



**BATTERED WOMEN WHO KILL ABUSIVE PARTNERS IN  
NON-CONFRONTATIONAL CIRCUMSTANCES...CAN SOUTH AFRICAN  
LEGISLATION DO MORE TO PROTECT THEM?**

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**DECLARATION**

I do hereby declare that the dissertation titled '**Battered women who kill abusive partners in non-confrontational circumstances...can South African legislation do more to protect them**' is my own work and that all sources used and referred to have been acknowledged in full. This dissertation has not been submitted in this or similar form in another module at this or any other University; and This project is an original piece of work which is made available for photocopying and for inter-library loan.

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‘Education is the most powerful tool which you can use to change the world.’ (Nelson Mandela)

## Table of contents

DECLARATION .....	i
ACKNOWLEDGEMENTS .....	ii
Table of contents .....	iii
CHAPTER ONE .....	1
1. Introduction .....	1
1.2. Background .....	2
1.2.1 Domestic Violence and Battered Women .....	2
1.3. Research questions .....	3
1.3.1 Sub-research questions .....	3
1.4. Rationale for the study .....	4
1.5. Research Methodology .....	4
1.6. The defence of private defence .....	5
1.6.1 Private Defence Requirements .....	6
1.7. Overview of chapters .....	8
CHAPTER TWO .....	10
2. Battered Woman Syndrome (BWS) .....	10
2.1. Introduction .....	10
2.2. What is Battered Woman Syndrome? .....	11
2.2.1. The Cycle of Violence .....	12
2.3. The reasons why battered women stay in abusive relationships .....	14
2.3.1. Psychological Entrapment .....	15
2.3.2. Investment Model .....	15
2.4. Conclusion .....	16
CHAPTER THREE .....	18
3. Battered Woman Syndrome and the South African Law of Private Defence .....	18
3.1. Introduction .....	18
3.2. Background .....	18
3.3. The South African law of Private Defence .....	19
3.4. The test for private defence .....	20
3.4.1. The objective test .....	20
3.5. The Requirements of Private Defence .....	21
3.5.1. Conditions Relating to the Attack .....	22

3.5.2.	Conditions Relating to the Defence .....	25
3.6.	Putative Private Defence .....	28
3.6.1	Elements of putative private defence .....	28
3.6.2.	Discussion of Putative private defence .....	29
3.6.	Conclusion.....	30
CHAPTER FOUR.....		33
4.	Battered women syndrome and the law of self-defence in the United States of America	33
4.1.	Introduction .....	33
4.2.	Battered Woman Syndrome and the law of self defence .....	33
4.2.1.	The Self-defence law .....	35
4.2.2.	The tests for self-defence .....	36
4.3.	Discussion of the legal elements of self-defence .....	38
4.3.1.	The imminence requirement .....	38
4.3.2.	The proportionality requirement.....	41
4.3.4.	Duty to retreat .....	42
4.4.	Conclusion.....	43
CHAPTER FIVE .....		47
5.	Conclusion.....	47
5.1	Introduction .....	47
5.2.	Discussion .....	48
5.3.	The standard to be followed when dealing battered women.....	50
5.3.1	A Reasonable Woman.....	50
5.4.	Conclusion.....	51
6.	BIBLIOGRAPHY .....	52
6.1.	Primary Sources .....	52
6.1.1.	Table of Cases.....	52
6.1.2.	Table of Statutes .....	54
6.2.	Secondary Sources .....	54
6.2.1.	Books .....	54
6.2.2.	Journals .....	55
6.2.3.	Thesis .....	58

## CHAPTER ONE

### 1. Introduction

In South Africa, statistics shows that 40% of men abuse their partners.<sup>1</sup> This highlights the problems being faced by women as victims of domestic violence. The Battered Woman Syndrome (hereinafter BWS) has been described as a psychological theory developed to describe the behaviour of an abused woman who is ill-treated by her husband, partner or lover.<sup>2</sup> Dr. Walker describes an abused woman as,

‘a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights.’

BWS serves as an explanation for why some abused women ultimately kill their abusive partners rather than leave them. In legal terms, the problematic issue which arises is whether the BWS can qualify as a justification ground for an abused woman who kills her husband. It is submitted that some authors have resorted to the notion that the syndrome can be used to raise the defence of private defence whilst some submit that non-pathological incapacity is the relevant defence with regards to battered women.

The problematic area with regards to the law governing private defence is the requirement that the attack must be imminent. Where there is no commenced or imminent attack, but the woman has been a victim of abuse over a long period of time, this poses a problem for judges.<sup>3</sup> In the context of battered women, the attack is often not imminent at all; it is precipitated by abuse over a long period of time. This again raises a question, of whether it is possible to extend the meaning of imminence to suggest a build-up of physical and emotional abuse over a period of time.<sup>4</sup>

Due to the escalation of domestic abuse cases, there is now a need to protect abused women who kill their partners in an attempt to protect themselves from future harm. There are a number of defences that battered women who kill in non-confrontational circumstances can

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<sup>1</sup> The South Africa College of Applied Psychology. *Domestic violence in South Africa: What's happened to our men?* (2013). Available at <http://www.sacap.edu.za/blog/counselling/domestic-violence-south-africa-whats-happened-men/> (Accessed on 10 April 2015).

<sup>2</sup> LK Fernandez. 'Battered women's syndrome' (2007) 8 *Georgetown Journal of Gender and the Law* 235.

<sup>3</sup> J Burchell *Principles of Criminal Law* 4<sup>th</sup> ed (2014) 452.

<sup>4</sup> See the Canadian case of *R v Lavallee* 1990 (55) CCC (3d) 97 at 349.

raise such as private defence, putative private defence, diminished capacity as well as the defence of non-pathological criminal incapacity. However, this dissertation is limited to the defences of private defence and putative private defence, thus this dissertation proposes that if the defence of private defence fails, the abused women should be able to rely on the defence of putative private defence to escape liability.<sup>5</sup> This is so because the defence of putative private defence excludes culpability. The defence of non-pathological criminal incapacity is not discussed because it falls outside the scope of this dissertation.

## **1.2. Background**

### **1.2.1 Domestic violence and battered women**

Women abuse is not a rare phenomenon of recent years as it has existed since time immemorial. Research reveals ‘a social stranglehold that demanded the maintenance of a silence around its occurrence and the preservation of family privacy’.<sup>6</sup> It can be argued that ‘domestic violence is a worldwide scourge, yet, as with the rest of the social order, many legal systems have struggled to confront the reality and effects of intimate aggression’.<sup>7</sup> It is submitted that, ‘legal rules have sometimes proved unsuitable or inadequate to protect the victims of such abuse and to deal fairly and justly with its consequences’.<sup>8</sup> Domestic violence describes a fundamental lack of understanding and appreciation of the commonality of our humanity, of what truly makes us human, of the bonds that support and nourish us.<sup>9</sup>

It is imperative that the South African the criminal justice and legal system evolve towards an understanding of battered women. This is so because battered women who stand accused of killing their abusive partner are not looking for sympathy: rather, they seeks a fair hearing which, in this instance, would include an appreciation of their lived realities.<sup>10</sup> This

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<sup>5</sup>The advantage of this approach is that there is no real need to cast the evidence of the abuse suffered by an intimate partner in the form of a stereotype because such evidence would be admissible in each case as relevant to the actual capacity or mental state of the accused.

<sup>6</sup> D Singh. *Self-defence as a ground of justification in cases of battered women who kill their abusive partner* (Unpublished doctoral thesis University of South Africa, (2009) 27.

<sup>7</sup> Reddi opines that, ‘A brief survey of the approaches of other legal jurisdictions towards intimate killings reveals that some of them, though aspiring to develop a jurisprudence that acknowledges the experiences of abuse survivors, are still struggling to do so as result of the introduction of the concept of ‘battered woman syndrome’ into the arena of legal decision-making. Compounding this issue is the failure of the law to allow the perceptions of women to inform the objective standard when determining the blameworthiness of abused women who kill their abusers.’ See M Reddi ‘Battered woman syndrome: some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers’ (2005) 18(3) SACJ 259.

<sup>8</sup> Singh (note 6 above) 9.

<sup>9</sup> EC Viano (ed.) *Intimate Violence: Interdisciplinary Perspectives* (1992) 10.

<sup>10</sup> Singh (note 6 above) 101.

dissertation seeks to put forward an argument that under certain situations, a battered woman may reasonably believe that she is in danger of being killed or sustaining grievous bodily harm from her abusive partner and that her only alternative is to kill him.<sup>11</sup> If her action in killing her abusive partner is justified, it would therefore not be unlawful.<sup>12</sup> However, the problem that arises is that, the abused woman's conduct in killing her abusive partner has not always complied with the requirements of private defence and her conduct has in several cases been found not to be justified.<sup>13</sup> Some authors however noted that, in considering the defences available, it should be borne in mind that the options available to the woman before the point at which lethal force is used (that is, the possibility of leaving the relationship,<sup>14</sup> calling the police, getting an injunction and so on) are of limited effectiveness. Failing to take this into account, as many commentators do, is to augment the problems faced by battered women.<sup>15</sup>

### **1.3. Research questions**

The main research question of this dissertation is as follows;

1. To what extent does private defence provide sufficient protection to victims of the BWS who kill their abusers in non-confrontational circumstances?

#### **1.3.1 Research sub-questions**

- 1.1 Should our law extend the meaning of imminence to include abuse which is inevitable?
- 1.2 When and if the defence of private defence fails, can the defence of putative private defence serve as a defence instead?

This dissertation is not going to provide a detailed overview of the defence of putative private defence but rather a brief overview in so far as the BWS is concerned. The research will be

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<sup>11</sup> Ibid

<sup>12</sup> E.I Nwogugu. *Family Law in Nigeria* 3<sup>rd</sup> ed (2014) 115.

<sup>13</sup> S Goosen. 'Battered women and the requirement of imminence in self-defence'. (2013) 16(1) *PELJ* 71, 128.

<sup>14</sup> See the case of *S v Engelbrecht* (2005) 2 SACR 41 (W) at 356. The law does not require the battered woman to leave her house to escape from the abusive partner.

<sup>15</sup> A Young 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1994) 31 *Osgoode Hall Law Journal* 761, 767.

limited to a detailed discussion of private defence as a justification ground for women who suffer from BWS who kill their abusers in non-confrontational circumstances.

#### **1.4. Rationale for the study**

This dissertation seeks to establish among other things, the reason why private defence rarely succeeds as a justification ground when raised by abused women who kill their abusers in non-confrontational circumstances. Also, it seeks to establish whether the battered woman will be able to rely on any other defence if she unsuccessfully raises the defence of private defence. Thus, the purpose of this study is to critically analyse the competence of private defence as a justification ground in relation to cases of abused women who kill their abusers in non-confrontational situations.

#### **1.5. Research Methodology**

The research method which is going to be adopted in this study is qualitative analysis. No empirical data is required for this research. Data is being collected in order to provide information on the current law so that the research provides an informed analysis and recommendation to fill in the gaps in the current law. The sources which are going to be used include case law, journal articles, internet sources, and existing legislation on the topic and text books. The sources which are going to be reviewed will give a foundational basis for the research and will address the research questions formulated above. The legal position of the abused woman who kills her abusive partner in non-confrontational circumstances and raises private defence as a justification ground in terms of South African law is compared with the position in the United States of America (hereinafter America). America has been chosen as a comparative jurisdiction because of its reasonably well-reported and recorded legal experience in dealing with domestic violence and the positive developments in the law on the subject within the identified jurisdictions.<sup>16</sup>

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<sup>16</sup> Singh (note 6 above) 6.

## 1.6. The defence of private defence

It is a trite fact that the rules of natural justice accord to every person the right to defend himself or herself against an unlawful attack.<sup>17</sup> In relying on private defence as a ground of justification for the battered woman who kills her abuser, the message is that the relevant conduct is approved or, at least, tolerated in that particular circumstance.<sup>18</sup> In the case of battered women who retaliate with aggression, which results in the death of the batterer, one can be confused as to who is the real victim. In such cases, women sometimes find it difficult to meet the requirements of ‘reasonableness’ and ‘imminence’ as defined by the law of private defence because of the stereotypes and misconceptions that abound with regard to abusive relationships.<sup>19</sup>

Courts applying the general principles regarding private defence have found that the deadly force that the woman used was either not a necessary and/or not a reasonable response to the attack of the abuser which preceded the fatal assault. The case law demonstrates that many abused women have killed their abusive partners in circumstances which could not be described as situations of imminent danger because the abuser was asleep, passed-out or walking away at the time.<sup>20</sup> Dressler<sup>21</sup> opines that,

‘the proposition that a battered woman is justified in killing her sleeping abuser, although well-meaning, is wrong, and any serious effort to expand private defence law to permit such killings risks the coarsening of our moral values about human life and, perhaps, even the condonation of homicidal vengeance.’<sup>22</sup>

He further asserts that, although a chronically battered woman may be justified in killing her abuser, it is nonetheless wrong.<sup>23</sup> This dissertation will highlight the difficulties faced by battered women in relying on private defence in non-confrontational situations. The difficulty is occasioned by the need to fulfil the imminence or immediacy threat requirement which is

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<sup>17</sup> CR Snyman. *Criminal Law* 5<sup>th</sup> ed (2008) 103.

<sup>18</sup> G Mousourakis ‘Distinguishing Between Justifications and Excuses in Criminal Law’ 1977 1 *Stellenbosch Law Review* 165, 166.

<sup>19</sup> Singh (note 6 above) 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> J Dressler. ‘Battered Women and Sleeping Abusers: Some Reflections’ (2006) 3 *Ohio State Journal of Criminal Law* 457.

<sup>22</sup> *Ibid* 458.

<sup>23</sup> *Ibid* 458.

often unattainable. The main difficulty is of discharging the burden of proof that harm was imminent or inevitable in a non-confrontational situation.<sup>24</sup>

### **1.6.1 Application of private defence to the BWS situation**

In order for the battered woman to successfully show that private defence was appropriate and that her conduct was, thus, justifiable and lawful, her conduct must satisfy the private defence requirements.<sup>25</sup>

In discussing private defence, the court in the case of *S v Engelbrecht*,<sup>26</sup> held that ‘the question whether an accused, who relies on private defence, has acted lawfully must be judged by objective standards’. In applying this objective standard our courts have tried to decide what the reasonable man, in the position of the accused and in light of all the circumstances would have done.<sup>27</sup> The court went on to state that ‘the reasonableness test is the vehicle to ascertain the legal convictions of the community or the community's sense of equity and justice, and in conducting this enquiry, the Court must be driven by the values and norms underpinning the Constitution’.<sup>28</sup> In that regard, Section 39(2) of the Constitution<sup>29</sup> requires that the elements of the established defences of justification be developed to promote the spirit, purport and object of the Bill of Rights. This would require that the defences be interpreted so as to be relevant and accessible to abused women who resort to violence as a result of the abuse. The court then took the position that the defence of private defence as justification against unlawfulness is available in our law to abused women who kill their abusive spouses and partners. However, the facts and circumstances of each case must be considered in order to arrive at a decision.<sup>30</sup>

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<sup>24</sup> JH Krause ‘Distorted reflections of battered women who Kill: A response to Professor Dressler’ 2006 (4) *Ohio State Journal of Criminal Law (OSJCL)* 555, 560.

<sup>25</sup> J Burchell and JRL Milton *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 230.

<sup>26</sup> *S v Engelbrecht* (2005) 2 SACR 41 (W).

<sup>27</sup> *Ibid* para 327.

<sup>28</sup> *Ibid* para 332.

<sup>29</sup> The Constitution of the Republic of South Africa, 1996. Section 39(2).

<sup>30</sup> *Engelbrecht* *supra* para 340.

Carstens<sup>31</sup> discusses the case of *S v Steyn*,<sup>32</sup> where the question the SCA had to assess whether the appellant did act in private defence when she shot and killed the deceased. The court went on to hold that every case must be determined in the light of its own particular circumstances and it was impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. There should be a reasonable balance between the attack and the defensive act. In considering the lawfulness of the appellant's conduct, the court stated that it was necessary to keep in mind that she was obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat.<sup>33</sup> In conclusion, the court held that in these circumstances she was entitled to use deadly force to defend herself. Had she not done so, it might well have cost her life. The court observed that in these circumstances her instinctive reaction, as she described it, of shooting at the deceased, who was seemingly hell-bent on killing her, was reasonable and the court a quo erred in finding otherwise.<sup>34</sup>

In assessing the judgment, Carstens<sup>35</sup> states that the court took a robust approach by recognising the requirements of private defence with regards to domestic violence. This judgment is also the first reported judgment of the SCA where a battered wife who killed her abusive husband successfully invoked private defence as a ground of justification in the context of domestic violence. Carstens welcomes this development as a positive one. The judgment also supports the view adopted by the *Engelbrecht* case where the court extended the meaning of imminence. This case is relevant to this research because it highlights the need to extend the requirements of private defence in order to adapt to the BWS. It also provides an illustration, in the form of case law, with regards to the application of the requirements of private defence to the battered woman.

The case of *Ferreira v The State*,<sup>36</sup> is one of the important cases in relation to abused women. The judgment in this particular case highlights the importance of fully understanding women's experiences with violence and particularly their reasons for killing when determining whether any mitigating circumstances exist at the sentencing stage. The test for mitigation is whether there are any factors that decrease the appellant's moral

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<sup>31</sup> P Carstens 'Private defence in context of the battered wife who kills her abusive husband/partner: Ann Elizabeth Steyn v The State (reported as *S v Steyn* 2010 1 SACR 411 (SCA)) (2010) 31(2) *Obiter* 478, 483.

<sup>32</sup> *S v Steyn* (2010) 1 SACR 411 (SCA).

<sup>33</sup> Carstens (note 31 above) 483.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ferreira v The State* 2004 (4) All SA 373 (SCA).

blameworthiness. The Court explained that moral blameworthiness must depend on the motive and subjective state of mind. The test adopted by the court had to consider that the woman's constitutional rights to dignity, freedom from violence and to bodily integrity had been violated by her abuser.<sup>37; 38</sup>

The court adopted the approach that putative private defence could also provide a defence for the accused who is a victim of the BWS. In that regard, the issue before the Court was whether Ferreira believed she had to kill the deceased to protect herself from serious harm. The court therefore had to test whether the belief was objectively credible. The Court considered the circumstances and threats of abuse to determine whether they could have led her to believe she had no option to escape the abuse. The Court canvassed each of the choices it felt could be open to her to avoid the deceased's violence. The court then held that Ferreira subjectively believed she had no choice but to kill him to escape further abuse. It is important to note that despite the courts acknowledgement of the effects of abuse there was no acquittal and this can be taken to mean that the court did not accept that there was a substantive defence. However, the important aspect in this case is that the court recognised the existence of putative private defence as a possible defence that can be raised by the accused. This defence is also relevant to this research because it highlights the importance of striking a balance between the subjective state of mind of the accused and the circumstances surrounding the murder.

## **1.7. Overview of chapters**

This dissertation consists of five chapters. Chapter one, is an introductory chapter which will have the background, a brief introductory overview and breakdown of the chapters. Chapter two will critically discuss and analyse the meaning of BWS, will look at the criticism of the BWS and will consider the reason why battered women end up killing their abusers. Chapter three is a comprehensive discussion of the South African laws governing private defence as well as putative private defence looking at the traditional requirements as well as their development to suit the claims

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<sup>37</sup> Ibid.

<sup>38</sup> See H Ludsin 'Ferreira v The State: A victory for women who kill their husbands in non-confrontational situations' (2004) 20 SAJHR 642-652.

of battered women who raise the defence. Chapter four is a discussion of the laws governing private defence laws in America which is a chosen jurisdiction for a comparative analysis. Lastly Chapter five will be the conclusion and a summarised discussion of the previous chapters.

## CHAPTER TWO

### 2. Battered Woman Syndrome (BWS)

#### 2.1. Introduction

It is trite that violence against women, much of which consists of men abusing their female partners, is most prevalent and a significant challenge in South Africa. It is against this background that the legislature enacted well-intentioned pieces of legislation to address the challenge of domestic violence, however the enacted laws are falling short to eradicate domestic violence. Thus, Reddi places the prevalent problem of domestic violence in context.<sup>39</sup>

‘Law is dynamic. It evolves to keep pace with the demands of society. One of the demands has been the need to arrest the ubiquitous abuse of women. States have been called upon to take special cognisance of this pandemic of domestic violence which is unencumbered by issues of race, class or age. Most jurisdictions throughout the world, including South Africa, have responded to the call by creating legislation aimed not only at protecting women from domestic abuse but also at securing them a status commensurate to that enjoyed by all other citizens. Despite these commendable protections, it is a trite fact that women continue to be abused at an alarming rate. Even more alarming is the fact that many abused women, world-wide, remain in abusive relationships.’<sup>40</sup>

Domestic violence often results in negative effects on the abused woman’s personality.<sup>41</sup> The negative effects of domestic violence can eventually lead to what is known as Battered Woman Syndrome (BWS). The BWS can occur in respect of ‘an abused woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to

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<sup>39</sup> M Reddi ‘Battered Woman Syndrome: Some Reflections on the Utility of this ‘Syndrome’ to South African Women who Kill their Abusers’ (2005) 18(3) SACJ 259.

<sup>40</sup> Ibid.

<sup>41</sup> The abused wife ‘undergoes a personality change as the abuse increases. She becomes frightened and unable to project her thinking into the future. She lives her life from one beating to the next and her thoughts relate solely to her efforts to avoid the next beating. The wife is usually hopeful that, if she pleases the husband, the abuse will stop. For his part, the husband usually expresses remorse after a beating and attempts to reconcile with gifts and/or promises to refrain from abuse in the future. The wife then sees the husband in a different light and is filled with false hope. Another aspect of the syndrome is that the wife eventually feels that she cannot escape her tormentor and that she will be tracked down if she attempts to flee the situation. Her self-esteem vanishes and her confidence is shattered. She feels that no one would believe her if she told them about the abuse and, thus, she keeps it to herself.’ See C.P. Ewing. Battered Women Who Kill: Psychological Self-Defense as Legal Justification (1990) 14(6) *Law and Human Behavior* 579-594.; *People v. Enmick*, 481 N.Y.S. 2d 552, 559 (1984).

coerce her to do something he wants her to do without concern for her rights'.<sup>42</sup> Dressler defines the BWS as follows:

'The battered woman defence defines the woman as a collection of mental symptoms, motivational deficits, and behavioural abnormalities; indeed, the fundamental premise of the defence is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.'

It is important to note that domestic abuse is not only confined to physical abuse, but it can include psychological abuse as well. The Domestic Violence Act,<sup>43</sup> has comprehensively defined domestic violence as including physical and non-physical forms of violence, all of which fall under the rubric of 'controlling and abusive behaviour ... where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant'.<sup>44</sup> In order to understand the psychological impact of abuse on women, it is important to look at the pattern of overall coercive control present in the relationships, rather than specific instances of such control. It can be argued that it may be control, rather than violence that creates the psychological profile of a battered woman.<sup>45</sup>

## **2.2. What is Battered Woman Syndrome?**

The term BWS was first coined by Dr Lenore Walker, an American psychologist, to denote a set of distinct psychological and behavioural symptoms that results from prolonged exposure to situations of intimate partner violence. According to Dr Walker,

'A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. In order to be classified as a battered woman, the couple must go through the battering cycle at least twice.'<sup>46</sup>

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<sup>42</sup> L. Walker. *The Battered Woman* (1979) xv.

<sup>43</sup> The Domestic Violence Act, No 116 of 1998.

<sup>44</sup> Ibid, Preamble to the Domestic Violence Act.

<sup>45</sup> *S v Engelbrecht* supra para 168.

<sup>46</sup> Walker (note 42 above) 16.

To expand fully on the BWS, Dr Walker came up with two theories that identified and defined the essential elements of the BWS. These theories are the theory of ‘learned helplessness’<sup>47</sup> and ‘the cycle of violence theory.’<sup>48</sup>

### **2.2.1. The Cycle of Violence**

Dr Walker opines that the cycle of violence theory asserts that battering involves an identifiable pattern. This pattern has three phases namely ‘a tension-building phase’,<sup>49</sup> ‘a release through acute battering’<sup>50</sup> and ‘a final cycle of apparent contrition and remorse by the abuser’.<sup>51</sup> To explain this theory further, Dr. Walker opines that ‘spousal abuse generally occurs in cycles characterised by different degrees of severity. She argued that in the first ‘tension-building’ phase, the victim will be exposed to verbal and/or emotional abuse and minor incidents of physical violence, such as slapping’.<sup>52</sup> In response, the victim may attempt to pacify her abuser utilising techniques which have been effective in the past.<sup>53</sup> Dr. Walker further submits that although the woman’s primary objective is to avoid future conflict and her actions during this phase are aimed at furthering this objective, her passivity will most often reinforce the abusers violent tendencies and the tension in the relationship will continue to build until it culminates in the second stage, ‘the acute battering incident’.<sup>54</sup>

Even though Dr. Walker acknowledges that the severity of violence used in ‘the release through acute battering’ phase would vary, she argues that it is at this time that a victim’s sense of fear and perceptions of danger are at their most heightened state as is the risk of death or serious injury.<sup>55</sup> The discharge of tension in the second stage, invariably leads to a third phase of ‘contrition and remorse by the abuser’ in which the batterer exhibits conciliatory behaviours and may attempt to convince the victim of his intentions to change.<sup>56</sup> This last phase offers a further reason why the battered woman remains with her abuser, at this stage she does not recognise the abuse as a pattern of behaviour, but rather views these

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<sup>47</sup> Ibid 16; 42-54; 187.

<sup>48</sup> Ibid 55-70; 187.

<sup>49</sup> Ibid 56-59.

<sup>50</sup> Ibid 59-65.

<sup>51</sup> Ibid 65-70.

<sup>52</sup> Z Crazen. ‘Battered Woman Syndrome’, (2003) Australian Domestic and Family Violence Clearinghouse 2. Available at [http://www.austdvclearinghouse.unsw.edu.au/topics/topics\\_pdf](http://www.austdvclearinghouse.unsw.edu.au/topics/topics_pdf) (accessed 16 December 2015).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

acts as generally unpredictable or due to her own fault. The battered woman believes this phase to accurately represent the present relationship.<sup>57</sup> It is against this background that Dr. Walker further argues that ‘the cycle of abuse will inevitably lead the victim to fall into patterns of behaviour she identified as indicative of ‘learned helplessness’.<sup>58</sup>

### **2.2.1.1 . The Theory of Learned Helplessness**

Learned helplessness can be defined as ‘a psychosocial theory for lack of response or passive behaviour in the face of the ability to act or respond to a threat’.<sup>59</sup> This was developed by Martin Seligman as a psychological theory based on laboratory experiments conducted on animals.<sup>60</sup> Dr. Walker hypothesised that continual exposure to battering, like electric shocks, would, over time, diminish a woman’s motivation to respond and produce the same kinds of cognitive, behavioural and motivational responses.<sup>61</sup> In other words, a woman who remained in a violent relationship was more likely to exhibit signs of learned helplessness than one who had never been in, or had escaped a violent relationship.<sup>62</sup> When the above analogy is applied to battered women, the correlation becomes evident that learned helplessness is ‘a psychological paralysis that battered women experience and which contributes towards keeping them in abusive relationships’.<sup>63</sup>

The theory of learned helplessness can be classified as a psychosocial learning theory,<sup>64</sup> whereby women, after repeated abuse, come to believe that they cannot control the abusive situation they find themselves in. Once the women are operating from a belief of

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<sup>57</sup> Walker (note 42 above ) 68.

<sup>58</sup> L Walker. 'Understanding battered woman syndrome', (1995) 31(2) *Trial* 30.

<sup>59</sup> MR Mahoney. 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) *Michigan Law Review* 1, 38.

<sup>60</sup> Seligman’s theory sought to “explain certain forms of psychological paralysis by utilising social learning and cognitive/motivational theoretical principles. Based on a study conducted with laboratory animals whereby the animal was repeatedly and non-contingently shocked until they became unable to escape the painful situation, the theory argued that the reason the animals failed to attempt to escape, even when escape was both possible and readily apparent to animals who had not undergone the previous shock treatment, could be found in their distorted perceptions of one’s capacity to alter their position. These distorted perceptions, according to Seligman, resulted from an inability to predict the efficacy of one’s actions. Seligman then drew comparisons between the behaviour of the animals in the study and certain forms of human depression, highlighting analogous cognitive, behavioural and motivational characteristics exhibited by each of these groups.” Adapted from Walker, L. E. *The Battered Woman Syndrome*, (1984).

<sup>61</sup> Crazen (note 52 above) 4.

<sup>62</sup> Ibid.

<sup>63</sup> Walker (note 42 above) 43.

<sup>64</sup> Ibid 45-47.

helplessness, the perception becomes reality and they become passive, submissive and helpless.<sup>65</sup> Thus, a battered woman's cognitive perceptions and motivation to act are altered;

'Repeated battering diminishes the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success [in the relationship] is changed. She does not believe her response will result in a favourable outcome, whether or not it might... She cannot think of alternatives.'<sup>66</sup>

It can be argued that Dr. Walker's battered woman syndrome can be classified as a sub-category of the generic Post-Traumatic Stress Disorder (PTSD) - an anxiety disorder<sup>67</sup> which is included within the Diagnostic and Statistical Manual of Mental Disorders.<sup>68</sup> Battered women experience psychological changes after repeated exposure to the trauma of being abused.<sup>69</sup> Symptoms experienced by these women include: high arousal symptoms, including a heightened sense of danger; cognitive disturbances, such as intrusive memories; and high avoidance symptoms such as depression or repression.<sup>70</sup>

### **2.3. The reasons why battered women stay in abusive relationships**

A number of theories have been put forward to explain the reasons why battered women would choose to stay in a relationship where they are abused rather than leaving the relationship. This chapter seeks to answer to the question as to why battered women do not leave the abusive relationship by looking at the three of the theories namely, 'the investment model' and 'the psychological entrapment' and 'the learned helplessness'. The 'learned helplessness' will not be discussed here again since it has been discussed above, only 'the investment model' and 'the psychological entrapment' will be discussed below.

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<sup>65</sup> Ibid 47.

<sup>66</sup> Ibid 49-50.

<sup>67</sup> LE Walker 'Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome' (1991) *Psychotherapy: Theory, Research, Practice, Training* 21.

<sup>68</sup> American Psychological Association *DSM-IV: Diagnostic and Statistical Manual of Mental Disorders* 4<sup>th</sup> ed (1994) 424-429.

<sup>69</sup> Walker (note 42 above) 326-330.

<sup>70</sup> Ibid.

### **2.3.1. Psychological Entrapment**

The other reason why battered women remain in abusive relationships is because of ‘psychological entrapment’, which suggests that, ‘the level of commitment within a relationship will increase as the amount of investments into that relationship increases’.<sup>71</sup> For instance, a battered woman would have invested a lot of time, energy, money and her life in an endeavour of making her marriage work. Although the battered woman feels unhappy with her abusive relationship, she may continue to invest more time and energy into the marriage to justify her previous expenses, thus she becomes too invested into the relationship to quit.<sup>72</sup>

The battered woman will remain in an abusive relationship and continue to comply with her abuser’s requests in the hope that those behaviours will eventually lead to a reduction in violence and improved relationship satisfaction.<sup>73</sup> It is unfortunate that the abused woman will continue to invest more time and energies as she believes that she did not invest enough to improve the relationship and as a result she will be more prone to psychological entrapment.<sup>74</sup>

### **2.3.2. Investment Model**

The investment model is based on a cost-benefit analysis when making commitment decisions. The commitment decisions are based on comparing the benefits and costs for the abusive relationship against the estimated benefits and costs of the prospective or alternative relationships including being single.<sup>75</sup> A battered woman may estimate her current level of relationship satisfaction by figuring out the current number of rewards within the abusive relationship such as security and money and measure it against the total number of costs associated with the relationship such as the frequency and severity of abuse, instability, effects on children. Using this same cost-benefit analysis, an estimate of satisfaction for alternative relationships is determined and compared with the satisfaction level for the current abusive relationship.<sup>76</sup> Thus the women will stay in an abusive relationship if even though

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<sup>71</sup> KM Bell and AE Naugle. ‘Understanding stay/leave decisions in violent relationships: A behavior analytic approach.’ (2005) 14 *Behavior and Social Issues* 23.

<sup>72</sup> Ibid 24.

<sup>73</sup> Ibid.

<sup>74</sup> J Brockner and JZ Rubin. *Entrapment in escalating conflicts: A social psychological analysis.* (1985) 38.

<sup>75</sup> Ibid.

<sup>76</sup> JH Pfouts. ‘Violent families: Coping responses of abused wives.’ (1978) 57(2) *Child Welfare* 101, 105.

there are low payoffs in the current abusive relationship but there are even lower payoffs for alternative relationships. For instance, a person in an abusive relationship may receive little financial and emotional support from her partner, but believe that she would lose even more economic security if she was single or in an alternative relationship.<sup>77</sup>

#### 2.4. Conclusion

The court in the case of *S v Engelbrecht* noted that when looking into moral blameworthiness of a battered woman, ‘focus had to be on the reasonableness of her actions within the context of her personal experience, as well as her experience as a woman, and not on her status as an abused woman and the fact that she suffered from battered woman syndrome’,<sup>78</sup> and the court went on and referred to a Canadian case of *R v Lavallee*<sup>79</sup> which stated that;

‘By emphasizing learned helplessness, her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "battered woman syndrome" the legal debate shifts from the objective rationality of her actions to preserve her own life, to those personal inadequacies which apparently explain her failure to flee from her abuser. Such emphasis complies too well with society's stereotypes about women. Therefore, it should be scrupulously avoided.’<sup>80</sup>

It is against the above that caution should be taken when tempted to blame the battered woman for continuing to stay in an abusive relationship. In the case of *S v Engelbrecht*,<sup>81</sup> the court held that caution should be taken when arguing that the abused women should have left the abusive relationship. The court held that ‘the judgment must not be reached on the basis that the abused women stayed in the abusive relationship, by arguing why the battered woman did not leave her abuser long ago, if the abuse was unbearable’.<sup>82</sup> Thus it can be argued that the court is not entitled to reach a conclusion that the abused women forfeited her right to private defence by having stayed in the abusive relationship.<sup>83</sup> This is so because

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<sup>77</sup> Ibid.

<sup>78</sup> Goosen, (note 13 above) 110.

<sup>79</sup> *Lavallee v R* (1990) 4 WWR 1.

<sup>80</sup> Ibid 120-125.

<sup>81</sup> *S v Engelbrecht supra*.

<sup>82</sup> *S v Engelbrecht supra*.

<sup>83</sup> Goosen, (note 13 above) 110.

requiring that a battered woman leaves an abusive relationship, is failing to consider the possibility that the woman may be placing her life in grave danger, since she will more likely be killed by her abuser when she decides to or leaves the abusive relationship as she will not be having a safe place to flee to.<sup>84</sup>

The court in *S v Engelbrecht* emphasised the point that “it was inappropriate that a woman's failure to leave her own home should be used to cast doubt on her plea of self-defence”, since;

‘it is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so ... the traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself. A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances.’<sup>85</sup>

It can be argued that, the woman who has been repeatedly abused can suffer profound physical and psychological effects which will ultimately lead to the BWS. The BWS has a lot of negative effects on an abused woman such as, low self-esteem, anxiety, depression, unable to have a sense of herself as a person outside the relationship with her abuser, bonded to the relationship by the cycle of abuse and contrition and, above all, paralyzed by her emotions, especially fear.<sup>86</sup> It is these conditions that will lead her to finally kill her abuser since she would have reached a breaking point.

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<sup>84</sup> Ibid.

<sup>85</sup> *Lavallee v R* supra 120-125.

<sup>86</sup> Reddi (note 39 above) 278.

## CHAPTER THREE

### 3. Battered Woman Syndrome and the South African Law of Private Defence

#### 3.1. Introduction

This chapter focuses mainly on the legal defence that is raised by battered women who kill their abusers in non-confrontational circumstances. It is submitted that battered women have been effectively excluded from the traditional private defence claims because of the difficulties they encounter in satisfying the elements of this defence, as a result of which their claim fails. This chapter will discuss the general legal nature of private defence and the selected requirements of the private defence law specifically the imminence of an attack, proportionality and the duty to flee. It will further discuss the development of the defence in order to make the defence available to the battered women who kill their abusers in non-confrontational circumstances. There will be a broad reference to case law which has formed the basis for private defence law.

#### 3.2. Background

One of the main reasons why the defence of private defence always fails for abused women who kill their abusive partners is the historical exclusion of women's perspectives from the realm of private defence.<sup>87</sup> Reddi argues that, 'the situation is further exacerbated by the failure of the law to allow the perceptions of women to inform the objective standard when determining the blameworthiness of abused women who kill their abusers'.<sup>88</sup> However, recent decisions of the South African courts in *S v Engelbrecht*,<sup>89</sup> *S v Ferreira and Another*,<sup>90</sup> and *S v Steyn*,<sup>91</sup> seems to suggest that, 'the South African judiciary is mindful of the shortcomings of the different approaches adopted in other jurisdictions and has itself espoused an approach to intimate killings by abuse survivors that may offer some elucidation to those jurisdictions still wrestling with the issues mentioned'.<sup>92</sup>

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<sup>87</sup> HLudsin (see note 38 above) 642.

<sup>88</sup> M Reddi 'Domestic Violence and Abused Women Who Kill: Private Defence or Private Vengeance?' (2007) 124(1) *SALJ* 22, 28.

<sup>89</sup> *S v Engelbrecht* supra.

<sup>90</sup> *S v Ferreira and Another* 2004 (2) SACR 454 (SCA).

<sup>91</sup> *S v Steyn* supra.

<sup>92</sup> Reddi (note 88 above) 28.

Reddi further notes that despite ‘the almost assiduous avoidance by the SCA of the use of BWS terminology in its judgment in the case of *S v Ferreira and Another*,<sup>93</sup> this case may be regarded as a watershed decision for abused women who kill their abusers’.<sup>94</sup> The *S v Ferreira and Another*, case is the first South African case in ‘which judicial recognition was given to the consequences of repeated acts of abuse on the psychological make-up of the survivor of the abuse, and the effects of such abuse on the blameworthiness of the survivor’s conduct in killing her abuser’.<sup>95</sup> The most important part of the *Ferreira*<sup>96</sup> case is when the SCA acknowledged that abused women must be treated with “due regard for gender difference in order to achieve equality of judicial treatment.”<sup>97</sup>

The above statement can be regarded as an endorsement by the SCA of the feminist argument that, objectively, the law is skewed in favour of the male gender.<sup>98</sup> It can be argued that the above statement is also in line with the court’s reasoning in the Canadian case of *R v Malott*,<sup>99</sup> which was also accepted in *Lavallee v R*,<sup>100</sup> that, ‘women’s perspectives have historically been ignored, and must now be taken into consideration to an equal extent to those of men in the determination of the objective standard of the reasonable person in relation to self-defence’.<sup>101</sup>

### **3.3. The South African law of Private Defence**

It is trite that South African criminal law recognises that killing in self-defence is justifiable, and therefore not murder.<sup>102</sup> Private defence has been defined as when, a person who is the victim of an unlawful attack upon person, property or other recognized legal interest may resort to force to repel such attack. Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.<sup>103</sup> In order to escape criminal liability for this act the battered woman must be able to show that her resort to private defence conformed to the legal requirement that allows the use of self-help. Thus she ‘must be able to provide

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<sup>93</sup> *S v Ferreira* supra.

<sup>94</sup> Reddi (note 88 above) 32.

<sup>95</sup> Reddi (note 88 above) 27.

<sup>96</sup> *S v Ferreira* supra.

<sup>97</sup> *S v Ferreira* supra para 40.

<sup>98</sup> Reddi (note 88 above) 28.

<sup>99</sup> *R v Malott* (1998) 1 SCR 123.

<sup>100</sup> *Lavallee v R* supra..

<sup>101</sup> *Lavallee v R* supra at 140–141.

<sup>102</sup> J Milton. *South African Criminal Law and Procedure: Common Law Crimes* (1996) 312.

<sup>103</sup> Burchell and Milton (see note 25 above) 230.

evidence that the use of force was necessary in the circumstances that she found herself in, and that she used the means appropriate to the danger that confronted her'.<sup>104</sup>

### **3.4. The test for private defence**

#### **3.4.1. The objective test**

The test for private defence in South Africa is an objective test. In applying this test the court must decide what the fictitious reasonable man, in the position of the accused and in light of all the circumstances would have done.<sup>105</sup> The case of *S v Engelbrecht*<sup>106</sup> confirmed that private defence had to be evaluated objectively, and is based on a consideration of what would have been reasonable in the situation the accused found herself in.<sup>107</sup> The court in *Engelbrecht* went further and noted that 'the reasonable woman must not be forgotten in the analysis and deserves to be as much part of the objective standard of a reasonable person as does the reasonable man'.<sup>108</sup> It is on this basis it was held that, 'there is indeed compelling justification for focusing not only on the specific form which the abuse may have over time and in particular circumstances, but pertinently on the impact of the abuse upon the psyche, make-up and entire world view of an abused woman'.<sup>109</sup>

Thus in considering the private defence claim, the court must endeavour to imagine itself in the position in which the battered woman was in. Having done so, the court must determine whether the reasonable person in that specific situation would have acted in the same manner.<sup>110</sup> If it is found that the reasonable person in the situation would have acted the same, the defendant will comply with the test for private defence. It has been submitted that, the appreciation of the situation by the abused woman and her belief as to the reaction which it required requires an objectively verifiable basis for such perception.<sup>111</sup> To this end, the questions that are asked are, 'what would the "reasonable man" have done? 'Was the force used reasonably necessary in the circumstances?' or 'did the accused act reasonably and

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<sup>104</sup> Burchell (see note 25 above) 230.

<sup>105</sup> See *S v Motleleni* 1976 (1) SA 403 (A) 406c; *S v De Oliveira* 1993 (2) SACR 59 (A)..

<sup>106</sup> *S v Engelbrecht* supra

<sup>107</sup> *S v Engelbrecht* supra para 327.

<sup>108</sup> *S v Engelbrecht* supra para 328.

<sup>109</sup> *S v Engelbrecht* supra para 343.

<sup>110</sup> Burchell and Milton (see note 25 above) 243.

<sup>111</sup> *S v Engelbrecht* supra para 359.

legitimately to protect herself against the deceased?’<sup>112</sup> It is submitted that this approach is correct and there is no need to subjectify the standard of the reasonable person when dealing with cases of battered women. What is relevant is that the courts take informed cognisance of the lived realities and experience.

However it important for the courts to take heed of what was stated in *S v Ntuli*<sup>113</sup> that;

‘South African courts have always insisted that they must be careful to avoid the role of armchair critics, wise after the event, and weighing the matter in the secluded security of the court-room. The approach is that in applying these formulations (the triggering conditions) to flesh and blood facts, the courts adopt a robust attitude, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence.’<sup>114</sup>

### **3.5. The Requirements of Private Defence**

In terms of the South African criminal law, in order to escape the conviction for a crime, an accused that raises private defence as a justification ground must be able to prove that her conduct met the requirements of the private defence law. These requirements can be divided into two, with those conditions that relate to the attack, namely;

- a. that there was an unlawful attack;
- b. which had commenced or was imminent;
- c. which was directed against a legally protected interest.<sup>115</sup>

And those conditions that relate to the defence, namely;

- a. the defence was necessary to avert the attack;
- b. it was directed against the attacker; and
- c. it was a reasonable response to the attack.<sup>116</sup>

It is important to reiterate that not all of the above requirements warrant a detailed discussion for present purposes, although all are equally important in practice. This dissertation will now look at selected requirements in detail starting with the conditions relating to the attack.

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<sup>112</sup> *S v Engelbrecht* supra para 129.

<sup>113</sup> *S v Ntuli* 1975 (1) SA 429 (A).

<sup>114</sup> *Ibid* para 437e.

<sup>115</sup> J Burchell. *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 233.

<sup>116</sup> *Ibid* 237.

### **3.5.1. Conditions Relating to the Attack**

#### **3.5.1.1 The attack must have been unlawful**

Snyman defines the element of attack under the private defence law as ‘presupposing a voluntary human act’.<sup>117</sup> In the same vein Reddi submits that, ‘in assessing the existence of an unlawful attack, courts look at the conduct of the attacker solely at the moment when the defensive measures were adopted to determine whether such conduct could reasonably be regarded as an attack’.<sup>118</sup> It is against this background that the position adopted by court a quo in the *Engelbrecht* case indicates that the conduct of the deceased will still qualify as an attack even if the defensive measures taken by the abuse survivor occurred during a period when the abuse was in abeyance.<sup>119</sup> However, it must first be shown that the abuser had established a pattern of coercive control over the abuse survivor. This approach can be regarded as a significant development in the law as it means that in such instances, based on its repetitive nature, both the active and passive phases of the abuse qualify as an attack if it can be proved that the accused was under the domination of the abuser.<sup>120</sup>

In the case of *Engelbrecht*, the court noted that, ‘whilst the attack may be physical in nature, it could also include psychological or emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts’.<sup>121</sup> It is submitted that even one individual incident of abuse or a series of violations or an ongoing cycle of maltreatment can constitute an attack for the purpose of private defence as far as battered women who kill their abusers in non-confrontational circumstances are concerned.<sup>122</sup> This is indicative of some development of the common law as historically the defensive measures adopted would have to have been taken in response to an individual incident.<sup>123</sup>

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<sup>117</sup> Snyman (see note 17 above) 104.

<sup>118</sup> Reddi (note 88 above) 33.

<sup>119</sup> *S v Engelbrecht* supra para 342.

<sup>120</sup> Reddi (note 88 above) 33.

<sup>121</sup> *S v Engelbrecht* supra para 133.

<sup>122</sup> *Ibid* para 133.

<sup>123</sup> Reddi (note 88 above) 33.

### **3.5.1.2      The attack must have been directed against a legally protected interest**

The South African legal system recognises that a person may act in private defence in an endeavour to protect life,<sup>124</sup> bodily integrity,<sup>125</sup> property,<sup>126</sup> and dignity.<sup>127</sup> This view is supported by the *Engelbrecht* case which noted that, ‘it follows that the interests which are attacked and which an abused woman may protect, include her life, bodily integrity, dignity, quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her children. In short, she defends her status as a human being and/or mother’.<sup>128</sup> To support the above this view, it was noted in the case of *S v Walters*,<sup>129</sup> that,

‘...Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interests, in circumstances in which it is reasonable and necessary to do so...’<sup>130</sup>

### **3.5.1.3      There must have been an attack which had commenced or was imminent**

The exact meaning and ambit of this requirement has been a bone of contention amongst academics, lawyers and the judiciary alike. The requirement of imminence, lies at the heart of the justification of private defence and forms the focal point of this chapter.<sup>131</sup> It has been noted from the various judgments from United States of America<sup>132</sup> in which was self-defence was raised and failed as a justification mainly because the abused women were unable to prove that the harm or threat of harm against which they claimed to have acted was imminent.<sup>133</sup>

When dealing with the imminence requirement the court is confronted with twofold issues namely;

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<sup>124</sup> See *S v Zikalala* 1953 (2) SA 568 A. See also Snyman (note 17 above)106.

<sup>125</sup> Snyman (note 17 above) 106.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *S v Engelbrecht* supra para 133.

<sup>129</sup> *S v Walters* 2002 (7) BCLR 663 (CC).

<sup>130</sup> *Ibid* para 53 where the court makes reference to *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A).

<sup>131</sup> See *S v Mogohlwane* 1982 (2) SA 587 (T). The attack should not yet have been completed Any measure taken after the attack has ended would be retaliatory rather than defensive.

<sup>132</sup> The self-defence law of the United States of America is discussed in the next chapter.

<sup>133</sup> Reddi (note 88 above) 34.

- a. Whether the killing of the abusive partner, at a time when he posed no immediate threat of harm or danger, fulfils the requirement of imminence for the killing to be justified in private defence.<sup>134</sup>
- b. Whether the killing of the deceased was a reasonable response to the harm threatened.<sup>135</sup>

Here the focus of the court will be on whether the circumstances of the accused objectively justified her resort to self-help when the danger threatened was not imminent.<sup>136</sup> In other words, the imminent attack requirement necessitates that a reasonable person in the circumstances would have believed that an attack will take place or would have taken place had he not acted.

Burchell notes that;

‘imminent means that the attack is about to begin immediately - what is important here is not so much the imminence of the threat, but rather the immediacy of the response required to avoid the attack. If the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary for effective protection.’<sup>137</sup>

This traditional application of the imminence element is problematic, as battered women tend to kill in instances where their abuser is asleep or incapacitated and there is no imminent threat of harm.<sup>138</sup> Thus, it fails to take into account the challenges faced by battered women.

Reddi submits that, the imminence requirement is based on the idea that ‘there must be a temporal connection between the apprehension of attack and the defensive act, which requires that the defensive measures taken must be an immediate response to the attack threatened’.<sup>139</sup> There should be an immediacy of danger such that the accused does not have the time or opportunity to seek alternate protection at the time she strikes the fatal blow to the abuser. Therefore an accused cannot take a pre-emptive step in defending herself from an attack which is not immediately threatening. However the court in the *Engelbrecht* case stated that, ‘for an abused woman to wait until a physical assault is underway before her apprehension can be validated in law would . . . be tantamount to sentencing her to murder by

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Burchell and Milton (note 25 above) 234.

<sup>138</sup> Goosen (note 13 above) 75.

<sup>139</sup> Reddi (note 88 above) 34.

instalment'<sup>140;141</sup> The court's position is evident enough to reinforce a suggestion that the traditional imminence requirement does not adequately cater for these women's situations.<sup>142</sup>

In order to determine whether the battered woman who kills has met the imminence element one has to look at the pattern of the abuse. This is so because the court in *Engelbrecht* referred to the Canadian case of *Lavallee*,<sup>143</sup> which stated that, 'where the abuse is frequent and regular such that it can be termed a "pattern" or a "cycle" of abuse then it would seem that the requirement of "imminence" should extend to encompass abuse which is inevitable'.<sup>144</sup> It is submitted that this approach is most welcome. The court in the case of *S v Steyn*,<sup>145</sup> further expanded on the development of the imminent attack requirement to the situation of the battered spouse. The court extended the imminent attack requirement to the situation where an abused woman can predict the next attack due to the cycle of violence, and then subsequently kills the abuser in order to prevent an impending attack. It is argued that the imminent attack requirement is now applicable where the attacks are reasonably predictable due to the fact that they occur in a cycle and the abused has learned how to predict the attacks.

### **3.5.2. Conditions Relating to the Defence**

#### **3.5.2.1 . The defence must be necessary to avert the attack**

It is submitted that the defence will be necessary where it is the only means available at the time for warding off the attack on the battered woman's rights and interests. However, the fact that other means of relief are available does not make the defence unnecessary if at the time of the attack it was impossible for the defender to obtain that relief.<sup>146</sup> When applying this condition to battered women it is important that the court critically analyse the extent to

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<sup>140</sup> *S v Engelbrecht* supra para 348. This phrase was first used in *State v Gallego* 719 P 2d 1268 (1986) at 1271 (NM) and later also applied in *Lavallee v R* (1990) 4 WWR 1.at 123. The court in the *Engelbrecht* case noted that, "premeditation of the defensive act is not necessarily inconsistent with reliance placed upon this ground of justification".

<sup>141</sup> This is so because, 'If the law were to have required the defender to wait for the first blow to strike him or her before retaliating, there is the possibility, if not probability, that such first blow could kill the innocent defender or otherwise put him or her out of action, thus resulting in injustice'.

<sup>142</sup> Goosen (note 13 above) 87.

<sup>143</sup> *Lavallee v R* supra at 120.

<sup>144</sup> *S v Engelbrecht* supra at 134 and 146. See also *Lavallee v R* (1990) 4 WWR 1 at 120.

<sup>145</sup> *S v Steyn* supra.

<sup>146</sup> Burchell (note 25 above) at 238.

which the ordinary law of the land is available to the accused and effective in supporting her and freeing her from the violence and its impact.<sup>147</sup>

This element entails looking at the proportionality requirement, and in the case of an abused woman, her particular circumstances should be taken into account. In the case of *Engelbrecht* the court emphasised that “in considering the relationship between the attack and a consequent defence, proper notice must be taken of the circumstances and lived realities of the battered woman accused, when making the determination as to whether the force used by her was proportional to the attack or reasonable in the circumstances”.<sup>148</sup> These factors may include;

‘the parties respective ages; the relative strengths, gender socialization and experiences; the nature duration and development of their relationship; the nature, the extent, duration, persistence of the abuse; the impact upon the body, mind, heart, spirit of the victim; the extent to which it is possible for State legislated, formal institutional, informal personal bodies and individuals to intervene to terminate the abuse; the extent to which it is possible for the abused victim to access and utilize any of the above channels in the event that they previously failed and to unilaterally intervene to impose constitutional protections.’<sup>149</sup>

However, In the case of *Ex parte Die Minister van Justisie: In re S v Van Wyk*<sup>150</sup> the court expressly rejected the requirement of proportionality as a condition of private defence. The court held that, ‘one who affronts the rights of another in a manner that he can only be stopped by extreme means must be regarded as ‘the author of his own misfortune’ and the court further questioned, ‘why should the defender who is unquestionably entitled to protect his rights, be viewed as the one acting unlawfully if he uses deadly force rather than sacrifice his rights?’<sup>151</sup>

Thus, it can be argued that the defensive act does not need to be directly proportional to the attack as, ‘modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all factors into account, the defender acted reasonably in the manner in which he defended himself or his

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<sup>147</sup> *S v Engelbrecht* supra para 134-5 and 150.

<sup>148</sup> *Ibid.*

<sup>149</sup> Goosen, (note 13 above) 79.

<sup>150</sup> *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A)

<sup>151</sup> *Ibid* para 497.

property'.<sup>152</sup> The establishment of proportionality is a question of fact rather than of law as each case must be determined on its own merit.

### 3.5.2.2 . The duty to flee

The question that arises in this instance is whether an abused woman has a duty to flee the attack rather than defend herself by killing her abuser. It is argued that there is no duty on a person who is attacked to flee from harm rather than retaliate. This view point finds support from the case law.<sup>153</sup> In regards to battered women the court in *Engelbrecht* noted that by its very nature, domestic violence is 'concealed' and frequently confined to the privacy of the home.<sup>154</sup> The court was thus cautious about requiring the abused woman and her children to vacate her home leaving the abusive spouse in full occupation.<sup>155</sup> It was stated that;

'the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that an accused battered woman stayed in the abusive relationship. Still less is the court entitled to conclude that she forfeited her right to self-defence for having done so.'<sup>156</sup>

While it could be said that the battered woman could have left the abusive relationship, the law does not require the abused woman to leave her home.<sup>157</sup> To require a battered woman to flee, 'is a negation of the whole essence of private defence which deals...with the upholding of justice ... not a capitulation to injustice'.<sup>158</sup> Thus, the approach of our law ought to be 'that the question of whether or not the battered woman could or should have retreated is merely one of the issues to be taken into account when assessing whether the abused woman's defensive act was allowed by law'.<sup>159</sup>

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<sup>152</sup> Burchell (see note 25 above) 243.

<sup>153</sup> See *Zikalala* 1953 (2) SA 568 (A) at 572.

<sup>154</sup> *S v Engelbrecht* supra para 135.

<sup>155</sup> *S v Engelbrecht* supra para 135.

<sup>156</sup> *Lavallee* supra at 356.

<sup>157</sup> Goosen, (note 13 above) 74.

<sup>158</sup> Snyman (note 17 above) 107.

<sup>159</sup> Burchell and Milton (see note 25 above) 239.

### 3.6. Putative Private Defence

It is trite that, ‘if an abused woman intentionally kills her abuser in circumstances that do not satisfy the requirements of self-defence whilst under the bona fide but mistaken belief that she is entitled at law to kill under those circumstances, she will fail in raising self-defence as a justification’.<sup>160</sup> This is so because her conduct will be unlawful as it would have failed to meet the requirements of private defence. It can however, be argued that the battered woman’s defence in these circumstances may be classified as putative private defence. In terms of which the battered woman may not be found guilty of murder if she can prove that she had a genuine but mistaken belief that she was acting lawfully when she killed her abuser.<sup>161</sup> In the case of *S v De Oliveira*,<sup>162</sup> the court held that putative private defence can be used by an accused ‘who honestly believes his life is in danger, but objectively viewed it is not’.<sup>163</sup> This honest but incorrect belief would eliminate the necessary intention to commit such an unlawful act and it therefore negates the intention and the conduct of the accused is thus excused.

#### 3.6.1 Elements of putative private defence

The main element of putative private defence is that an accused person should have honestly believed that she was acting in private defence, but that she (a) mistakenly held that belief; and (b) exceeded the bounds of private defence.<sup>164</sup> It is then submitted that, ‘where the accused genuinely believes that a defence excluding unlawfulness exists (*but it does not*) or the accused honestly thinks that she is entitled to use such force as she did (*but she is not*), then the accused is said to lack fault in the form of intention’.<sup>165</sup> It is submitted that the most important requirement of putative private defence is that the accused honestly believed that she was acting in private defence. This is so because an accused who is aware that she is acting unlawfully, or foresees that she could be acting unlawfully, including by being aware or foreseeing that she may be exceeding the bounds of private defence, cannot meet the elements of this defence and can be convicted of murder.<sup>166</sup>

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<sup>160</sup> Reddi (note 7 above) at 275.

<sup>161</sup> Reddi (note 7 above) at 275.

<sup>162</sup> *S v De Oliveira* 1993 (2) SACR 59 A.

<sup>163</sup> *Ibid* at 163i-j.

<sup>164</sup> JM Burchell *South African Criminal Law and Procedure Volume 1*. 3<sup>rd</sup> ed (1997) 265.

<sup>165</sup> Singh. (note 6 above) 104.

<sup>166</sup> CR Snyman *Criminal Law* 4<sup>th</sup> ed (2002) 112.

### 3.6.2. Discussion of Putative private defence

Putative private defence can be differentiated from private defence since private defence excludes the unlawfulness of the actors conduct whilst putative private defence may exclude intention on part of the accused.<sup>167</sup> This principle is confirmed by the court in *S v Naidoo*,<sup>168</sup> where the court found that putative private defence excludes intent as the defender does not have knowledge of the unlawfulness as required by the unlawfulness requirement.<sup>169</sup> In the same vein the court held that in a putative private defence claim, the test for intention is subjectively assessed. It important to note that, the focus of attention in ascertaining whether or not intention existed is the woman's subjective state of mind. The fact that her belief may have been unreasonable or even foolish under the circumstances is of no consequence at all as this enquiry does not concern itself with what a reasonable person would have done under the same circumstances.<sup>170</sup> Thus, in the absence of intention, a charge of murder will fail.

The defence of putative private defence does not exclude unlawfulness but it looks at the blameworthiness of the defendant. The defendants 'honest but erroneous belief that his life or property was in danger may exclude dolus'.<sup>171</sup> In the case of *De Oliveira* the court noted that, 'in putative private defence it is not lawfulness that is in issue but culpability'.<sup>172</sup> However, it is important to note that the fact that a battered woman who kills does not have intention may not save her from possibly being convicted of culpable homicide.<sup>173</sup> This is because negligence, not intention, is the fault element required for a culpable homicide conviction.<sup>174</sup>

Reddi submits that the abused woman will not necessarily escape liability and she notes that:

'this does not save the accused woman from possibly being convicted of culpable homicide. This is because negligence, not intention, is the fault element required for a culpable homicide conviction. To establish liability for this crime the test is whether the reasonable person would have foreseen that the remedy of self-defence was not lawful. The position at law is that if a reasonable person would have foreseen that the resort to self-defence was unlawful, then the

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<sup>167</sup> Reddi (note 7 above) 275.

<sup>168</sup> *S v Naidoo* 1997 (1) SACR 62 (T).

<sup>169</sup> *Ibid.*

<sup>170</sup> Reddi (note 7 above) 275.

<sup>171</sup> *S v De Oliveira* supra at 60.

<sup>172</sup> *Ibid.*

<sup>173</sup> Reddi (note 7 above) 275.

<sup>174</sup> *Ibid.*

accused is negligent for failing to foresee this. She would accordingly be guilty of culpable homicide.<sup>175</sup>

However, it is submitted that the ‘social framework or circumstances that may have impacted on the woman's conduct would have a bearing on the determination of the woman's culpability’.<sup>176</sup> Evidence of the ‘cyclical nature of abuse’ as well as the woman's failed attempts at leaving her abuser would be highly relevant to inform putative self-defence.<sup>177</sup> Thus, Reddi opines that, ‘if the extraordinary circumstances of the accused would not have foreseen that the resort to self-defence was unlawful, then the abused woman cannot be expected to have such foresight’.<sup>178</sup> In such circumstances ‘her lack of foresight would not be regarded as negligent and a charge of culpable homicide would fail’.<sup>179</sup>

### **3.6. Conclusion**

Battered women who kill in non-confrontational circumstances have always found it extremely difficult to prove the requirements of private defence, as courts typically interpret the imminence element narrowly and assume that unless the attack is immediately threatened, the victim can simply leave or turn to law enforcement to stop it.<sup>180</sup> This despite the fact that, the private defence law was developed to allow a person to defend him or herself against an unlawful attack or one imminently threatened when she or he has no other alternative to avoid it.<sup>181</sup>

Even though this chapter was not an exhaustive discussion of the law relating to private defence it has managed to lay the foundational basis and all the requirements of the defence. It has been established that for a battered woman who kill her abuser in non-confrontational circumstances to successfully rely on private defence she has to comply with all the requirements of private defence. It can be argued that the judgment in *Ferreira* can be regarded as a relief for battered women who kill their abusers in non-confrontational

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<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> See H Ludsin ‘Legal Defences for Battered Women Who Kill Their Abusers: Discussion Document 1’ (2003) Centre for the Study of Violence and Reconciliation chapter 4.

<sup>181</sup> CR Snyman *Criminal Law* (2002) 102.

situations. This is so because the judgment brought them closer to the goal of having their experiences included within criminal defence law and sentence mitigation and begins to correct some of the existing gender bias in criminal law.<sup>182</sup>

It is submitted that, ‘despite the murder conviction in *Engelbrecht*, the judgment of that court, together with the majority judgment of the SCA offer indications of the attitude of our judiciary towards instances of intimate killings arising from abuse’.<sup>183</sup> It is Reddi’s further submission that;

‘the judgments of *Engelbrecht* and *Ferreira* signify an unequivocal acknowledgment that the impact of abuse on an accused woman will be an important factor in determining that accused’s blame-worthiness. In addition, both judgments indicate judicial recognition of the gendered nature of the law, and the need for the eradication of this feature if the right to equality and equal treatment before the law is to be respected.’<sup>184</sup>

The judgments provide an illustration of how innovative the South African judiciary is prepared to be in order to achieve the above goals.

It is important to note that in cases involving domestic violence, the threat of violence is ever-present and the accused reasonably knows that further violence is inevitable. This should be one of the basis on which the imminence of the attack requirement is analysed. Some academics have suggested that victims of battered woman syndrome ought to be allowed to pre-empt the anticipated and inevitable attack of the abusive spouse, and it would appear as if South African courts are moving in that direction.<sup>185</sup> This development comes about as the law acknowledges that spouses in abusive relationships are able to identify the behaviour which usually precedes the physical attacks by their abusers.<sup>186</sup> It thus can successfully be argued that the courts have taken cognisance of the fact that it will defy logic if the battered woman is required to wait until the abuser has struck first before taking retaliatory measures.<sup>187</sup> Burchell submits that, ‘if the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary

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<sup>182</sup> Ludsin (note 87 above) 652.

<sup>183</sup> Reddi (note 88 above) 36.

<sup>184</sup> *Ibid.*.

<sup>185</sup> Goosen (note 13 above) 75.

<sup>186</sup> Ludsin (note 87 above) 642.

<sup>187</sup> Snyman. (note 17 above) 106.

for effective protection'.<sup>188</sup> Thus it can be argued that battered woman 'ought to be allowed to pre-empt the anticipated and inevitable attack of the abusive partner'.<sup>189</sup>

The traditional requirement that the threat must be imminent or must have commenced is extremely problematic for a battered woman who kills her abuser. This is so because a battered woman is not allowed to respond to an attack once it had ceased nor may she take a pre-emptive step in anticipation of being attacked by the abuser at some future point.<sup>190</sup> If that is the case her actions are seen as being vengeful and retaliatory. It can be concluded that that the traditional requirement of imminence does not adequately cater for battered women's situations,<sup>191</sup> this is so because traditional requirement is very narrowly interpreted and this limits the essential scope of private defence.

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<sup>188</sup> Burchell (note 25 above) 234.

<sup>189</sup> *Ibid.*.

<sup>190</sup> S Krause. *Defences available to battered women who kill their abusers: a comparative analysis*. (Unpublished PhD thesis, UKZN, 2009) 102.

<sup>191</sup> The act of the accused in such cases does not meet the conventional requirements of the law namely, that the accused reasonably believed that at the time of the killing, the deceased was about to harm or kill her. See Singh (note 6 above).

## CHAPTER FOUR

### 4. **Battered woman syndrome and the law of self-defence in the United States of America**

#### 4.1. **Introduction**

Reddi<sup>192</sup> submits that the, ‘approaches of other legal jurisdictions towards intimate killings reveals that some of them, though aspiring to develop a jurisprudence that acknowledges the experiences of abuse survivors, are still struggling to do so as result of the introduction of the concept of ‘battered woman syndrome’ into the arena of legal decision-making’.<sup>193</sup> It is against this background that this dissertation employs a comparative analysis of the BWS and the self-defence law in the United States with a specific reference to South Africa. Therefore, this chapter seeks to provide a discussion on the development self-defence law in the United States for battered women with a specific focus being placed on the main elements of self-defence, and also on the type of tests utilised, which for the purposes of this dissertation are limited to the objective and the subjective tests. It is important to note that for the purposes of this research the main focus will be placed on the elements of imminence, proportionality and duty to retreat when assessing self-defence claims.

#### 4.2. **Battered Woman Syndrome and the law of self-defence**

It is trite that the use of the BWS expert evidence in murder trials of women who kill their abusers in non-confrontational circumstances predominates in the United States of America.<sup>194</sup> BWS has most often been recorded and utilised in America and it has also been generally characterised in the American courts as a sub-category of PTSD.<sup>195</sup> As a result battered women who kill their partners in non-confrontational circumstances and raise the BWS to enhance the plea of self-defence have received a degree of legitimacy and acceptance in the American courts.

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<sup>192</sup> Reddi (note 88 above) 232.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid 261.

<sup>195</sup> See *Commonwealth v Crawford* 429 Mass 60, 66-67 (1999); *Commonwealth v Grimshaw* 412 Mass 505, 506 (1992) cited in Reddi (note 88 above) 259-279.

The admissibility of BWS as expert evidence was first reviewed by an appeal court in *Ibn-Tamas v. United States*,<sup>196</sup> in 1979. The court a quo ruled that expert evidence of BWS was detrimental as it interfered with the jury's fact-finding function, as a result the court refused to admit it.<sup>197</sup> The matter went on appeal where the appeal court found that BWS expert evidence could inform the jury about the battered woman's possible state of mind as a victim of domestic abuse.<sup>198</sup> This in turn would help the battered woman to gain credibility in the eyes of the jury, thus making her claim that she believed her husband would kill her and she had no alternative but to act in self-defense more plausible.<sup>199</sup> After *Ibn-Tamas v. United States* most American jurisdictions generally accepted BWS expert evidence in battered women's self-defence claims.<sup>200</sup>

It is important to note that contrary to popular beliefs, BWS is not a justification ground or an excuse for murder in terms of the American law.<sup>201</sup> Rather, the BWS is applied within the realms of the self-defence claims where a battered woman has attacked and killed her abuser in non-confrontational circumstances, and expert testimony describing the effects of battering on a woman's mental state helps the jury understand the defendant's perception that she was in imminent danger of death or bodily harm.<sup>202</sup> The BWS expert evidence is also led to demonstrate that, 'the recurrent abuse heightened the woman's apprehension of danger and added to the belief that her only means of escape was through the use of force'.<sup>203</sup> Even though expert evidence of BWS is usually introduced to explain the battered woman's state of mind at the time of the commission of the offence, most American courts have held that

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<sup>196</sup> *Ibn-Tamas v. United States* 407 A.2d 626 (D.C. 1979).

<sup>197</sup> *Ibid Ibn-Tamas* at 632.

<sup>198</sup> *Ibid Ibn-Tamas* at 634-35. In this case the court reasoned that 'the expert witness could explain the effects that a history of being subjected to battering and abuse may have on a battered woman's mental state, and would have supplied an interpretation of the facts which differed from the ordinary lay perception that a battered woman can freely get out of the relationship with her batterer'.

<sup>199</sup> *Ibid Ibn-Tamas* at 632. At paragraph 634-635, the court noted that 'expert testimony would provide background information that the jury could use to determine whether the defendant indeed perceived that there was a threat to her life. The court also accepted the suggestion that expert testimony might give weight to the defendant's claim of being unable to escape the relationship, on grounds attributable to her state of mind'.

<sup>200</sup> J Parrish 'Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal' (1996) 11(1) *Wisconsin Women's Law Journal* 75, 83. This is a summary of the results of a 1995 study, which showed that "expert testimony on battering and its effects was admissible, at least to some degree in all fifty states, the District of Columbia, and in most of the federal courts that had considered this issue".

<sup>201</sup> *Ibid* 78.

<sup>202</sup> *ibid* 78-79.

<sup>203</sup> DA Curhan 'Commonwealth v Conaghan, 433 Mass. 105 (2000): A flexible approach to BWS in the Massachusetts courts' (2003) (Battered Woman Syndrome Article 1-4.) Available at <http://www.angelfire.com/mn3/deadbydiabetes2/PDF/BatteredWomanSyndrome2.pdf>.

BWS is not a mental disease, defect or illness.<sup>204</sup> As a result, ‘attempts to fashion an insanity defence based on evidence of BWS have largely failed’.<sup>205</sup>

Despite the criticisms of the BWS, its use and acceptance by the American courts has significantly broadened the aspect of imminence in self-defence claims and have demonstrated that the traditional elements of self-defence, although rigid, can change over time.<sup>206</sup> The broader framework;

‘acknowledges that in many cases, both due to physiological and socialisation differences, a female simply cannot defend herself in the same manner as a male and even more specifically, that living in a battering situation for an extended period of time impacts on the individual's ability to act according to the way that 'a reasonable man' would behave.’<sup>207</sup>

It is important to note that the broadening of the interpretation did not in any way change the wording of self-defence.<sup>208</sup> However, even though the United States has a broad self-defence framework which has led to many battered women who kill their partners in non-confrontational circumstances to be acquitted, many women continue to be found guilty of murder or manslaughter.

#### **4.2.1. The Self-defence law**

Early American law followed the established English common law requirements of self-defence.<sup>209</sup> There were some changes here and there, but by the end of the 19<sup>th</sup> century, the principles of self-defence law in the American law were well established and the same principles are still being used till today.<sup>210</sup> The principle on which the American self-defence law is premised is that, ‘one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defence, should be able to take reasonable steps to

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<sup>204</sup> *Commonwealth v Conaghan* 433 Mass. 105 (2000) at 319.

<sup>205</sup> Reddi (note 88 above) 234.

<sup>206</sup> ME Veinsreideris ME "The Prospective Effects of Modifying Existing Law to Accommodate Pre-emptive Self-defence by Battered Women" (2000) 149(2) *University of Pennsylvania Law Review* 613.

<sup>207</sup> *Ibid* at 613.

<sup>208</sup> This is so despite the fact that American lawyers and BWS experts evidence have put in a lot of work to try and redefine the elements of self-defence to suit the actions of the BWS victim and place her actions against the norms of a battered woman who kill in non-confrontational circumstances.

<sup>209</sup> CE Klaffer 'The Americanization of Blackstone's Commentaries' in W Jones (ed) *Essays on English Law and the American Experience* (1994) 42.

<sup>210</sup> D McCord, SK. Lyons 'Moral Reasoning and the Criminal Law: The Example of Self-Defense' (1992) 30 *American Criminal Law Review* 97, 144.

defend himself'.<sup>211</sup> This means that self-defence can be a complete defence or an excuse to the charge of murder if the jury is of the opinion that the defendant, 'reasonably perceived imminent danger of great bodily harm or death and responded only with the force necessary to defend against that harm'.<sup>212</sup> Even though the American legal elements of self-defence differ from one state to the other,<sup>213</sup> the main common elements remain the same, which are that:

1. The defendant must have reasonably believed that there is a present or imminent danger of harm;
2. The use of force was necessary to prevent the harm; and
3. No more force was used than was reasonably necessary to defend against the threat of harm.<sup>214</sup>

#### **4.2.2. The tests for self-defence**

In the case of *State v Stewart*,<sup>215</sup> it was held that,

Our test for self-defence is a two-pronged one. We first use a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend. We then use an objective standard to determine whether the defendant's belief was reasonable - specifically, whether a reasonable person in the defendant's circumstances would have perceived self-defence as necessary.<sup>216</sup>

Thus it can be seen that there are at least two tests that a jury can use to determine whether the battered woman's claim of self-defence is plausible. We now in turn look at each of the tests in detail.

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<sup>211</sup> W LaFave & AW Scott. *Handbook on Criminal Law* (1972) 391.

<sup>212</sup> Ibid. It was argued that, "A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his person by such other person. The actor may intentionally use only such force or threat thereof as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death or great bodily harm unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself".

<sup>213</sup> In America there is no single law of self-defence, this so because the federal system allows each state to define and understand the law relating to those defences differently. It is against this background that this dissertation will consider only the general nature of self-defence law as a broad substantive topic.

<sup>214</sup> W Lafave. *Criminal Law* 3<sup>rd</sup> ed. (2000) 491.

<sup>215</sup> *State v Stewart*, 763 O.2d 572, 579 (Kan. 1988).

<sup>216</sup> Ibid at 579.

#### 4.2.2.1 The Objective test

Traditionally the majority of American states required an objective standard in terms of which the jury considered how an ordinary intelligent and prudent person in the position of the defendant under the circumstances existing at the time of the alleged offence would have responded.<sup>217</sup> The case of *Stewart*,<sup>218</sup> illustrates the use of an objective test where the court states that;

‘A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of an unlawful force. Such justification requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief. You must determine from the viewpoint of the defendant’s mental state, whether the defendant’s belief in the need to defend herself was reasonable in light of her subjective impressions and the facts and circumstances known to her.’<sup>219</sup>

The objective test requires that, ‘a reasonable person would have acted in the same way as the defendant had they been confronted with the same circumstances and that the force used was reasonable in those circumstances’.<sup>220</sup> It is submitted that this objective requirement gives rise to a question on how a jury determine whether an individual’s act is ‘objectively’ reasonable?<sup>221,222</sup> The case of *State v Cramer*,<sup>223</sup> helps answer this question where the court held that, ‘the unique perceptions of the battered woman as affected by battered women syndrome should not be taken into account in the objective test since this would change this test into a completely subjective test’.<sup>224</sup>

#### 4.2.2.2. The subjective test

Due to the limitations of the objective test the courts in the American different jurisdictions have adopted a subjective test. The subjective test was set out in the case of *State v*

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<sup>217</sup> *State v. Mendoza*, 80 Wis. 2d 122, 150, 258 N.W.2d 260, 272 (1977)

<sup>218</sup> *State v Stewart*, *supra*

<sup>219</sup> *State v Stewart*, *supra* at 579.

<sup>220</sup> *State v Cramer* 17 Kan. App 2d 623, 841 P.2d 1111 (1993).

<sup>221</sup> K J Heller. ‘Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases’ (1998) 26 *American Journal of Criminal Law* 1, 12.

<sup>222</sup> *ibid.*

<sup>223</sup> *State v Cramer* 17 Kan. App 2d 623, 841 P.2d (1993) at 1111.

<sup>224</sup> *Ibid.*

*Leidholm*,<sup>225</sup> where the court held that; The issue is not whether the circumstances attending the defendant's use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in a defendant an honest and reasonable belief that he must use force to defend himself.<sup>226</sup> Also in the case of *State v Daws*,<sup>227</sup> the court held that:

'In any case involving self-defence, the trier of fact is called upon to determine whether the defendant had an honest belief that she was in imminent danger of death or great bodily harm and that the use of force was her only means of escape. This test is subjective and the jury must consider the circumstances of the defendant and determine whether her actions are reasonable given those circumstances.'<sup>228</sup>

The subjective test requires the jury to evaluate a plea of self-defence in the context of a battered woman's situation.<sup>229</sup> This entails considering the history of battering and taking into account the abusive relationship as evidence to be presented at the trial.<sup>230</sup> Thus,

'A defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.'<sup>231</sup>

### **4.3. Discussion of the legal elements of self-defence**

#### **4.3.1. The imminence requirement**

The debate around the imminence requirement usually arises in cases where the battered woman kills her partner in non-confrontational circumstances, like when the abuser is sleeping or walking away. The element of imminent or immediate danger gives rise to a more fundamental problem with the battered woman's plea of self-defence. For a battered woman relying on a self-defence claim, she has to prove that she 'perceived a threat of imminent

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<sup>225</sup> *State v Leidholm* 334 N.W. 2d 811 (N.D. 1983).

<sup>226</sup> *Ibid* at 818.

<sup>227</sup> *State v Daws* 104 Ohio App. 3d 448, 662 N.E. 2d 805 (1994).

<sup>228</sup> *Ibid* at 810-811.

<sup>229</sup> Krause (note 190 above) 181.

<sup>230</sup> *Ibid*.

<sup>231</sup> *State v Hazlett* 16 N.D. 426, 113 N.W. 37 4 (1907).

harm from her abuser which required defensive action'.<sup>232</sup> It has been submitted that imminent harm means more than fear and that the attacker is in the process of the attack, the defender is thus in immediate danger and strikes back in self-defence.<sup>233</sup> The question that then arises is, 'what exactly is meant by the term imminent harm and whether this term adequately provides for situations in which battered women find themselves in'.<sup>234</sup> Also, in the case of *State v Hundley*,<sup>235</sup> the court was faced with a question as to whether 'imminent harm' was the same as 'immediate harm'. In answering this question the appeal court held that, 'imminent is a broader and a more inclusive term than immediate and that a jury focusing on imminent harm will not necessarily be bound by the time limitations that are associated with the immediacy requirement'.<sup>236</sup> The appeal court went further and stated that;

'...we can see the use of the word "immediate" in the instruction on self-defence places undue emphasis on immediate action of the deceased, and obliterates the nature of the build-up of terror and fear which had been systematically created over a long period of time; "imminent" describes the situation more accurately. ...An aggressor who is customarily armed and gets involved in a fight may resent an imminent danger, justifying the use of force in self-defence, even though the aggressor is unarmed on the occasion. There may be no immediate danger, since the aggressor is in fact unarmed, but there is a reasonable apprehension of danger. In other words, the law of self-defence recognizes that one may reasonably fear danger but be mistaken.'<sup>237</sup>

In a landmark ruling on the imminence requirement the Washington Supreme Court in the case of *State v Wanrow*,<sup>238</sup> stated that, 'it is clear that the jury is entitled to consider all of the circumstances surrounding the incident in determining whether the defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted'.<sup>239</sup> This can be taken to mean that the battered woman would have reasonably believed that she was in immediate danger.

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<sup>232</sup> Krause (note 190 above) 194.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> *State v Hundley* 236 Kan 461, 693 P. 2d 475 (1985). In this case 'the defendant had endured ten years of abusive marriage. Abusive acts included her husband diluting her insulin medicine, choking her into unconsciousness, harassing her and threatening to kill her and members of her family. When she eventually left her abuser, he tracked her down to a motel where she was staying. He broke the door down and raped her. He then pounded a beer can on the nightstand next to her bed and demanded she buy him cigarettes. Instead she killed him with a gun she had purchased previously for her protection'.

<sup>236</sup> R S Ogle and S Jacobs. *Self-Defense and Battered Women who Kill: A New Framework* (2002) 93.

<sup>237</sup> *State v Hundley* supra at 478-479.

<sup>238</sup> *State v Wanrow* 88 Wn.2d 221, 559 P.2d 548, 1977 Wash. 750.

<sup>239</sup> Ibid at 236.

It is submitted that the reasonable perception is based on the reasonable perception of a battered woman and not the reasonable perception of someone else who is not a battered woman.<sup>240</sup> Ogle and Jacobs,<sup>241</sup> opines that ‘the battered woman learn to distinguish subtle changes in the tone of the defendant’s voice, facial expression, and levels of danger and is therefore in a position to know, with greater certainty than someone attacked by a stranger, that the abuser’s threats are real and will be carried out’.<sup>242</sup> Also, the Oklahoma Court of Criminal Appeals in the case of *Bechtel v State*,<sup>243</sup> recognised that, ‘because of her intimate knowledge of the batterer, the abused woman perceives danger more quickly and accurately than others would and is more acutely aware that a new or escalated violent episode is about to occur’.<sup>244</sup>

It is submitted that due to the constant abuse and BWS effects, the battered woman is living in a constant state of fear and will be convinced that her spouse will kill her one day and as a result she becomes constantly and extremely vigilant. Thus, a defendant's prior experience with the victim, or knowledge of his violent behaviour, may influence his perception of imminence and danger. In such a case the immediacy of danger is constant and it can be argued that;

‘...It is the defendant's state of mind and sense of fear which is critical to a justification defence. In this regard, proof of violent acts previously committed by the victim against the defendant as well as any evidence that the defendant was aware of specific prior violent acts by the victim upon third parties is admissible as bearing upon the reasonableness of the defendant's apprehension of danger at the time of the encounter.’<sup>245</sup>

Thus it is submitted that, in a battering situation, violence is always a strong possibility, the threat is always there, even during the ostensible lulls.<sup>246</sup> It can be argued that ‘the women in these cases are not alleging that because they are battered that they have the right to kill, but that because of the history of violence in the relationship, they become sensitive to cues from the batterer that generate a feeling or belief of imminent danger’.<sup>247</sup>

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<sup>240</sup> Krause (note 190 above) 194.

<sup>241</sup> Ogle and Jacobs (note 236 above) 451.

<sup>242</sup> *Ibid.*.

<sup>243</sup> *Bechtel v State* 840 P.2d 1 (Okla Crim App 1992) at 28

<sup>244</sup> *Ibid* at 28.

<sup>245</sup> J Blackman. *Intimate Violence* (1989) 188-9. cited in P Eastal. ‘Battered women who kill: a plea of self-defence.’ (1991) *Women and the law: proceedings of a conference* 40.

<sup>246</sup> *Ibid.*

<sup>247</sup> R Thyfault, C Bennett & R Hirschhorn ‘Battered Women in Court: Jury and Trial’ in D Sonkin (ed) *Domestic Violence on Trial*. (1987) 59.

#### **4.3.2. The proportionality requirement**

It is trite that a battered woman's self-defence claim may only succeed if the degree of force she used to kill her abuser was reasonably related to the degree of harm threatened.<sup>248</sup> As a result, proof that a battered woman used more force than necessary to protect herself will undermine her claim of self-defence.<sup>249</sup> The test to decide if the force used was reasonable is 'whether the force used in defence was reasonably related to the threatened harm which he seeks to avoid.'<sup>250</sup>

Battered women accused of killing their abusers have almost invariably used deadly force - that is, force which is intended to cause death or grievous bodily harm.<sup>251</sup> In terms of the proportionality requirement, 'deadly force is not justified unless the abused woman reasonably believed that her abuser was about to kill her or inflict grievous bodily harm'.<sup>252</sup> Thus the proportionality requirement serves as another way in which traditional self-defence law requires the defendant's acts to be objectively reasonable.<sup>253</sup> Lee opines that 'the proportionality requirement is concerned not only with the means of force or the instrument of force, it is also concerned with the degree of force and the gravity of the harm threatened'.<sup>254</sup>

The focus of this requirement is that amount of force used to ward off the attack must be reasonable. In the case of *State v Wanrow*,<sup>255</sup> which dealt the issue of whether a battered woman could use a weapon to defend herself if the abuser is not armed? The court held that in order to fight equally with a man, a woman may need to resort to the use of a weapon. It can be argued that, 'in establishing self-defence, the battered woman who kills her batterer in a non-confrontational situation must demonstrate not only that she reasonably believed that an attack was forthcoming but also that she reasonably believed that deadly force was necessary and proportionate to the impending attack'.<sup>256</sup>

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<sup>248</sup> Krause (note 190 above) 200.

<sup>249</sup> Ibid.

<sup>250</sup> LaFave (note 214) 540.

<sup>251</sup> Krause (note 190 above) 200.

<sup>252</sup> K Kinports. 'Defending Battered Women's Self-Defense Claims' (1988) *Oregon Law Review* 393, 451-452.

<sup>253</sup> C Lee. 'The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification' (1998) 2(191) *Buffalo Criminal Law Review* 192, 204.

<sup>254</sup> Ibid 203.

<sup>255</sup> *State v Wanrow* supra.

<sup>256</sup> Krause (note 190 above) 198.

In considering the proportionality requirement and the use of a weapon against an unarmed attacker, the court in *Reeves*,<sup>257</sup> held that; ‘It is a firmly established rule that the aggressor need not have a weapon to justify one’s use of deadly force in self-defence ... and that a physical beating may qualify as such conduct that could cause great bodily harm’.<sup>258</sup> This approach is more appropriate when considering the battered woman’s size, strength or physical condition compared to that of the abusive partner. It is against this background that the Oklahoma Criminal Court of Appeals noted that,<sup>259</sup>

‘It cannot be said to be true in all cases where fists are used in making an attack upon another that the person attacked would not be legally justified in the use of a deadly weapon...There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon. It is conceivable that a man might be so brutal in striking a woman with his fists as to cause her death.’<sup>260</sup>

#### **4.3.4. Duty to retreat**

It is trite that a battered woman does not have to retreat even where she can do so in safety,<sup>261</sup> before using deadly force against the abusive partner whom she reasonably thought would kill her or cause her grievous bodily harm. This is so because, if retreat is to be preferred over the use of deadly force, then it could be argued that alternative steps which could terminate the dangerous encounter should likewise be required in instead of self-defence with deadly force.<sup>262</sup>

The question that arises when applying the duty to retreat element is ‘whether a battered woman faced with a deadly assault should be obliged to flee if it is safe to do so rather than resort to deadly force in self-defence’. In answering this question LaFave opines that,

‘The majority of American jurisdictions holds that the defender ... need not retreat, even though he can safely do so, before using deadly force upon an assailant whom he reasonably

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<sup>257</sup> *People v Reeves* 47 Ill. App.3d 406 (Ill. App. Ct. 1977).

<sup>258</sup> *Ibid.*

<sup>259</sup> *Easterling v State*, 267 P. 2d 185, 188 (Okla, Crim, App, 1954)

<sup>260</sup> *Ibid.*

<sup>261</sup> Krause (note 190 above) 198.

<sup>262</sup> *Ibid* 199.

believes will kill him or do him serious bodily harm. A strong minority, however, holds that he must retreat ... before using deadly force, if he can do so in safety.<sup>263</sup>

#### 4.4. Conclusion

The difficulties encountered by American battered women in meeting a strict standard of self-defence led to the introduction of BWS expert evidence to assist the jury in understanding the context and circumstance in which the crime was committed.<sup>264</sup> However the self-defence claim in non-confrontational circumstances, even with the introduction of expert testimony remains questionable and creates a challenge as to whether self-defence is indeed the option.<sup>265</sup> As a result, many theorists have noted that battered women are ‘stretching the boundaries of self-defence beyond its acceptable limits’.<sup>266</sup> To counter this argument, this research argues that self-defence was designed to protect the sanctity of human life, and that it will not be abused since there are strict guidelines and requirements of necessity, proportionality and imminence, which limit the urge of resorting to self-help.<sup>267</sup>

It has been submitted above that self-defence may either be an excuse or a justification ground for the charge of murder and in dealing with the legal requirements of self-defence, the courts agree that the significant question is that of the reasonableness of the conduct and beliefs of the accused.<sup>268</sup> Thus the court in the case of *Leidholm*,<sup>269</sup> noted that; ‘the decisive issue under our law of self-defense is not whether a person’s beliefs are correct, but rather whether they are reasonable and thereby excused or justified’.<sup>270</sup> Singh submits that, each of the conditions of self-defence is evaluated against a standard of reasonableness. In assessing this requirement of reasonableness, ‘the courts have evolved a hybrid standard of subjective factors and objective evaluations which take cognisance of the exigencies of the milieu of the accused, whilst maintaining a norm for objectivity’.<sup>271</sup> It is also important to note again that

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<sup>263</sup> LaFave (see note 214) 547.

<sup>264</sup> Krause (note 190 above) 202.

<sup>265</sup> Ibid 203.

<sup>266</sup> S Smith. ‘Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response’ (1993) 42(1) *Catholic University Law Review* 141, 158-159.

<sup>267</sup> Ibid.

<sup>268</sup> GP Fletcher ‘The Right and the Reasonable’ (1985) 98 *Harvard Law Review* 949, 980.

<sup>269</sup> *State v Leidholm* 334 N.W.2d 811, 814 (N.D. 1983)

<sup>270</sup> Ibid at 181.

<sup>271</sup> Singh (note 6 above) 173.

the BWS is not recognised as a separate defence in the United States. The California Court of Appeals in *Romero*,<sup>272</sup> case cleared the misconception when it held that;

‘There nevertheless still exists a misconception by some lawyers and judges that there is a defense called ‘battered woman syndrome’ giving women who are battered some unique right simply because they are battered. This is not the law in California or, as far as we can tell, anywhere else.’<sup>273</sup>

Also, one of the important requirement which limits the abuse of the self-defence plea by battered women is that before resorting to killing the abuser, the battered woman must not only must be confronted with an imminent threat, but also that the perception of the threat must be a reasonable one. It is against this background that the court discussed the implications of this traditional understanding in respect of battered women:<sup>274</sup>

‘For the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent. Based on the traditionally accepted definition of imminence and its functional derivatives a battered woman, to whom a threat of serious bodily harm or death always imminent would be precluded from asserting the defense of self-defense... Thus... an abused woman may kill her mate during the period of threat that precedes a violent incident, right before the violence escalates to the more dangerous levels of an acute battering episode. Or, she may take action against him during a lull in an assaultive incident, or after it has culminated in an effort to prevent a recurrence of the violence. And so, the issue is not whether the danger was in fact imminent, but whether, given the circumstances as she perceived them, the defendant’s belief was reasonable that the danger was imminent.’<sup>275</sup>

As discussed above, it can successfully be argued that, ‘a defensive action by a battered woman results from a perception of the imminence of the coming harm’.<sup>276</sup> This is so because, ‘in the time leading up to the killing of her abusive spouse, a battered woman has a heightened sense of danger but she does not necessarily wish to murder her spouse’.<sup>277</sup> Thus a, ‘a battered woman’s reasonable perception of imminent danger drives her to take pre-emptive action before the abuser has an opportunity to inflict significant physical harm, and

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<sup>272</sup> *State v Romero* 13 Cal. Rptr. 2d 332, 337 (Cal. Ct. App. 1992).

<sup>273</sup> *Ibid.*

<sup>274</sup> *Bechtel v State* 840 P.2d 1 (Okla Crim App 1992)

<sup>275</sup> *Ibid* 12.

<sup>276</sup> L Walker. ‘Battered Women Syndrome and Self-Defense’ (1992) 6(2) *Notre Dame Journal of Law, Ethics & Public Policy* 321, 324.

<sup>277</sup> Walker LE ‘Battered Women as Defendants’, in Zoe HN (ed.) *Legal Responses to wife Assault: Current Trends and Evaluation* (1993) 324.

is thus a critical component of her self-defense claim'.<sup>278</sup> It is submitted that a battered woman does not kill her attacker purely in response to a threat; she evaluates the threat through the lens of the battering relationship and concludes that she is facing imminent harm.<sup>279</sup> This dissertation argues that a battered woman kills her abusive partner only because she has a strong belief that her life is in danger. As a result a degree leniency, legitimacy and acceptance have been shown in the American courts when deciding on her case.

Another requirement of self-defence is that force used in defence must have been reasonable to the harm threatened. However, it has been argued that it is not required that the defence be proportional to the attack in the sense that fists should only be met with fists and guns always met with guns.<sup>280</sup> Singh submits that in this regard, the American law has shown itself to be sufficiently flexible enough to adapt to the specificity of the circumstances and position of the accused.<sup>281</sup> Singh further submits that in deciding the reasonableness of the battered woman's action most states in America have acknowledged that the lived realities of battered women and the effects of domestic violence are beyond the ordinary knowledge and understanding of the average person. As a result, 'expert evidence has been allowed to assist in the understanding of the dynamics of intimate abuse and to provide contextual reference to why the conduct of a battered woman accused may be regarded as reasonable'.<sup>282</sup>

It can be argued that while the courts struggled to define BWS and set parameters for its use in the trial courts, the Massachusetts Supreme Judicial Court in the case of *Commonwealth v Conaghan*,<sup>283</sup> rightly refused to adopt a single, arbitrary definition or a single set of arbitrary criteria for the admission of evidence on the subject.<sup>284</sup> Instead, the court embraced a more flexible approach, leaving the initial evaluation to the experts. The advantage of this stance is that it is able to accommodate change in the definition of BWS by granting to accused women the opportunity to present expert evidence suited to their individual circumstances.<sup>285</sup> This, it can be argued will allow the trial courts to make fair and accurate decisions.<sup>286</sup>

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<sup>278</sup> Walker (note 276 above) 324.

<sup>279</sup> Walker (note 277 above) 326.

<sup>280</sup> Singh (see note 6 above) 175.

<sup>281</sup> *Ibid* 174.

<sup>282</sup> *Ibid* 175.

<sup>283</sup> *Commonwealth v Conaghan*, 433 Mass 105, 110 (2000).

<sup>284</sup> Curhan (note 203 above) 3.

<sup>285</sup> Reddi (note 88 above) 265.

<sup>286</sup> Curhan (note 203 above) 3.

It is also important to note that, the Supreme Judicial Court in the case of *Commonwealth v. Crawford*,<sup>287</sup> recognised the need for a ‘more flexible approach in which an BWS expert examines each woman in light of her individual experiences, determines her particular mental state as a battered woman" and presents those findings to the court’.<sup>288</sup> This can be regarded as a step in the right direction which was also endorsed by the court *Conaghan*, were the court neither endorsed nor rejected her claims, but simply held that a decision could not be made without expert guidance.<sup>289</sup>

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<sup>287</sup> *Commonwealth v. Crawford*, 417 Mass.358 (1994) 629 N.E2d 1332 at 66.

<sup>288</sup> Curhan (note 203 above) 3.

<sup>289</sup> *Commonwealth v. Conaghan* supra 110.

## CHAPTER FIVE

### 5. Conclusion

#### 5.1 Introduction

This dissertation has looked at the traditional law governing private defence and its development in South Africa and the United States of America. It has been argued that the traditional elements of private defence in terms of South African law can present a number of challenges and complex legal hurdles for a battered woman who kills her abuser in non-confrontational circumstances. As a result many battered women who have been charged with murder and raised private defence as a justification ground have been found guilty because their claims did not meet the traditional parameters of private defence laws. It has also been argued that the traditional interpretation of the private defence law has since time immemorial failed to take into account the circumstances created by intimate violence and abuse.

The law of private defence is firmly established and well-defined in South Africa unlike in other jurisdictions. However, due to the high prevalence rate of domestic violence, a high number of battered women who kill their abusers especially not in the midst of a confrontational has arisen. This gave rise to a question of whether the private defence law in its current formulation and application responds adequately and effectively to the different circumstances of battered women who kill after having been exposed to domestic violence that was inevitable. Singh submits that ‘having regard to the definitional requirement of private defence in South Africa and comparing them with the requirements of self-defence in the United States of America one may reasonably state that the doctrinal framework of the South African law is sound’.<sup>290</sup> This is so because the South African courts may have adopted a much flexible approach to the application of the private defence requirements when dealing with abused women as evidenced by the judgments of *S v Steyn*<sup>291</sup> and *S v Engelbrecht*,<sup>292</sup> particularly when the court interpretation of the imminent element and by taking cognisance of the circumstances of abuse women.

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<sup>290</sup> Singh (note 6 above) 269.

<sup>291</sup> *S v Steyn supra*.

<sup>292</sup> *S v Engelbrecht supra*.

## 5.2. Discussion

The BWS has been raised in many American cases since 1979 and as a result it has since been increasingly accepted and admitted by the American appeal courts. One of the reasons why reliance on BWS by battered women gained prominence was because the private defence laws were generally unresponsive to situations faced by female victims of domestic violence, and its frequent use in self-defence claims has made it a valid point of reference in discussing the legal requirements of self-defence.<sup>293</sup> However, it is important to note that the reliance on BWS by battered women who kill has come under severe criticism in the American courts. However, the raging bone of contention and debate in America as to what really constitutes BWS and how expert evidence should be led at a trial received some direction from the case of *Commonwealth v Conaghan*,<sup>294</sup> where the court, ‘refused to adopt a single arbitrary definition or a single set of arbitrary criteria for the admission of evidence on the subject’.<sup>295</sup> Instead, the court embraced, ‘a more flexible approach, leaving the initial evaluation to the experts’.<sup>296</sup> Reddi opines that, ‘the advantage of this stance is that it is able to accommodate change in the definition of BWS by granting accused women the opportunity to present expert evidence suited to their individual circumstances’.<sup>297</sup>

It is important to note that an attack on a battered woman need not be an ongoing cycle of abuse or a prolonged abuse but as noted in the case of *Engelbrecht* that ‘the unlawful attack against which the accused defends herself or others may be one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment’.<sup>298</sup> It is submitted that this explanation is in line with the Domestic Violence Act’s definition of domestic violence as enshrined in Section 1.<sup>299</sup> The South African courts should consider the accused’s woman circumstances and also take into consideration the difficulty that the abused woman faced in extricating herself from this position.<sup>300</sup> It is important to note that some academics have put forward the argument that when looking at the imminence requirement regard should be to

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<sup>293</sup> Singh (note 6 above) 269.

<sup>294</sup> *Commonwealth v Conaghan* supra.

<sup>295</sup> Curhan (note 203 above) 3.

<sup>296</sup> Ibid.

<sup>297</sup> Reddi (note 7 above) 265.

<sup>298</sup> *S v Engelbrecht* supra para 133.

<sup>299</sup> Section 1 of the Domestic Violence Act, No 106 of 1998.

<sup>300</sup> Krause (note 190 above) 292.

the fact that from the battered woman's point of view the danger is always imminent.<sup>301</sup> Thus it can be submitted that, 'the fact of her lived reality is that the threat of violence is ever-present and the attack always remains on foot'.<sup>302</sup>

The recent landmark court decisions in the cases of *S v Ferreira*,<sup>303</sup> *S v Engelbrecht*<sup>304</sup> and *S v Steyn*,<sup>305</sup> seems to suggest that the South African judiciary is mindful of the shortcomings of the different approaches adopted in other jurisdictions and has itself espoused an approach to intimate killings by abuse survivors that may offer some elucidation to those jurisdictions still wrestling with the issues mentioned.<sup>306</sup> It is submitted that even though there have been calls for the abolition of the imminence requirement, the traditional element of private defence in the South African law should remain in force. This will enable the courts to distinguish legitimate private defence cases from the illegitimate ones at the edges of private defence law will be blurred in order to defend the accused woman's.<sup>307</sup>

It has been argued in chapter 3 that the basic idea underlay private defence is that a battered woman is allowed to 'take the law into her own hands', as it were, only if the ordinary legal remedies do not afford her effective protection.<sup>308</sup> It is Synman's submission that private defence deals 'with nothing less than the protection of justice in the circumstances in which the police are unable because of their absence, to perform this task'. Thus, it is imperative that the court critically examines the extent to which the 'ordinary law of the land' was effective in protecting the abused women.<sup>309</sup>

It is unfortunate that more often than not the South African justice system fail the victims of domestic violence by failing to provide adequate protection and to effective legal remedies to abused women. It is for this reason that the Constitutional Court in the case of *S v Baloyi*,<sup>310</sup> 'criticised the efficacy of the criminal justice system to assist victims of domestic

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<sup>301</sup> AC Scales 'Feminists in the Field of Time' 1990 (42) *Florida Law Review* 112. See also CP Ewing. *Battered Women Who Kill: Psychological Self-Defense as a Legal Justification* (1987) 48; LP Eber 'The Battered Wife's Dilemma: To Kill or Be Killed' 1981 (32) *Hastings Law Journal* at 929.

<sup>302</sup> Singh (note 6 above) 276.

<sup>303</sup> *S v Ferreira* supra.

<sup>304</sup> *S v Engelbrecht* supra.

<sup>305</sup> *S v Steyn* supra

<sup>306</sup> Reddi (note 88 above) 22.

<sup>307</sup> Veinsreideris (note 208 above) 624.

<sup>308</sup> Snyman (note 17 above) 102.

<sup>309</sup> Ibid.

<sup>310</sup> *S v Baloyi* 2000 (1) SACR 81 (CC).

violence’.<sup>311</sup> The court expressed the opinion that the ‘ineffectiveness of the criminal justice system intensifies the subordination and helplessness of the victims and sends an unmistakable message to the whole society that the daily trauma of vast numbers of women counts for little’.<sup>312</sup> The Constitutional Court further held that, ‘the apathy of the system served to compound the belief that domestic violence is inevitable and so, patterns of systemic sexist behaviour are normalised rather than combated’.<sup>313</sup> In considering whether the battered had reasonably exhausted other remedies, before resorting to self-help regard should be given to all the presented evidence and the circumstances of the accused.<sup>314</sup>

### **5.3. The standard to be followed when dealing with battered women**

#### **5.3.1 A Reasonable Woman**

It is submitted that, ‘to ensure that the proper weight is given to the circumstances of the accused, the standard against which the conduct of the battered woman must be judged is that of the reasonable woman in the social framework of the accused’.<sup>315</sup> This approach is correct because battered women’s experiences in relation to private defence may well be different to that of their male counterparts.<sup>316</sup> It is submitted that the standard of the reasonable battered woman should not be used because it, ‘an individualised standard for battered women that can result in the perpetuation of stereotypes for battered women’.<sup>317</sup> Singh submits that, ‘a single norm of the ‘reasonable battered woman’ cannot be recommended given the diversity of social, economic, personal, and maybe even psychological issues that impact on the life of a battered woman. Battered women are not a homogenous group of actors – rather they are individuals, each with their own lived realities’.<sup>318</sup>

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> *S v Engelbrecht* supra para 62-83.

<sup>315</sup> *S v Engelbrecht* supra para 136.

<sup>316</sup> Ibid.

<sup>317</sup> Singh (note 6 above) 107.

<sup>318</sup> Ibid. It is submitted that attempts to mould victims of abuse into a pre-determined set of character traits can often work against women who are victims of domestic violence but fail to fit the mould.

#### **5.4. Conclusion**

It is submitted that putative private defence is highly relevant to the abused woman who kill her abuser in circumstances that fall outside the parameters of private defence, as it may represent the difference between a conviction of murder and one of culpable homicide in South African law.<sup>319</sup> At its most extreme, it may even prove the difference between a conviction of murder and a complete acquittal.<sup>320</sup> Thus, the traditional requirements of private defence should not be changed because battered women can raise both private defence and putative private defence in the alternative. Even though the traditional elements of private defence do not adequately cater for battered women's circumstances, the variations that have been introduced in foreign law will not work in principle in South African law. This is so because the South African courts already take the accused battered situation into account by judging the reasonableness of the accused's conduct from the perspective of a reasonable person in the same circumstances.

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<sup>319</sup> Reddi (note 7 above) at 278.

<sup>320</sup> Ibid 276.

## **6. BIBLIOGRAPHY**

### **6.1. Primary Sources**

#### **6.1.1. Table of Cases**

##### **6.1.1.1. Canadian**

*R v Lavallee* [1999] 55 CCC (3d)

*R v Malott* [1998] 1 SCR 123 (SCC)

##### **6.1.1.2. South Africa**

*Ex Parte Minister of Justice: In re S v Van Wyk* 1967 (1) SA 488 (A)

*Ntanjana v Minister of Justice* 1950 (4) SA 398 (C)

*S v Baloyi* 2000 (1) SACR 81 (CC)

*S v De Oliviera* 1993 (2) SACR 59 (A)

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

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

*S v Mogohlwane* 1982 (2) SA 587 (T)

*S v Motleleni* 1976 (1) SA 403 (A)

*S v Naidoo* 1997 (1) SACR 62 (T)

*S v Ntuli* 1975 (1) SA 429 (A)

*S v Steyn* 2010 (1) SACR 411 (SCA)

*S v Walters* 2002 (7) BCLR 663 (CC)

*S v Zikalala* 1953 (2) SA 568 A

**6.1.1.3. United States of America**

*Bechtel v State* 840 P.2d 1 Okla Crim App [1992]

*Commonwealth v Conaghan*, 433 Mass 105, 110 [2000]

*Commonwealth v Crawford* 429 Mass 60, 66-67 [1999]

*Commonwealth v Grimshaw* 412 Mass 505, 506 [1992]

*Commonwealth v. Crawford*, 417 Mass.358 629 N.E2d 1332 [1994]

*Easterling v State*, 267 P. 2d 185, 188 Okla, Crim, App, [1954]

*Ibn-Tamas v. United States* 407 A.2d 626 D.C. [1979]

*People v Reeves* 47 Ill. App.3d 406 Ill. App. Ct. [1977]

*People v. Enmick*, 481 N.Y.S. 2d 552, 559 [1984]

*State v Cramer* 17 Kan. App 2d 623, 841 P.2d [1993]

*State v Daws* 104 Ohio App. 3d 448, 662 N.E. 2d 805 [1994]

*State v Hazlett* 16 N.D. 426, 113 N.W. 37 4 [1907]

*State v Hundley* 236 Kan 461, 693 P. 2d 475 [1985]

*State v Leidholm* 334 N.W. 2d 811 N.D. [1983]

*State v Romero* 13 Cal. Rptr. 2d 332, 337 Cal. Ct. App. [1992]

*State v Stewart*, 763 O.2d 572, 579 Kan. [1988]

*State v Wanrow* 88 Wn.2d 221, 559 P.2d 548, [1977]

*State v. Mendoza*, 80 Wis. 2d 122, 150, 258 N.W.2d 260, 272 [1977]

### **6.1.2. Table of Statutes**

Canadian Criminal Code, 1985

Constitution of Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Domestic Violence Act 116 of 1998

## **6.2. Secondary Sources**

### **6.2.1. Books**

American Psychological Association *DSM-IV: Diagnostic and Statistical Manual of Mental Disorders* 4<sup>th</sup> ed Washington DC: American Psychiatric Association, (1994).

Brockner, J and Rubin, JZ *Entrapment in escalating conflicts: A social psychological analysis* New York: Springer, (1985).

Burchell J and Milton JRL *Principles of Criminal Law* 2<sup>nd</sup> ed Cape Town: Juta, (1997).

Burchell J and Milton JRL *Principles of Criminal Law* 4<sup>th</sup> ed Cape Town: Juta, (2013).

Burchell JM and Milton JRL *Principles of Criminal Law* 3<sup>rd</sup> ed Cape Town: Juta, (2005).

EC Viano (ed.) *Intimate Violence: Interdisciplinary Perspectives* Washington DC: Hemisphere, (1992).

J Milton. *South African Criminal Law and Procedure: Common Law Crimes Vol II* 3<sup>rd</sup> ed Cape Town: Juta, (1996).

JM Burchell *South African Criminal Law and Procedure Volume 1: General Principles of Criminal Law* 4<sup>th</sup> ed Cape Town: Juta (2011).

Klafter CE 'The Americanization of Blackstone's Commentaries' in W Jones (ed) *Essays on English Law and the American Experience* Texas A&M University Press: College Station, (1994).

LaFave WR and Scott AW *Handbook on Criminal Law* 6<sup>th</sup> ed St. Paul, MN: West Group, (1972).

LaFave WR *Criminal Law* 3<sup>rd</sup> ed Minnesota: West Group, (2000).

Nwogugu EI *Family Law in Nigeria* 3<sup>rd</sup> ed Ibadan: HEBN, (2014).

Ogle, RS and Jacobs, S *Self-Defense and Battered Women who Kill: A New Framework* London, Westport, CT: Praeger (2002).

Snyman CR *Criminal Law* 5<sup>th</sup> ed Durban: LexisNexis, (2008).

Thyfault R, Bennett C & Hirschhorn R 'Battered Women in Court: Jury and Trial' in D Sonkin (ed) *Domestic Violence on Trial: Psychological and legal dimensions of family violence* New York: Spring (1987).

Walker LE 'Battered Women as Defendants', in Zoe HN (ed.) *Legal Responses to wife Assault: Current Trends and Evaluation* London: Sage, (1993).

Walker LE *The Battered Woman* New York: Harper Row & Row, (1979).

Walker LE *The Battered Woman Syndrome* New York: Springer, (1984).

### **6.2.2. Journals**

Bell KM and Naugle AE 'Understanding stay/leave decisions in violent relationships: A behavior analytic approach' (2006) 14 *Behavior and Social Issues* 23-46.

Carstens, P 'Private defence in context of the battered wife who kills her abusive husband/partner: Ann Elizabeth Steyn v The State (reported as S v Steyn 2010 1 SACR 411 (SCA))' (2010) 31(2) *Obiter* 478-485.

Crazen, Z 'Battered Woman Syndrome', (2003) *Australian Domestic and Family Violence Clearinghouse* 1-18.

Curhan, DA 'Commonwealth v Conaghan, 433 Mass. 105 (2000): A flexible approach to BWS in the Massachusetts courts' (2003) *Battered Woman Syndrome Article* 1-4.

Dressler, J 'Battered Women and Sleeping Abusers: Some Reflections' (2006) 3 *Ohio State Law Journal of Criminal Law* 457-471.

Dressler, J 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code' (1988) 19 *Rutgers Law Journal* 671-716.

Dressler, J 'Rethinking Heat of Passion: A Defense in Search of Rationale' (1982) 73 *Journal of Criminal Law and Criminology* 421-470.

Easteal, P 'Battered women who kill: a plea of self-defence' (1991) *Women and the law: proceedings of a conference* 37-47.

Eber, LP 'The Battered Wife's Dilemma: To Kill or Be Killed' (1981) 32(4) *Hastings Law Journal* 895-931.

Ewing, CP 'Battered Women Who Kill: Psychological Self-Defense as Legal Justification' (1990) 14(6) *Law and Human Behavior* 579-594.

Fernandez, LK 'Battered women's syndrome' (2007) 8 *Georgetown Journal of Gender and the Law* 235-249.

Fletcher, GP 'The Right and the Reasonable' (1985) 98(5) *Harvard Law Review* 949-982.

Goosen, S 'Battered women and the requirement of imminence in self-defence' (2013) 16(1) *PELJ* 71-127.

Heller, KJ 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases' (1998) 26(1) *American Journal of Criminal Law* 1-120.

Kinports, K 'Defending Battered Women's Self-Defense Claims' (1988) 67 *Oregon Law Review* 393-465.

Krause, JH 'Distorted reflections of battered women who Kill: A response to Professor Dressler' 2006 (4) *Ohio State Journal of Criminal Law (OSJCL)* 555-572.

Lee, C 'The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification' (1998) 2 *Buffalo Criminal Law Review* 192-247.

Ludsin, H 'Ferreira v The State: A victory for women who kill their husbands in non-confrontational situations' (2004) 20(4) *SAJHR* 642-652.

Mahoney, MR 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) *Michigan Law Review* 1-94.

McCord, D and Lyons, SK 'Moral Reasoning and the Criminal Law: The Example of Self-Defense' (1992) 30(1) *American Criminal Law Review* 97-160.

Mousourakis, G 'Distinguishing Between Justifications and Excuses in Criminal Law' 1977 1 *Stellenbosch Law Review* 165-183.

Parrish, J 'Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal' (1996) 11(1) *Wisconsin Women's Law Journal* 75-173.

Pfouts, JH 'Violent families: Coping responses of abused wives' (1978) 57(2) *Child Welfare* 101-111.

Reddi, M 'Battered Woman Syndrome: Some Reflections on the Utility of this 'Syndrome' to South African Women who Kill their Abusers' (2005) 3 *South African Journal of Criminal Justice* 259-278.

Reddi, M 'Domestic Violence and Abused Women Who Kill: Private Defence or Private Vengeance?' (2007) 124(1) *SALJ* 22-37.

Smith, SC 'Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response' (1993) 42(1) *Catholic University Law Review* 141-178.

Veinsreideris ME 'The Prospective Effects of Modifying Existing Law to Accommodate Pre-emptive Self-defence by Battered Women' (2000) 149(2) *University of Pennsylvania Law Review* 613-644.

Walker, LE 'Battered Women Syndrome and Self-Defense' (1992) 6(2) *Notre Dame Journal of Law, Ethics & Public Policy* 321-334.

Walker, LE 'Post Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome' (1991) *Psychotherapy* 20-35

Walker, LE 'Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome' (1991) 28(1) *Psychotherapy: Theory, Research, Practice, Training* 21-29.

Young, A 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1993) 31(4) *Osgoode Hall Law Journal* 761-808.

### **6.2.3. Thesis**

Krause, S *Defences available to battered women who kill their abusers: a comparative analysis*. (unpublished doctoral thesis, UKZN, 2009).

Singh, D *Self-defence as a ground of justification in cases of battered women who kill their abusive partner* (unpublished doctoral thesis, University of South Africa, 2009).