.

38 *The People v. Leidholm*, 334 N.W.2d 811 (N.D. 1983).

39 Dickson C.J., in *R. v. Hill* ((1986), 25 C.C.C. (3d) 322 at 337-338 (S.C.C.)), expressed great faith in the jury:

I have the greatest confidence in the level of intelligence and plain common sense of the average Canadian jury sitting on a criminal case. Juries are perfectly capable of sizing the matter up.

40 *Supra*, note 1 at 281.

41 *R. v. Faid* (1983), 2 C.C.C. (3d) 513 (S.C.C.); *Reilly v. R.* (1984), 15 C.C.C. (3d) 1 (S.C.C.).

42 The "middle ground" or "qualified" defence for excessive self-defence was recognized in Australia; however, the High Court of Australia in *Zecevic v. D.P.P.* (*supra*, note 35) recently abolished that defence. See also D. Lanham, "Death of a Qualified Defence?" (1988) 104 L.Q. Rev. 239; and, P. Fairall, "The Demise of

I suggest that a principled way to find manslaughter in the Angélique Lavallée case is through the qualified defence of provocation. Some writers argue that provocation and self-defence are mutually incompatible, self-defence being a reasonable response by one in fear for one's life or of serious injury, whilst provocation is an emotional response prompted by anger.⁴³ Glanville Williams retorts:⁴⁴

A person who reacts to a blow often does so in mixed fear and anger, and there would be no sense in trying to confine the provocation defence strictly to action in anger. Both fear and anger release hormones that prepare the body for violent action, and both tend to result in violence.

For that reason Glanville Williams is of the opinion that many instances of excessive self-defence fall into provocation.

The defence of provocation under s. 232 of the *Criminal Code* has three components:⁴⁵ first, would an ordinary person be deprived of self-control by the act or insult? secondly, did the accused in fact act in response to those "provocative" acts; in short, was he provoked by them whether or not an ordinary person would have been? and thirdly, was the accused's response sudden and before there was time for his or her passion to cool? Provocation, like self-defence, has an objective and subjective arm.

Dickson C.J. in *R. v. Hill*, the leading case on the objective test for provocation, defined the "ordinary person" as "not exceptionally excitable, pugnacious or in a state of drunkenness."⁴⁶ He went on to exclude the ascribing of "peculiar or idiosyncratic" characteristics to the "ordinary person."⁴⁷ Therefore, this would foreclose a trial judge from instructing a jury to consider the "reasonable battered woman" under the objective test for provocation. This does not, however, preclude the consideration of past events as they impact on the incident in question. In *R. v. Daniels*, Laycraft J.A. observed:⁴⁸

The purpose of the objective test prescribed by s. 215 [now s. 232] is to consider the actions of the accused in a specific case against the standard of the ordinary person. Hypothetically, the ordinary person is subjected to *the same external pressures of insult by acts or words as was the accused*. Only if those pressures would cause an ordinary person to lose self-control does the next question arise whether the accused did, in

Excessive Self-Defence Manslaughter in Australia: A Final Obituary?" (1988) 12 *Crim.L.J.* 28.

43 Kinports, *supra*, note 29 at 462.

44 G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens, 1983) at 545.

45 *R. v. Hill*, *supra*, note 39 at 326.

46 *Ibid.* at 335.

47 *Ibid.*

48 *R. v. Daniels* (1983), 7 C.C.C. (3d) 542 at 554 (N.W.T.C.A.) [emphasis added].

fact, lose self-control. *In my view, the objective test lacks validity if the reaction of the hypothetical ordinary person is not tested against all of the events which put pressure on the accused.*

This statement of the law was accepted by the Ontario Court of Appeal in *R. v. Conway*, and, more recently, by the Albertan Court of Appeal in *R. v. Hansford*.⁴⁹ Approval in the latter case is significant in that *Hansford* was decided after *R. v. Hill*, and the Albertan Court of Appeal considered whether the views expressed by Laycraft J.A. in *Daniels* on "external pressures" were still valid given the *Hill* decision. The Court ruled that *Daniels* was still good law and accepted the distinction between external factors that impact on every one and internal attributes that are peculiar to the accused. Under the objective arm, then, it is entirely appropriate to place the "ordinary person" in the circumstances of beatings and brutality experienced by the accused.

The second and third requirements for provocation flow into one another. The accused must be "provoked" and respond before his or her passion cools. The requirement that the accused act on the "sudden" presents a contentious issue for battered women.

First, note that there are no set time limit for what constitutes "sudden." The response need not be immediate. Admittedly, the more immediate the response, the more likely a jury will find that the accused was acting on the provocation. Yet, delay does not mean that the accused's passion had necessarily "cooled."⁵⁰

The American case law provides us with useful examples of where provocation was, or ought to have been, relied upon in battered women cases. In *The People v. Kelly*, Wilentz C.J. approved of the following jury instruction on provocation:⁵¹

It is well settled that when there is evidence of prior physical abuse of defendant by the decedent, the jury must be told that a finding of provocation may be premised on "a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue."

In *The People v. Felton*, the Supreme Court of Wisconsin ruled that the trial lawyer's failure to inform himself of and failure to put in the "heat of passion" defence in a case involving a battered women constituted ineffective assistance of counsel.⁵² The accused shot her husband

49 *R. v. Conway* (1985), 17 C.C.C. (3d) 481 (Ont.C.A.); *R. v. Hansford* (1987), 33 C.C.C. (3d) 74 (Alta.C.A.).

50 *Lowther v. R.* (1957), 26 C.R. 150 at 162 (Que.C.A.).

51 *Supra*, note 11 at 384.

52 *The State v. Felton*, 329 N.W.2d 161 (Wis. 1983).

while he was asleep. In deciding that the objective arm of provocation could have been satisfied, the Court stated:⁵³

While it is true that a defendant's background is not in general relevant to the objective test for heat of passion, the question is how an ordinary person faced with a similar provocation would react. The provocation can consist, as it did here, of a long history of abuse.

Moreover, the shooting in *Felton* occurred some two or three hours after the last assault or provocation by the deceased. Yet, the Court ruled that this delay did not preclude the defence.⁵⁴

Let us turn to the case of Angelique Lavallée. She is a battered woman. She is terrified of her abuser. He says to her, "either you kill me or I'll get you". In her situation, that is no idle threat. She reacts. Whether her reaction is sparked by fear or anger, it matters not, because under either label it is open to a jury to conclude that when she fired she was "deprived of the power of self-control."

Provocation dilutes the defence of self-defence. The jury is given a middle ground; namely, acquit of murder but find manslaughter, which has no minimum period of incarceration. Some commentators object to provocation on the ground that it is an "excuse" in criminal law and is not a "justification" for the woman's actions.⁵⁵ In its simplest terms, a "justification" means that the person did no wrong, whereas with an "excuse" the person has done a wrong but argues that they ought not to be punished or not punished so severely.⁵⁶ This theoretical argument over the moral and legal "rightness" of the battered woman's actions is best left to the practical wisdom of the jury. Let the jury decide the question of "justification" or "excuse." At the end of the day, if the jury is convinced, or at least a reasonable doubt is raised in their mind, that she was "right" in what she did, they will acquit. If the jury is not comfortable in saying that she was "justified" in killing in self-defence and acquit, but they do understand what she was going through and her fear, it is open to them to "excuse" her conduct through provocation.

53 *Ibid.* at 172.

54 *Ibid.* at 173. There is the suggestion that, for instances of "cumulative terror," the cooling off period becomes "elongated" (Mihajlovich, *supra*, note 9 at 1279).

55 Kinports, *supra*, note 29 at 462, and P. Crocker, "The Meaning of Equality For Battered Women Who Kill Men in Self-Defense," (1985) 8 Harv. Wom. L.J. 121.

56 Dressler, *supra*, note 24; and, J. Dressler, "Provocation: Partial Justification or Partial Excuse?" (1988) 51 Mod. L.Rev. 467.

VI. THE INSANITY ALTERNATIVE

SOME HAVE SUGGESTED that "battered woman syndrome" best fits to the plea of insanity.⁵⁷ In certain cases, the physical and psychological abuse suffered by the battered woman will manifest itself into a mental illness such as to render her unable to appreciate the nature and quality of her actions. Where appropriate insanity should be raised; however, in most cases involving battered women, the plea of insanity is inappropriate.

"Battered woman syndrome" *per se* is not a mental disease. Rather, it characterizes a behaviour.⁵⁸ Charles Ewing in his book *Battered Women Who Kill*, observed:⁵⁹

The fact that few battered women homicide defendants raise an insanity defense is not surprising. First of all, it seems clear that most such defendants, though perhaps emotionally distraught or on the verge of mental illness, were well aware of what they were doing when they killed their batterers and knew that killing was morally and legally wrong. For the most part, when battered women kill their batterers, they do so for a rational reason: namely, to protect themselves from further physical or mental suffering.

VII. CONCLUSION

ANY NOVEL DEFENCE PROMPTS HARBINGERS of the "floodgate" argument. Studies indicate that wife abuse is an alarming social problem, but an acquittal for Angelique Lavallée or other battered women does not mean "open season" on abusers.⁶⁰ One critic of the "battered woman defence" also lamented:⁶¹

Soon, abused children, the elderly abused in nursing homes or at the hands of relatives, or any other victim of repeated assaults or other crimes, may be able to claim self-defense based upon a victimization-syndrome.

And why not? Is this bad? Juries and judges are not fools. In any case where a violent act has occurred and the accused is identified as the perpetrator, courts will not readily acquit. We see this with other defences, such as automatism, where the accused must come forward with supporting evidence before the judge or jury will accept that he or

57 R. Cipparone, "The Defense of Battered Women Who Kill" (1987) 135 U. Penn. L.Rev. 427.

58 Kinports, *supra*, note 29 at 417.

59 Ewing, *supra*, note 6 at 45-6.

60 For a summary on the social problem presented by spousal abuse, see Brodsky, *supra*, note 2 at 461.

61 Mihajlovich, *supra*, note 9 at 1276.

she was sleepwalking or suffering from a "psychological blow." The same is true for the battered woman who raises the defences of self-defence or provocation.

It is said that the defence of self-defence is "embedded deeply in ordinary standards of what is fair and just."⁶² The jury acquitted Angélique Lavallée. That result is fair, just, and correct in law.