

# SECURING FAIR OUTCOMES FOR BATTERED WOMEN CHARGED WITH HOMICIDE: ANALYSING DEFENCE LAWYERING IN *R v FALLS*

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*Despite law reforms intended explicitly to improve their prospects of receiving fairer consideration within the criminal justice system, it is still the case that most battered women accused of homicide are not successful in relying on self-defence. Defending battered women charged with homicide offers substantial challenges for defence lawyers. Acquittals leave little trace in standard modes of legal reporting and thus there are few opportunities for defence lawyers to examine the advocacy of their peers. In this article we document strategies that may support successful outcomes with specific reference to R v Falls, in which a battered woman charged with murder in 'non-confrontational circumstances' was acquitted on the basis of self-defence.*

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## I INTRODUCTION

This case would probably have never come to trial had [she] shot and killed a stranger who threatened, beat, and raped her; took her money; cut her off from her family; and then forced her to subordinate herself in every way imaginable under threat of death.<sup>1</sup>

The defence of battered women<sup>2</sup> charged with homicide offers substantial challenges to the defence team. Homicide cases are relatively infrequent, and cases in which an abused woman is the accused and not the victim of a domestic homicide are rarer.<sup>3</sup> Despite law reforms that in some instances have

<sup>1</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 304–5.

<sup>2</sup> Terms such as 'battered woman' have been criticised, including for defining women by reference to their victimisation: see, eg, Martha R Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1. Despite these criticisms, we use the term because it remains in common usage, is concise, and because there is no widely accepted alternative. We also note that the term 'Battered Woman Syndrome' has been discredited and we avoid using it except for the purpose of critical analysis or where we draw on work that uses the term: see National Institute of Justice, Department of Justice (US) and National Institute of Mental Health, Department of Health and Human Services (US), 'The Validity and Use of Evidence concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the *Violence Against Women Act*' (Report No NCJ 160972, May 1996) ('The Validity and Use of Evidence concerning Battering and Its Effects in Criminal Trials').

<sup>3</sup> For example, the New Zealand Family Violence Death Review Committee documented all intimate partner homicides in New Zealand during 2009–10. Of the 31 homicides in which one partner in a heterosexual couple had killed the other, 23 perpetrators were male and 8 were female. For 7 of the 8 female perpetrators, there was evidence in agency records of 'an extensive history of [intimate partner violence] suggesting that the female was the primary

been intended explicitly to improve the prospects of the accused in such cases receiving fairer consideration within the criminal justice system, it is still the case that most battered women accused of homicide are not successful in relying on self-defence.<sup>4</sup> In Australia<sup>5</sup> and in Canada<sup>6</sup> the overwhelming majority of cases involving battered women accused are still prosecuted as murder, even though murder convictions are rare and the majority of these cases are resolved by the acceptance of guilty pleas to manslaughter charges.

victim throughout the relationship': Family Violence Death Review Committee, *Third Annual Report: December 2011 to December 2012* (Health Quality & Safety Commission New Zealand, 2013) 43. These figures are based on government agency data, including police homicide data, rather than media reports and judgments: at 28. See also Marie Virueda and Jason Payne, 'Homicide in Australia: 2007–08 National Homicide Monitoring Program Annual Report' (Monitoring Report No 13, Australian Institute of Criminology, 2010) 25. Virueda and Payne recorded 260 homicide incidents involving 308 perpetrators of whom 268 were male and 39 female (the gender of 1 perpetrator being unknown). The Domestic Violence Resource Centre in Victoria searched all media reports and judgments for the period of November 2005 to October 2013, finding 39 intimate partner homicides, in which 8 women killed their male partners or ex-partners and 31 men killed their female partners or ex-partners: Debbie Kirkwood and Mandy McKenzie, 'Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners' (Discussion Paper No 9, Domestic Violence Resource Centre Victoria, 2013) 9–10, 52–3 ('Justice or Judgement?'). Canadian data are comparable: Statistics Canada reported that in 2012 there were 82 intimate partner homicides, of which 83 per cent were committed by men against women: Jillian Boyce and Adam Cotter, 'Homicide in Canada, 2012' [2013] (19 December) *Juristat* 18.

<sup>4</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34 *Sydney Law Review* 467, 486–8.

<sup>5</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45 *Australian & New Zealand Journal of Criminology* 383, 386, note that for the period 2000–10, 85 per cent of the Australian cases involving battered women as defendants for which this information was available commenced with a murder charge and only 15 per cent were charged as manslaughter. However, in 63 per cent of all Australian homicide cases involving battered women as defendants from the period of the study, the prosecution accepted a plea of guilty (in the majority of cases, to manslaughter charges) and in a further 16.5 per cent a verdict of manslaughter was the result of proceeding to trial. In fact, only 1.5 per cent of cases resulted in a murder conviction following trial. 'Justice or Judgement?', above n 3, 12–15, examined the eight cases involving battered women who killed their male partners or ex-partners after the Victorian reforms to self-defence in 2005: see *Crimes (Homicide) Act 2005* (Vic). They found that all were charged with murder, although one was resolved by the magistrate refusing to commit the case for trial, three were resolved by guilty pleas to manslaughter and two by guilty pleas to defensive homicide, whilst two proceeded to trial on murder charges and resulted in a manslaughter and defensive homicide conviction respectively.

<sup>6</sup> Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, 2014) 10–11, Appendix: Women's Homicide Cases in Which There Was Evidence of Prior Abuse, 1990–2005.

In 2013 the New South Wales Select Committee on the Partial Defence of Provocation expressed concern about ‘overcharging’ and suggested that specific guidelines are required to assist prosecutors to determine the appropriate charge to lay in circumstances where there is a history of violence against the accused.<sup>7</sup>

Several law reform inquiries have emphasised the need for the education and training of legal professionals concerning violence against women to improve practice and to support the frameworks for reform.<sup>8</sup> The desirability of improving legal skills in this area has also been noted by practitioners. For instance, Queensland barrister Andrew Boe, who has been involved in at least two high profile homicide trials involving battered women accused of murder, has asked two very pertinent questions:

- ‘How can a criminal defendant who is also a victim of violence be treated fairly?’
- ‘How can our lawyers be up-skilled to secure a fair outcome?’<sup>9</sup>

In this paper we engage in critical analysis of legal advocacy as a scholarly and practical contribution to reform intended to achieve fairer outcomes. We respond to Andrew Boe’s questions with particular reference to *R v Falls* (*Falls*),<sup>10</sup> a decision in which a battered woman charged with murder was acquitted on the basis of self-defence. In *Falls* the accused ground sleeping pills into her husband’s meal and, once he was asleep, shot him in the head. She then disposed of his body and maintained the fiction for four weeks that he had disappeared — including participating in public appeals by the police for information about his whereabouts.

*Falls* is particularly remarkable for two reasons. It was decided in Queensland, which has one of the strictest legal formulations of self-defence in

<sup>7</sup> Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013), 157–68 [8.9]–[8.56] (*The Partial Defence of Provocation*).

<sup>8</sup> See, eg, *ibid* 205–8 [9.87]–[9.100]; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Report No 115 and NSWLRC Report No 128 (2010) vol 2, ch 31 (*Family Violence — A National Legal Response*).

<sup>9</sup> Andrew Boe, ‘Domestic Violence in the Courts: Re-Victimising or Protecting the Victims?’ (Paper presented at National Access to Justice and Pro Bono Conference, Brisbane, 27–28 August 2010) 1 <<http://www.nationalprobono.org.au/page.asp?from=5&id=287>>.

<sup>10</sup> (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010).

Australia,<sup>11</sup> and it involved a ‘non-traditional’ self-defence scenario, in that the accused was not under attack, or in immediate danger of being attacked, by the deceased at the time that she killed him.<sup>12</sup> Such non-traditional scenarios rarely feature in acquittals. Our research of homicide cases involving battered women as defendants in Australia from 2000–10 uncovered 67 cases. In only 11 cases was the accused acquitted on the basis of self-defence,<sup>13</sup> and only 3 of these involved non-traditional self-defence scenarios.<sup>14</sup> In Canada, although a number of battered women have been acquitted on the basis of self-defence, the only known jury acquittal of a woman who killed in a non-traditional self-defence scenario came years before legal reforms were achieved through *R v Lavallee* (*‘Lavallee’*)<sup>15</sup> and, according to one recent study, has not since been replicated.<sup>16</sup> In New Zealand acquittals on the basis of self-defence

<sup>11</sup> ‘The Queensland formulation of self-defence is distinct from that of other jurisdictions in that it does not expressly recognise the contextual nature of reasonableness, and requires acts of self-defence to be undertaken in response to an unlawful assault’: *Family Violence — A National Legal Response*, above n 8, vol 1, 628 [14.23]. See also *Criminal Code Act 1899* (Qld) sch 1 (*‘Criminal Code (Qld)’*) ss 271–2; Sheehy, Stubbs and Tolmie, ‘Defences to Homicide for Battered Women’, above n 4, 469–76.

<sup>12</sup> Sheehy, Stubbs and Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand’, above n 5, 388.

<sup>13</sup> In one further case in New South Wales the prosecution withdrew charges and in another in Victoria a magistrate declined to commit the case for trial. It has been argued that the latter decision was taken whilst the Victorian homicide reforms designed to provide an improved response to battered women facing homicide charges were fresh and that this approach has not been subsequently sustained: ‘Justice or Judgement?’, above n 3, 13.

<sup>14</sup> Sheehy, Stubbs and Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand’, above n 5, 387–8. These were *R v Spurr* (Unreported, Supreme Court of New South Wales, Wood J, 16 June 2005); *R v MacDonald* (Unreported, Supreme Court of Victoria, Nettle J, 3 March 2006); *Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010). Older cases are *Secretary v The Queen* (1996) 5 NTLR 96 (*‘Secretary’*) and *R v Stjernqvist* (Unreported, Supreme Court of Queensland, Derrington J, 19 June 1996). See Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003) 112 [4.20]: ‘homicides in contexts other than spontaneous encounters rarely led to an acquittal on the basis of self-defence’.

<sup>15</sup> [1990] 1 SCR 852. Prior to this case, in 1983, Jane Hurshman was acquitted by a jury of killing her violent husband while he was passed out in his truck, but the acquittal was set aside and a retrial was ordered by the Nova Scotia Court of Appeal, and she pleaded guilty to manslaughter prior to the second trial: see *R v Whynot (Stafford)* (1983) 61 NSR (2d) 33; Brian Vallée, *Life with Billy* (Pocket Books, 1989).

<sup>16</sup> Since 1990, one woman who killed her sleeping partner was acquitted by the Quebec Court of Appeal; another was acquitted on the basis of lack of proof of causation; and a third was acquitted seemingly on the basis of automatism: see Sheehy, above n 6, 296 n 1.

remain rare for battered women and there has yet to be a case in which self-defence has been successful in a non-traditional self-defence scenario.<sup>17</sup>

An additional complication in *Falls* is that Queensland has a partial defence of 'killing for preservation in an abusive domestic relationship'.<sup>18</sup> The defence has been criticised for its potential to undermine a claim to self-defence where the homicide is a response to domestic violence.<sup>19</sup>

Acquittals leave little trace in standard modes of legal reporting and thus there are few opportunities for defence lawyers to examine the advocacy of their peers.<sup>20</sup> In this article we document how the defence lawyers in *Falls* supported and argued self-defence on the facts of the case.<sup>21</sup> It is notable that

<sup>17</sup> There are four acquittals on the basis of self-defence on the New Zealand public record in respect of murder charges against battered women: *R v Manuel* (Unreported, High Court of New Zealand, Robertson J, 19 September 1997); *R v Stephens* (Unreported, High Court of New Zealand, O'Regan J, 12 April 2002); *R v Ford* (Unreported, High Court of New Zealand, Toogood J, 11 August 2011); *R v Keefe* (Unreported, High Court of New Zealand, Collins J, 19 September 2013). All of these women killed while under attack by the deceased and had witnesses to support their versions of events.

<sup>18</sup> *Criminal Code* (Qld) s 304B. This defence will apply, unlike self-defence, even though the accused has killed in non-confrontational circumstances in response to the ongoing threat presented by their relationship rather than a specific attack. It is also the case that the defence places a greater emphasis on the accused's subjective beliefs when making objective appraisals as to the necessity of their defensive action.

<sup>19</sup> This defence was argued in the case of *Falls* but, somewhat unexpectedly, the accused was instead acquitted on the basis of self-defence. The judge in *Falls* assisted in this outcome by making it clear that the jury did not need to consider the new partial defence unless the prosecution had proved beyond reasonable doubt that self-defence did not apply: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 3 June 2010) 10, 19. Moreover, his Honour stated that just because Parliament had enacted a partial defence for victims of abuse 'does not mean that other defences such as self-defence are not available for people who have been in an abusive relationship': at 14. See also Michelle Edgely and Elena Marchetti, 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality' (2011) 13(2) *Flinders Law Journal* 125, 147–8. For a critique of the partial defence, see Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2010) 35 *Alternative Law Journal* 132, 135–6.

<sup>20</sup> Although there was a transcript of the trial in this instance it is not publicly accessible and runs to more than 800 pages.

<sup>21</sup> We have chosen not to analyse the lawyering by the Crown in *Falls* because it follows fairly traditional patterns of argument in such cases. The tendency for Crown counsel is to argue that the abuse was not as severe or as recent as the accused portrayed it or was mutual, that the accused lacks credibility or was lying in her account of events, that her defensive force was an unreasonable overreaction to the abusive circumstances that she was facing in that there were other options for dealing with her victimisation, or a combination of the three. See 'Justice or Judgement?', above n 3, for a description of such arguments in the seven Victorian cases involving battered women defendants that were prosecuted and committed to trial

implicit in the defence conduct of the case was: an expansion of the time frame within which the danger the accused was facing was to be understood (with the result that historical and cumulative experiences of violence and the risk of future harm were both relevant); an understanding that the danger in battering cases includes an element of entrapment; an attention to detail in the range of evidence presented in court in order to describe and corroborate this danger; the provision of support for the accused's credibility in her assessment of her situation; up-to-date expert explanations of the phenomenon of intimate partner violence and the broader social framework within which it occurs; and the use of rhetorical devices to support particular normative readings of the material before the Court.

We engage with these issues in four Parts. First, we describe the expansive interpretation adopted in the case of the self-defence requirements set out in the *Criminal Code Act 1899* (Qld) sch 1 (*Criminal Code* (Qld)) s 271, noting that in *Falls* the presiding judge was sympathetic to an expansive reading of the legal requirements for self-defence.<sup>22</sup> Second, we describe the extensive and detailed range of third party evidence provided to corroborate the accused's account of the threat that she faced.<sup>23</sup> Third, we describe the lens put on that material in court — the rhetorical devices used to provide a normative reading of the stories told in court and the expert framework provided to interpret the threat and assess the accused's credibility. Finally, we describe the work done to support the accused's emotional recovery so that the defence was able to use her testimony effectively in court.

We acknowledge at the outset that good lawyering is not all that Susan Falls had going for her. She also conformed to stereotypes of the type of woman whom it has been argued that the criminal justice system views as a

between the introduction of the Victorian reforms relating to self-defence and 1 October 2013.

<sup>22</sup> A significant problem is that individual judges differ in their expertise on the subject of intimate partner violence and their corresponding sensitivity to the particular legal difficulties faced by battered woman defendants in meeting the legal requirements of self-defence. For this reason there have been a number of calls for the consistent national education of the legal profession and judges in the subject of family violence: see 'Justice or Judgement?', above n 3, 39, 48; Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 194–202 [4.153]–[4.176]; *Family Violence — A National Legal Response*, above n 8, vol 1, 651 [14.99]–[14.102].

<sup>23</sup> For a description of the full range of evidence that could be considered in particular instances, see *Family Violence — A National Legal Response*, above n 8, vol 1, 623–4 [14.7]–[14.10].

'good victim'.<sup>24</sup> Falls did not have a criminal history to diminish her credibility, nor had she engaged in the use of force prior to the homicide, which can undermine a self-defence argument<sup>25</sup> and the status of an accused as a 'real' battered woman.<sup>26</sup> Falls also did not have a history of self-medicating with alcohol or drugs in response to the severe levels of trauma she experienced.<sup>27</sup> Such women will face difficulties in remembering and providing a coherent account of the relationship, as well as what took place on the night in question.<sup>28</sup> Instead Falls was a relatively young, white, middle-class mother who

<sup>24</sup> This point is also made by Heather Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 *Australian & New Zealand Journal of Criminology* 367, 377. See also Marie Fox, 'Feminist Perspectives on Theories of Punishment' in Donald Nicolson and Lois Bibbings (eds), *Feminist Perspectives on Criminal Law* (Cavendish Publishing, 2000) 49, 62–3; Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990) ch 7; Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000) 141, quoting *R v Malott* [1998] 1 SCR 123, 142 [40] (L'Heureux-Dubé J for L'Heureux-Dubé and McLachlin JJ) ('*Malott*'); Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, 1990) ch 3; Martha Shaffer, 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *Lavallee*' (1997) 47 *University of Toronto Law Journal* 1, 25.

<sup>25</sup> See, eg, *R v Mahari* (Unreported, High Court of New Zealand, Winkelmann J, 14 November 2007) ('*Mahari*'); *R v Wihongi* (Unreported, High Court of New Zealand, Wild J, 30 August 2010); *R v Wihongi* [2012] 1 NZLR 775 (Court of Appeal).

<sup>26</sup> See, eg, Jamie Gladue, who was described by the judge who sentenced her as not a 'battered or fearful wife' even though her deceased partner had been convicted of assaulting her when she was pregnant: *R v Gladue* [1999] 1 SCR 688, 697 [9] (Cory and Iacobucci JJ for Lamer CJ, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ), cited in Sheehy, above n 6, 162. Many Indigenous accused, for example, have used force on prior occasions, although the reasons for this phenomenon are complex. The destructive legacy of colonisation means that Indigenous women face levels of violence that are particularly extreme, struggle to access support from agencies and therefore have less ability to protect themselves by legal means, have fewer alternatives to responding to physical force with force, and are more vulnerable to being constructed as offenders rather than victims: see Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41 *Australian & New Zealand Journal of Criminology* 138; Annie Mikaere, 'Māori Women: Caught in the Contradictions of a Colonised Reality' (1994) 2 *Waikato Law Review* 125; Julia Tolmie, 'Women and the Criminal Justice System' in Julia Tolmie and Warren Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis, 2007) 295, 297–313 [11.2.1]–[11.2.3]; Douglas, 'A Consideration of the Merits', above n 24, 377.

<sup>27</sup> See Alicia H Clark and David W Foy, 'Trauma Exposure and Alcohol Use in Battered Women' (2000) 6 *Violence against Women* 37; T K Logan et al, 'Victimization and Substance Abuse among Women: Contributing Factors, Interventions and Implications' (2002) 6 *Review of General Psychology* 325.

<sup>28</sup> Alcohol abuse further supports a reading of the accused as an aggressive and erratic drunk rather than a primary victim: see Sarah M Buel, 'Effective Assistance of Counsel for Battered

could be characterised as a ‘normal mum of four’,<sup>29</sup> a ‘perfectly ordinary suburban housewife’<sup>30</sup> and a ‘hockey mum’.<sup>31</sup> She therefore did not look like a person who belonged in the criminal justice system. And perhaps surprisingly, given her history of victimisation, she was a highly skilled advocate for herself.

It is clear from the account provided in this paper that successful lawyering in these difficult cases requires more than an intelligent handling of legal principle. It requires, amongst other things, knowledge of the phenomenon of male violence against women and its complexities, sensitivity in managing the accused’s emotional recovery, the effort and time involved in finding and engaging with a range of witnesses, and the ability to secure experts who are up-to-date with the research literature in this specialist subject. In short, good defence work in such cases will have conceptual, evidential, therapeutic, expert and normative dimensions.

## II THE LEGAL FRAMEWORK: AN EXPANSIVE INTERPRETATION OF SELF-DEFENCE

The requirements for self-defence in Queensland differ from those in other Australian jurisdictions.<sup>32</sup> In Queensland an accused may use lethal force in self-defence against an unlawful and unprovoked assault if ‘the nature of the assault’ is such as to cause ‘reasonable apprehension of death or grievous bodily harm’.<sup>33</sup> In other words, the accused must have been responding to a

Women Defendants: A Normative Construct’ (2003) 26 *Harvard Women’s Law Journal* 217, 265, 284.

<sup>29</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 59 (J R Hunter).

<sup>30</sup> *Ibid* 63 (J R Hunter).

<sup>31</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 26 (S T Courtney).

<sup>32</sup> On the traditional legal obstacles to raising self-defence in homicide cases involving battered defendants, see Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome’ (1999) 23 *Melbourne University Law Review* 709; Sheehy, Stubbs and Tolmie, ‘Defences to Homicide for Battered Women’, above n 4, 468–9.

<sup>33</sup> *Criminal Code* (Qld) s 271(2) (emphasis added). In full, s 271 provides:

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

specific assault that is objectively determined to have been dangerous. In addition, the accused must have *reasonable grounds* for believing that she could not otherwise preserve herself or another from death or serious bodily harm.<sup>34</sup>

In *Falls*, the defence team faced numerous challenges arising from the stricter formulation of self-defence that exists in the *Criminal Code* (Qld), with its requirement for a triggering assault.<sup>35</sup> This provision presents a substantial obstacle in non-traditional self-defence cases since while the threat of battery may constitute an assault, the deceased must have had ‘actually or apparently a present ability’ to act on the threat.<sup>36</sup>

Applegarth J took what has been described as ‘a decidedly welcome approach’<sup>37</sup> to this requirement by drawing on the Northern Territory Court of Criminal Appeal decision in *Secretary v The Queen* (‘*Secretary*’).<sup>38</sup> In *Secretary*

- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Note that there are different legal requirements if the assault that the accused is responding to is ‘provoked’ as opposed to ‘unprovoked’: at s 272.

<sup>34</sup> In *R v Gray* (1998) 98 A Crim R 589, 593, McPherson JA said that

[t]he defender must believe that what he is doing is the only way he can save himself or someone else from the assault. He must hold that belief ‘on reasonable grounds’; but it is the existence of the actual belief to that effect that is the critical or decisive factor. There is no additional requirement that the force used to save himself or someone else must also be, objectively speaking, ‘necessary’ for the defence.

In *Julian v The Queen* (1998) 100 A Crim R 430, the Queensland Court of Appeal made it clear that whilst the grounds for the accused’s honest belief need to be reasonable, there is no requirement that the reasonable person would have held that same belief in the circumstances. See also Edgely and Marchetti, above n 19, 135–7.

<sup>35</sup> ‘Queensland is the only Australian jurisdiction that retains the need to prove that the accused was in fact responding to a specific [threat of] assault objectively determined to be dangerous’: Sheehy, Stubbs and Tolmie, ‘Defences to Homicide for Battered Women’, above n 4, 473. By way of contrast, in Tasmania, for example, an accused ‘is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use’: *Criminal Code Act 1924* (Tas) sch 1 s 46. This provision does not require that the accused be responding to a specific assault by the deceased and assesses whether defensive force was reasonable within the context of what the accused *honestly* thought their circumstances were.

<sup>36</sup> *Criminal Code* (Qld) s 245(1).

<sup>37</sup> Edgely and Marchetti, above n 19, 136.

<sup>38</sup> (1996) 5 NTLR 96. This case is discussed in Julia Tolmie, ‘*Secretary*’ (1996) 20 *Criminal Law Journal* 223. Note that there was case law precedent allowing self-defence in non-traditional

the majority held that an aggressor who had threatened the accused prior to falling asleep that violence would take place when he woke up, had the ‘actual or apparent present ability’<sup>39</sup> to act on his threat even though he was still sleeping when the accused attacked him. Mildren J held that the phrase “‘present ability’” means in this context, an ability, based on the known facts as present at the time of the making of the threat, to effect a purpose at the time the purpose is to be put into effect’.<sup>40</sup> He went on to add:

the [*Criminal Code Act 1983* (NT) sch 1 s 187] in my view employs language which makes it clear that provided the threat is one which the person making it would have the apparent ability to carry out, it does not matter that the threat is evidenced by mere words, and nor is there a requirement for an apprehension of immediate personal violence. Threats by their nature relate to future conduct. The *Code* sensibly places no limitations upon how immediate the threat of future violence must be.<sup>41</sup>

Defence counsel in *Falls* emphasised that the threat the accused was facing did not have to be an ‘imminent’ attack,<sup>42</sup> stating that

it doesn’t matter that at the moment she shot Mr Falls in the head he didn’t at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.<sup>43</sup>

This assessment of the risk that the accused may have been facing does not ask whether she was facing an assault that was happening or about to happen, but whether the dangerous nature of her relationship (including the repetitive nature of the violence and her level of entrapment) meant that a serious attack on her *could* happen at any time and inevitably *would* happen at some stage in the near future. It could be argued that this approach goes beyond what was

circumstances under the Queensland legislation: *R v Stjernqvist* (Unreported, Supreme Court of Queensland, Derrington J, 19 June 1996), cited in Stubbs and Tolmie, ‘Falling Short of the Challenge?’, above n 32, 735, 739–40.

<sup>39</sup> *Criminal Code Act 1983* (NT) sch 1 s 187.

<sup>40</sup> *Secretary* (1996) 5 NTLR 96, 104.

<sup>41</sup> *Ibid.*

<sup>42</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 54 (J R Hunter).

<sup>43</sup> *Ibid* 54–5 (J R Hunter).

contemplated in *Secretary* in that it does not require a specific and articulated threat that is to be executed in the future but an ongoing, non-specific threat that is present in the dangerous nature of the relationship itself.<sup>44</sup>

Given that domestic violence is best understood as a pattern of behaviour with a cumulative impact rather than a series of isolated assaults, it is important that legal principle be interpreted in an expansive and holistic manner.<sup>45</sup> In this instance, the manner in which the legal requirements of self-defence were presented to the jury permitted the threat the accused was facing to be appraised not just in the immediate circumstances of the killing, but in terms of the history of violence (including the cumulative impact of repetitive victimisation over time), the relational context in which the abuse took place, the entrapment that was reinforced by the deceased's abuse, and the commonly recurrent nature of intimate partner violence and therefore the future risk it presented.<sup>46</sup>

In addition, defence counsel emphasised that self-defence must accommodate the accused's *actual* situation when making objective appraisals as to what was 'reasonable' for the accused to have done.<sup>47</sup> Importantly it was stressed that the threat that the accused was facing in this case had to be assessed against the background of her entire 20-year relationship with the deceased,<sup>48</sup> and the experience of surviving and being affected by that background, not just the immediate interaction prior to his death. The issue was

<sup>44</sup> However, on the facts of *Falls*, there was an impending, although not imminent, specific threat to one of the children. Note that in *R v Stjernqvist*, Derrington J directed the jury that the threat could be found in the general nature of the relationship, rather than any specific action the deceased had taken on the day in question: Transcript of Proceedings, *R v Stjernqvist* (Supreme Court of Queensland, Derrington J, 19 June 1996) 172–3; Stubbs and Tolmie, 'Falling Short of the Challenge?', above n 32, 739–40.

<sup>45</sup> The interpretation adopted in *Falls* is not unprecedented. Unfortunately, it has yet to be embraced in New Zealand where *R v Wang* [1990] 2 NZLR 529 (Court of Appeal), requiring an imminent threat, remains authoritative. In *R v Richardson* (Unreported, New Zealand Court of Appeal, Blanchard, Robertson and Young JJ, 19 March 2003), the New Zealand Court of Appeal also required a specific threat — meaning that a threatening set of circumstances will not be sufficient to raise self-defence.

<sup>46</sup> See the excellent discussion in Douglas, 'A Consideration of the Merits', above n 24, 376–7.

<sup>47</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 58 (J R Hunter).

<sup>48</sup> In Queensland, '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed' is expressly legislated as admissible in criminal proceedings against a person for a range of offences, including homicide: *Evidence Act 1977* (Qld) s 132B.

whether what had gone before impaired or affected the defendant's reasoning process and made the process of reasoning in her case reasonable, [although] it would not be reasonable in the circumstances of the ordinary person who did not have that background.<sup>49</sup>

This point speaks to a number of dichotomies entrenched in the criminal law that set up inherent tensions in these cases.<sup>50</sup> Self-defence requires a reasonable defensive reaction and, whilst a trauma-informed response might be a 'reasonable' response to a renewed threat against a history of harm, it is also, paradoxically, by definition an irrational response. Furthermore, whilst the accused's reaction must always be appraised in the context in which they were located, there is debate about the degree to which personal characteristics of the accused can be accommodated when objectively assessing their response to those circumstances.<sup>51</sup> What is distinctive about the experience of trauma, as compared to personal attributes such as age, mental illness, culture or character idiosyncrasies, is that it is something that is clearly externally imposed. If a woman is changed by experiencing abuse, to what degree does that change become a part of her and to what degree does it remain her partner's behaviour that she is reacting to? Lawyers have struggled in these cases to locate the trauma in the man's abuse so that a trauma-informed response is seen to be a rational one, rather than an irrational overreaction by a woman who has developed a unique psychological condition.<sup>52</sup>

### III BUILDING AN EVIDENTIAL BASE

In *Falls* the defence team provided detailed testimony on the deceased's violence throughout the relationship and the control and dominance that his strategic use of violence reinforced. Corroboration was provided from multiple sources in spite of the fact that the only *direct* witness to the violence,

<sup>49</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 27 (Applegarth J).

<sup>50</sup> For a general discussion of the operation of dichotomies in constructing meaning in law — particularly in relation to issues impacting on women — see Frances Olsen, 'The Sex of Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Basic Books, 3<sup>rd</sup> ed, 1998) 691; Joan W Scott, 'Deconstructing Equality-versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33.

<sup>51</sup> See the discussion in A P Simester and W J Brookbanks, *Principles of Criminal Law* (Brookers, 4<sup>th</sup> ed, 2012) 127–30 [4.6.2]; *R v Sam [No 17]* [2009] NSWSC 803 (13 August 2009), in which the Supreme Court of New South Wales grappled with these issues.

<sup>52</sup> See, eg, *R v Oakes* [1995] 2 NZLR 673.

with the exception of one incident, was its victim — the accused. Perpetrators work hard to hide their criminal acts of domestic violence from others and to enforce a code of silence on their victims.<sup>53</sup> Frequently the only witnesses are the perpetrator and the immediate victim. She may lack credibility in portraying the violence to have been severe, having minimised and hidden it in the past.<sup>54</sup> Unfortunately, not all lawyers appear to understand the importance of the history of violence between the couple,<sup>55</sup> how to provide corroboration of hidden violence, how to position the physical violence within the larger context of coercive control and cumulative harm,<sup>56</sup> or the significance of tactics of coercive control directed towards other people.<sup>57</sup>

<sup>53</sup> For example, one of the key tactics of coercive control is to isolate victims from those who would help them in order to prevent disclosure and help-seeking: see Stark, *Coercive Control*, above n 1, 262–71. Other tactics include intimidation and surveillance: at 249–61.

<sup>54</sup> For a discussion of the minimisation and secrecy that surrounds domestic violence, see Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) ch 6.

<sup>55</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Project No 97 (2007) 269, commented that ‘some lawyers do not appreciate the importance of a history of violence (or do not believe that it can be used to establish a defence) and therefore do not seek detailed instructions about the violence’. A New Zealand example is *Mahari* (Unreported, High Court of New Zealand, Winkelmann J, 14 November 2007). Without personal knowledge of a case it is difficult to appraise whether defence counsel discovered or introduced the best available evidence. In *Mahari*, evidence suggesting a history of family violence was introduced by accident in the course of other testimony: Transcript of Proceedings, *R v Mahari* (High Court of New Zealand, CRI 2006-070-8179, Winkelmann J, 3 October 2007) 73–4 (Leslie Geoffrey Whiteside). The defendant’s lawyer had focused on the build up to, and the events surrounding, the fatal stabbing on the day in question and had done nothing to deliberately bring evidence of this history to the jury.

<sup>56</sup> See ‘Justice or Judgement?’, above n 3, 28, 39, citing *R v Creamer* [2011] VSC 196 (20 April 2011).

<sup>57</sup> See *R v Dzuiba* (Unreported, Supreme Court of Western Australia, Johnson J, 14 May 2007) (*‘Dzuiba’*), where the trial judge drew distinctions in terms of relevance between different ‘types’ of violence and between violence directed at different people: Transcript of Proceedings, *R v Dzuiba* (Supreme Court of Western Australia, 80/2006, Johnson J, 11 May 2007) 1309 (Johnson J). In *Dzuiba* the defendant was acquitted on the basis of self-defence for stabbing her violent boyfriend of several years whilst he was attacking her. Whilst the case involved a traditional self-defence scenario it is noteworthy because it was one of the first Australian cases involving a battered woman successfully raising self-defence despite the absence of expert evidence on the concept of Battered Woman Syndrome. Note that even s 9AH(3)(a) of the *Crimes Act 1958* (Vic), which provides that violence in the history of the relationship and towards other family members is relevant when considering the application of the self-defence requirements, only refers to evidence of family violence, as opposed to interpersonal violence and coercive tactics towards animals, property and those outside the family. The section refers to

*Falls* illustrates the importance of interviewing as many people as possible to find indirect corroborating evidence of the abuse.<sup>58</sup> It also illustrates the importance of evidence of violence by the deceased towards people *other* than the accused. Private investigators may need to be hired by the defence to find this evidence.<sup>59</sup> In cases where it is not possible or desirable for the accused to testify, such strategies may be of even greater significance.

#### A *The Deceased's Past Violence towards the Accused*

In *Falls*, the accused provided a detailed account of the serious physical violence that she had experienced from the deceased over the 20 years that they were in a relationship,<sup>60</sup> including sexual abuse,<sup>61</sup> and the lengths to

the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member.

<sup>58</sup> See Rebecca Bradfield, 'Understanding the Battered Woman Who Kills Her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and Law* 177, 178; Buel, above n 28, 261; William G Austin, 'Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case' (2000) 38 *Family and Conciliation Courts Review* 462, 468–71 (directing evaluators to consider abuse in previous relationships, to investigate third-party sources, and to seek out disconfirming information).

<sup>59</sup> As was done in *Dzuiba*: Transcript of Proceedings, *R v Dzuiba* (Supreme Court of Western Australia, 80/2006, Johnson J, 23 April 2007) 99 (J J Scudds); Email from Jeremy Scudds to Julia Tolmie, 20 June 2007 (on file with authors).

<sup>60</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 60–82 (J R Hunter, Susan Falls); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 1–46 (J R Hunter, Susan Falls). Although she had sought treatment for an injury that required stitches near the beginning of their 20-year relationship, no hospital records or testimony from nursing staff or doctors were produced to corroborate her account: see Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 69 (J R Hunter, Susan Falls). It is not clear from the transcript why this evidence was not made available to the Court. Defence counsel did make the point that it was the Crown who bore the burden of proof, had the resources of a large homicide investigation and had the responsibility of interviewing people to disprove her allegations. It was argued that the fact that they had not done this meant that the Crown accepted her allegations as true: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 14–20 (J R Hunter, Jodie Nicole Allan, Applegarth J); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 40 (J R Hunter). See Buel, above n 28, 271–4 (discussing the importance of adducing evidence of the deceased's past violence towards the defendant to defence strategy in cases involving battered women charged with homicide).

<sup>61</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 8–9 (J R Hunter, Susan Falls).

which she went to hide the violence from others.<sup>62</sup>

Whilst there was only one witness who testified to directly perceiving physical violence by the deceased against the accused,<sup>63</sup> the defence was able to draw on indirect corroboration of the violence.<sup>64</sup> This took the form of testimony from a hairdresser,<sup>65</sup> a day care director,<sup>66</sup> an employee of the accused,<sup>67</sup> a landlord,<sup>68</sup> a police officer,<sup>69</sup> friends and family of the deceased,<sup>70</sup> and a mother at the children's school<sup>71</sup> about injuries they had seen on the accused or her attempts to cover up injuries (wearing unseasonal clothes that covered her body, wearing sunglasses inside, and looking the other way in an attempt to avoid being closely observed). Evidence was also given by neighbours who had been woken up at night by the deceased yelling at the accused,<sup>72</sup> police officers who were aware of a notification to the Department of Families as a result of one of the daughters of the accused and the deceased

<sup>62</sup> See, eg, *ibid* 11–12 (J R Hunter, Susan Falls).

<sup>63</sup> The witness had been a child at the time on a sleepover: *ibid* 14 (J R Hunter, Susan Falls); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 58–61 (J R Hunter, Bailee Morgan Dick).

<sup>64</sup> Note that the Crown attempted to counter this evidence by calling witnesses (for example, family of the deceased) who said that they never saw injuries on Falls in spite of the fact that she wore 'tiny little clothes ... singlet tops and shorts': Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 27 (Kim Therese Page).

<sup>65</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 16–17 (J R Hunter, Carla Marie Waskiw).

<sup>66</sup> *Ibid* 20 (J R Hunter, Patricia Gay Doughty).

<sup>67</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 32–3 (G J Cummings, Leisel Deanne Bourne).

<sup>68</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 47 (J R Hunter, Mark John Quinlivan).

<sup>69</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 18 (J R Hunter, Joanne Linda Moore).

<sup>70</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 44, 45–6 (G J Cummings, Robert James McClelland); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 36 (G J Cummings, Peter Andrew Dauk).

<sup>71</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 55 (J R Hunter, Lyn Dye).

<sup>72</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 19 May 2010) 14–15 (G J Cummings, Roslyn Georgina Young, J R Hunter); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 54–5 (J R Hunter, Lyn Dye).

telling her teacher that her father was violent,<sup>73</sup> and those who observed damage to the houses the couple had been living in.<sup>74</sup>

Several witnesses who had not directly observed the violence had been concerned enough to intervene.<sup>75</sup> One was a police officer who took a seven-page statement from the accused in 2000 detailing violence going back to when she was 14.<sup>76</sup> She commented:

I have been a police officer for over 16 years and in the entire duration of my service I have not been involved in a domestic violence incident that has caused me as much concern for the aggrieved's welfare as that of this case. I personally told Susan that in my opinion if she stayed with Rodney he would eventually kill her.<sup>77</sup>

The officer described making arrangements for the accused and her children to travel interstate to a secret location to escape the deceased whilst he was out of town.<sup>78</sup> Defence counsel pointed out that it was significant that none of the

<sup>73</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 11 (J R Hunter, Joanne Linda Moore); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 21 (J R Hunter, Christopher Kevin Eaton).

<sup>74</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 50 (G J Cummings, Robert James McClelland).

<sup>75</sup> See, eg, *ibid* 45 (G J Cummings, Robert James McClelland), 48–9 (J R Hunter, Robert James McClelland); see also at 51 (J R Hunter, Robert James McClelland). An employee of the accused also described having the accused stay overnight at her house once — even though they were not friends — because she was too scared to go home: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 32 (J R Hunter, Leisel Deanne Bourne).

<sup>76</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 44 (J R Hunter).

<sup>77</sup> *Ibid* 44, 60 (J R Hunter). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 15 (J R Hunter, Joanne Linda Moore). The accused's statement and the officer's warning were allowed into evidence not as the truth about the domestic violence the accused had experienced or as expert opinion about the relationship, but as relevant to the nature of the accused's relationship with the deceased and to the accused's beliefs that were relevant to her defences: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 52–3 (Applegarth J).

<sup>78</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 15 (J R Hunter, Joanne Linda Moore). Similarly, the deceased's uncle testified about his role in this escape attempt, including warning the accused that the deceased would, in time, kill her: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 46 (G J Cummings, Robert James McClelland), 48–9, 51 (J R Hunter, Robert James McClelland). This was her only attempt to leave the relationship and she was bullied into returning: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 18–19 (J R Hunter, Susan Falls).

people who gave testimony were close personal friends of Susan Falls.<sup>79</sup> It was also emphasised that people do not normally notice injuries on other people because people ‘like Susan’ are ‘adept at hiding’ them.<sup>80</sup>

In *Falls* the disparity in physical size between the accused and the deceased was underscored through photographs and witness accounts.<sup>81</sup> The deceased was a body builder who injected steroids, whilst the accused was an extremely slight woman who, in the trauma of the relationship, lost a great deal of weight.<sup>82</sup>

### B *The Deceased's Character: Violence towards Other People, Animals and Things*

Bradfield suggests that there is a tendency to view external factors as causing domestic violence, with a focus on ‘the characteristics of the couple and the behaviour of the battered woman rather than the abusive male’.<sup>83</sup> In *Falls* the defence examined Crown and defence witnesses about the deceased’s use of standover tactics and violence towards people *other* than the accused,<sup>84</sup> including non-family members, as well as animals (family pets),<sup>85</sup> objects and property that got in the way of what he wanted.<sup>86</sup> In addition to bolstering the credibility of the accused’s account of the deceased’s violence towards her,

<sup>79</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 29 (S T Courtney).

<sup>80</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 31 (J R Hunter).

<sup>81</sup> See, eg, Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 33–4 (J R Hunter).

<sup>82</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 59 (J R Hunter); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 48 (J R Hunter, Mark John Quinlivan).

<sup>83</sup> Bradfield, above n 58, 183, quoting Prasuna Reddy et al, ‘Attributions about Domestic Violence: A Study of Community Attitudes’ (1997) 4 *Psychiatry, Psychology and Law* 125, 141.

<sup>84</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 10–13 (J R Hunter, Jonathan Leslie Turner); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 53–4 (J R Hunter, Lyn Dye). See also *R v Besim* [2004] VSC 168 (17 February 2004), in which testimony from the deceased’s first wife about his violence to her was admitted.

<sup>85</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 77–9 (J R Hunter, Susan Falls).

<sup>86</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 31 (J R Hunter, Peter Andrew Dauk). This was also an important part of the defence strategy in *Dzuiba*: Transcript of Proceedings, *R v Dzuiba* (Supreme Court of Western Australia, 80/2006, Johnson J, 1 May 2007) 487 (J J Scudds).

such testimony had the advantage of demonstrating that his violence was his problem, a manifestation of his need to dominate, by any means necessary, in relationships.<sup>87</sup> Evidence of violence towards other people is significant in elucidating the fact that family violence is a harmful pattern of relating by the perpetrator rather than a series of one-off incidents generated by, for example, stressful circumstances.<sup>88</sup> Independent testimony was also provided in *Falls* about threats by the deceased to people who attempted to protect the accused from him.<sup>89</sup>

### C *The Power Imbalance in the Relationship between the Accused and Deceased*

Bradfield has emphasised the importance of going beyond evidence that simply outlines discrete instances of physical violence in order to convey to the jury the ‘experience and *effects* of living a life of *being abused*’.<sup>90</sup> One means of doing this is to locate the physical violence that occurred within what Evan Stark describes as the ‘coercive control’ that characterises intimate

<sup>87</sup> One of the most powerful examples of this testimony in *Falls* came from a Crown witness who was the deceased’s friend: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 5–6 (G J Cummings, Jonathan Leslie Turner), 10–12 (J R Hunter, Jonathan Leslie Turner). He described borrowing the deceased’s mobile phone a month before his death, and taking it outside for 10 minutes to better hear the conversation. The deceased found him and punched him in the face and chest, leaving him bloodied with a black eye, broken nose and severe bruising in his chest: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 13 (J R Hunter).

<sup>88</sup> See Family Violence Death Review Committee, *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission New Zealand, 2014), where it is noted that family violence is a pattern of relating that frequently spans multiple relationships, and that intimate partner violence, child abuse and neglect, and intrafamilial violence are enmeshed forms of abuse. On the co-occurrence of family violence and animal abuse, see Frank Ascione et al, ‘Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women’ (2007) 13 *Violence against Women* 354; Sarah DeGue and David DiLillo, ‘Is Animal Cruelty a “Red Flag” for Family Violence? Investigating Co-occurring Violence toward Children, Partners and Pets’ (2009) 24 *Journal of Interpersonal Violence* 1036.

<sup>89</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 4 (G J Cummings, Joanne Linda Moore), 16–17 (J R Hunter, Joanne Linda Moore); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 34–5 (G J Cummings, Leisel Deanne Bourne), 38 (J R Hunter, Leisel Deanne Bourne).

<sup>90</sup> Stella Tarrant, ‘Something Is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws’ (1990) 20 *University of Western Australia Law Review* 573, 599 (emphasis in original), quoted in Bradfield, above n 58, 178.

partner violence, and to communicate the emotional effect of cumulative abuse on the accused. Stark suggests:

[The] critical elements of control are the isolation of victims from support systems (eg, friends, family, workmates, and helping professionals) and the exploitation and microregulation of their everyday lives in areas that extend from such survival resources as food or money to everyday routines linked to sex roles, such as how women dress, clean, or cook.<sup>91</sup>

In *Falls* the defence presented evidence detailing the psychological abuse the accused was subjected to and the power dynamics of the relationship enforced by the deceased. The defence painted a picture of a relationship in which he exercised complete control over her,<sup>92</sup> which he could enforce by his use of physical violence.<sup>93</sup> She described doing whatever she could to appease him to forestall his violence: ‘But then I ... could look at him the wrong way or speak in a tone that’s not acceptable or not cook enough or not cook the right food, just anything’.<sup>94</sup>

The accused described waking up every morning feeling ‘petrified’, constantly on guard and finely attuned to the deceased’s body language.<sup>95</sup> She described her fear as so powerful that it continued, irrationally, even after his death. After she shot him in the head at point-blank range she immediately pulled the cartridge out of the gun so that if he got up to shoot her the gun would not work.<sup>96</sup> She reloaded and shot him a second time. Even when she saw that he had stopped breathing she still locked the unit as she left so that he could not follow her. She was too scared to sleep that night in case he returned and attacked her.<sup>97</sup>

<sup>91</sup> Evan Stark, ‘Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence” (2006) 12 *Violence against Women* 1019, 1021–2.

<sup>92</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 28 (J R Hunter).

<sup>93</sup> *Ibid* 30, 41 (J R Hunter). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 61 (J R Hunter).

<sup>94</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 62 (J R Hunter).

<sup>95</sup> *Ibid*; Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 35 (J R Hunter, Susan Falls). Buel, above n 28, 265, talks about the need to convey the battered accused’s ‘omnipresent fear’.

<sup>96</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 57 (Susan Falls).

<sup>97</sup> *Ibid* 58–9 (Susan Falls). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 63 (J R Hunter).

Independent witnesses verified the power dynamics of the accused's relationship with the deceased. They rarely saw her out of his company, observed the derogatory way he spoke to her and her subdued demeanour when she was in his company compared to when she was not. They described how she assumed physical labour even though she was tiny compared to him, and her refusal to socialise within her community.<sup>98</sup> The defence made much of the fact that when the police were looking through the couple's records they did not find any friends who had seen them together socially, although they found many who had socialised with him.<sup>99</sup> Susan Falls had no friends' numbers on her mobile phone and apparently no friends.<sup>100</sup> As noted above, social isolation is an aspect of coercive control,<sup>101</sup> and this evidence added to Falls' detailed account of how the deceased isolated her from, and undermined her relationship with, her family.

#### D *Escalation Prior to the Killing*

Evidence of the escalation in violence prior to the killing came entirely from the accused's testimony. She said that the deceased was hitting her with a lot more force, and using his legs.<sup>102</sup> His time limits restricting her behaviour

<sup>98</sup> This testimony came from the officer who helped her escape: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 21 May 2010) 12, 17–18 (J R Hunter, Joanne Linda Moore); another mother from the children's school: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 53 (J R Hunter, Lyn Dye); a landlord: at 47, 48 (J R Hunter, Mark John Quinlivan); the deceased's friend from the rugby club: at 30 (J R Hunter, Peter Andrew Dauk); and an uncle of the deceased: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 18 May 2010) 44 (G J Cummings, Robert James McClelland).

<sup>99</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 15 (J R Hunter, Jodie Nicole Allan); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 54 (J R Hunter, Lyn Dye).

<sup>100</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 15 (J R Hunter, Jodie Nicole Allan); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 26 May 2010) 21 (J R Hunter, Christopher Kevin Eaton); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 25 (J R Hunter).

<sup>101</sup> See also Vera E Mouradian, *Abuse in Intimate Relationships: Defining the Multiple Dimensions and Terms* (2000) National Violence against Women Prevention Research Center <<https://www.musc.edu/vawprevention/research/defining.shtml>>.

<sup>102</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 43 (Susan Falls).

were getting tighter.<sup>103</sup> He began to demand that she ask permission for everything.<sup>104</sup> He also told her that if her mother came to visit, as was planned, he would kill one of the children on her mother's birthday.<sup>105</sup> This was the first time he had threatened the children.<sup>106</sup> Her mother's visit and birthday were impending when she killed him.

### E Evidence of Entrapment

To the judge in *Falls*, the weakness in the accused's defence was evident:

even taking the most favourable view of the evidence ... I struggle to think that killing the deceased was reasonable in all the circumstances to avoid danger, even if [the accused] honestly believed it to be so.<sup>107</sup>

It is noteworthy that Susan Falls' testimony includes an account of how the violence she experienced reinforced her entrapment.<sup>108</sup> She described learning not to fight back when he attacked her because he escalated the violence in response. He forbade her to cry or scream or put her hands up to defend her face because he would cut himself on her engagement ring: 'I just had to take it'.<sup>109</sup>

Some family members, like the deceased's uncle, had tried to protect the accused and had been threatened themselves or had made the situation worse. Others, like the deceased's sister, were not prepared to admit that there was anything wrong.<sup>110</sup>

<sup>103</sup> Ibid 41 (J R Hunter, Susan Falls).

<sup>104</sup> Ibid 46 (J R Hunter, Susan Falls).

<sup>105</sup> Ibid 39–40 (J R Hunter, Susan Falls), 42 (Susan Falls).

<sup>106</sup> A threat to the children has been called the 'turning point' in some of these homicides: see, eg, Angela Browne, *When Battered Women Kill* (The Free Press, 1987) 128–30; Transcript of Proceedings, *R v Kondejewski* (Court of Queen's Bench of Manitoba, 97.02.46 CR, Mykle J, 19 May 1998) 66–9; Transcript of Proceedings, *R v Kondejewski* (Court of Queen's Bench of Manitoba, 97.02.46 CR, Mykle J, 20 May 1998) 28, cited in Sheehy, above n 6, 108, 111.

<sup>107</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 87.

<sup>108</sup> See James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 10.

<sup>109</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 5 (Susan Falls).

<sup>110</sup> The deceased's sister described their uncle's attempts to protect Susan as 'interference' in Rodney's marriage: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 24 May 2010) 28 (J R Hunter, Kim Therese Page); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010)

The accused testified that the deceased had threatened to hurt her parents or her sister and her sister's children if she ever left him,<sup>111</sup> and this was one of the salient reasons why she had returned to him on the one occasion when she had escaped.<sup>112</sup> Leaving had been fraught: she had obtained external funding to assist her flight and had escaped while he was away from home. After he had bullied and intimidated her into returning it had, in the words of her lawyer, 'emboldened' him,<sup>113</sup> and made her situation even more dangerous and difficult to leave. Any unsuccessful attempt to leave would 'significantly escalate the risk of an assault'.<sup>114</sup> If she did manage to leave him there was no guarantee that he would not track her down and extract revenge at some point in the future.<sup>115</sup> She testified that when she left him she thought that if she did not go home she would be looking over her shoulder for the rest of her life.<sup>116</sup>

Falls also believed that she had lost the support of the police, having returned to the marriage after being assisted to escape.<sup>117</sup> In the words of her lawyer, 'the police know that women going back to their abusers is, in fact, something that happens all the time, but she doesn't know that'.<sup>118</sup> She also believed that if she went to the police to report his threats to kill their three-year-old child, he could not be arrested, she would have to go home that night and she would have been killed by him for making such an allegation to a police officer.<sup>119</sup> In other words, she believed the police could not respond

23 (J R Hunter). Buel, above n 28, 274, comments that '[i]t is my experience that the batterer's family vehemently denies that any abuse occurred, though, of course, they were not with the couple at all times'.

<sup>111</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 4 (J R Hunter, Susan Falls).

<sup>112</sup> *Ibid* 18 (J R Hunter, Susan Falls).

<sup>113</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 25 (J R Hunter).

<sup>114</sup> *Ibid* 49 (J R Hunter).

<sup>115</sup> *Ibid* 31 (J R Hunter).

<sup>116</sup> *Ibid*; Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 21 (J R Hunter, Susan Falls).

<sup>117</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 19 (Susan Falls).

<sup>118</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 31 (J R Hunter).

<sup>119</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 27 May 2010) 45 (J R Hunter, Susan Falls).

effectively, and simply reporting the threat with no immediate, certain, and long-term protection was extremely dangerous.<sup>120</sup>

There was also the issue as to how her perceptions of the options available to her had been affected by her experience of being abused.<sup>121</sup> In the words of the lawyer for Mr Hoare, one of the co-accused:

The question is not whether Miss Falls' conduct was right or wrong, the question is not whether you would have done such a thing, the question is not whether there are other options, the question is whether Miss Falls in all the circumstances, that is given what had occurred in the previous two decades, and given what had occurred in the previous two months, whether at that time when she pulled the trigger ... she believed on reasonable grounds she could not otherwise protect herself and/or her child.<sup>122</sup>

#### IV PROVIDING AN INTERPRETIVE LENS: SPECIALIST KNOWLEDGE AND RHETORICAL FRAMING

The narrative used to order and communicate events in the courtroom has crucial consequences for understanding those events, interpreting blame, attributing authority to one version of the events, and producing legal outcomes.<sup>123</sup> In this section we discuss the interpretive framework provided in *Falls* for understanding the accounts of the various witnesses in court. We first look at the expert testimony tendered and then briefly describe some of the rhetorical devices used by the defence to explain to the jury the abusive relationship that was at the centre of the trial.

<sup>120</sup> For a discussion on factors and reasons associated with victims of domestic violence not reporting violence to the police, see Emma Birdsey and Lucy Snowball, 'Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services' (Issue Paper No 91, New South Wales Bureau of Crime Statistics and Research, Department of Attorney General and Justice, October 2013). For a discussion of the problematic nature of the more general criminal justice response to domestic violence, see Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439.

<sup>121</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 49 (J R Hunter).

<sup>122</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 34 (S T Courtney).

<sup>123</sup> Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013) 91.

### A *The Function of Expert Testimony*

Expert evidence can perform a range of useful functions in homicide cases involving battered women.<sup>124</sup> The relevance and value of such testimony has been affirmed in leading decisions in Canada<sup>125</sup> and endorsed in a major United States review.<sup>126</sup>

The first function is to explain the phenomenon of domestic violence. A common error made in approaching such cases is to assume that domestic violence can be understood as a series of discrete instances of physical violence in between which the victim can (and should) either leave the relationship or get help.<sup>127</sup> Judges and juries may need guidance to understand the range of harm abusers inflict, its fundamental architecture, and the fact that it has a cumulative and compounding effect on the victim over the passage of time.<sup>128</sup>

The second (related) function of expert testimony is ‘the removal of the potential sources of error in the fact-finding process’.<sup>129</sup> Juries will commonly need assistance, for example, in understanding why leaving may not resolve domestic abuse,<sup>130</sup> why failed attempts to get help might make future help-seeking by the victim more difficult or dangerous, why there may be few independent witnesses to corroborate the accused’s account, why the accused may have made allegations of violence in the past and recanted, and why her story may take some time to fully emerge. In fact it may only emerge as a truthful and complete account after considerable time has passed and perhaps

<sup>124</sup> See Bradfield, above n 58; Regina A Schuller, ‘The Impact of Battered Woman Syndrome Testimony on Jury Decision Making: *Lavallee v R* Considered’ (1990) 10 *Windsor Yearbook of Access to Justice* 105.

<sup>125</sup> *Lavallee* [1990] 1 SCR 852; *Malott* [1998] 1 SCR 123.

<sup>126</sup> ‘The Validity and Use of Evidence concerning Battering and Its Effects in Criminal Trials’, above n 2.

<sup>127</sup> See, eg, *R v Witika* [1993] 2 NZLR 424, 436 (Gault J).

<sup>128</sup> See, eg, *Osland v The Queen* (1998) 197 CLR 316, 376–7 [167], 378 [169] (Kirby J) (*‘Osland’*). Without expert framing the sentencing judge in *R v King* (Unreported, High Court of New Zealand, Ronald Young J, 16 December 2005) [7], appears to have missed the significance of coercive control, seen the harm faced by the accused primarily in terms of the physical abuse and minimised that because of the lack of corroborative evidence. While the defence presented direct and indirect evidence of the deceased’s physical violence, including the coercive control within which it occurred, this testimony lacked expert framing: at [6]. The judge appeared to think that the abuser’s discrete acts of physical violence could be managed (for example, by giving him sleeping pills) so as to obviate the abuse, a strategy that the accused should have continued rather than seeking to be free of the abuse entirely: at [7].

<sup>129</sup> Bradfield, above n 58, 184.

<sup>130</sup> See Buel, above n 28, 258.

even then only within a relationship of trust.<sup>131</sup> Expert testimony will be particularly significant in understanding past retaliatory violence by the accused.

The third function of expert testimony is to bridge the gap between the legal requirements of self-defence and the accused's evidence.<sup>132</sup> For example, expert evidence can help support the reasonableness of the woman's perception of grave danger or her belief that no lesser measure could have protected her life.

The fourth function of such evidence is to assist in rehabilitating the accused's personal credibility, explaining her state of mind for the purposes of the subjective component of the test for self-defence, and normalising other aspects of her behaviour or demeanour that may be troubling for the jury.<sup>133</sup>

Although it is possible to successfully run self-defence in a homicide case involving a battered woman without the support of expert testimony, as is evidenced by the case of *Dzuiba*,<sup>134</sup> this can be a risky strategy, particularly in a non-traditional self-defence scenario.

### B Conceptualising the Impact of Domestic Violence

Expert testimony in these cases has drawn on different underlying theories of domestic violence and its impact on the victim. One defence strategy is to frame what took place in terms of the 'Battered Woman Syndrome'.<sup>135</sup> On this understanding domestic violence occurs in recurrent cycles with three stages: tension building; battering; and loving contrition.<sup>136</sup> Having lived through the cycle several times, the person who is the target of violence develops 'learned

<sup>131</sup> A prominent case illustrating these issues is *R v Kina* (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993). See also Boe, above n 9.

<sup>132</sup> In other words, expert evidence may perform a function in elaborating on her account, lending it some weight and translating that account into the legal requirements for self-defence: see, eg, *Lavallee* [1990] 1 SCR 852, 890 (Wilson J for Dickson CJ, Lamer, Wilson, L'Heureux-Dubé, Gonthier and Cory JJ).

<sup>133</sup> See generally Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Albany Law Review* 973.

<sup>134</sup> However, note that in *Dzuiba* both of the accused's counsel had social work training. One had had experience in working for women's refuges and therefore a detailed knowledge of the plight of battered women that she was able to draw on in crafting the defence address to the jury: Email from Jeremy Scudds to Julia Tolmie, 20 June 2007 (on file with authors).

<sup>135</sup> See Lenore E Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper & Row, 1989) 48.

<sup>136</sup> *Ibid* 42.

helplessness'.<sup>137</sup> Because her efforts to avoid the man's violence repeatedly fail as do her exit strategies, she comes to believe that his violence is inevitable and that there is little she can do to avoid or escape it. The theory was developed to explain why abused women remain in violent relationships.

Battered Woman Syndrome has been criticised as unscientific<sup>138</sup> and as an ineffective defence strategy.<sup>139</sup> In particular, it does not necessarily translate a battered woman's use of lethal defensive force into a credible self-defence case. Instead it can be understood as suggesting that the woman has developed a psychological disorder, which undermines the requirement that it was reasonable for her to employ lethal defensive force.<sup>140</sup> However, Battered Woman Syndrome evidence does have the advantage of being widely accepted as a proper subject for expert testimony and indeed some women's acquittals have been won when this theory has been deployed.<sup>141</sup>

Battered Woman Syndrome is sometimes presented as an example of the more general phenomenon of 'post-traumatic stress disorder' — also seen in those who have experienced repeat and prolonged terror: combat soldiers or refugees who have survived violent social breakdown, violence, and displace-

<sup>137</sup> See *R v Runjanjic* (1991) 56 SASR 114, 118 (King CJ). Note that this concept was also controversially employed in *R v MacDonald* (Unreported, Supreme Court of Victoria, Nettle J, 3 March 2006): see Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 261–2.

<sup>138</sup> Ian Leader-Elliott, 'Battered but Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; 'The Validity and Use of Evidence concerning Battering and Its Effects in Criminal Trials', above n 2; *Osland* (1998) 197 CLR 316, 374–5 [164] (Kirby J); David L Faigman and Amy J Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Arizona Law Review* 67; Marilyn McMahon, 'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome' (1999) 6 *Psychiatry, Psychology and Law* 23.

<sup>139</sup> Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369. See also *Malott* [1998] 1 SCR 123, 143 [41] (L'Heureux-Dubé J for L'Heureux-Dubé and McLachlin JJ); Myrna S Raeder, 'The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and against Batterers in Cases Implicating Domestic Violence' (1996) 67 *University of Colorado Law Review* 789.

<sup>140</sup> Patricia Easteal and Anthony Hopkins, 'Women and Criminal Law: Defences to Homicide' in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 109, 127, refer to evidence of this nature as focusing on the 'medically explicable "irrationality" of her actions'. See also Julie Stubbs and Julia Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australia Case Study' (1995) 8 *Canadian Journal of Women and the Law* 122; Toole, above n 137, 278, criticising the reasoning in *R v Black* [2011] VSC 152 (12 April 2011).

<sup>141</sup> *Lavallee* [1990] 1 SCR 852; *R v Runjanjic* (1991) 56 SASR 114; *R v MacDonald* (Unreported, Supreme Court of Victoria, Nettle J, 3 March 2006).

ment. Common features are said to be disassociation, hyper-vigilance, and flashbacks.<sup>142</sup> The disorder can be used to explain why battered women may have a finely developed sensitivity to danger and extreme emotional reactions to seemingly minor incidents. A variation of 'learned helplessness' can also be found in the concept of 'traumatic bonding' — an ambivalent form of bonding observed in hostage situations where the hostage develops an emotional attachment to the captor.<sup>143</sup>

More recently there has been a move from focusing on the psyche of the woman who is the target of the man's violence to attempting to explain his strategic use of violence and the social context in which his actions are reinforced — evidence on 'battering and its effects' or 'social framework evidence'.<sup>144</sup> This evidence is intended to convey the objectively dangerous nature of serious domestic violence and the myriad of real life factors that operate to assist a man in entrapping a victim of domestic violence, including the many obstacles to obtaining help.<sup>145</sup> This evidence is directed at supporting the objective limbs of self-defence — explaining why the accused was in fact under serious threat and why she had no legal means of defusing that threat short of using lethal self-help.

<sup>142</sup> See Judith Lewis Herman, *Trauma and Recovery* (Basic Books, 1992) 35–47.

<sup>143</sup> For a detailed description of batterers' strategies and the effects upon their victims, see *ibid* ch 4.

<sup>144</sup> Holly Maguigan, 'A Defense Perspective on Battered Women Charged with Homicide: The Expert's Role during Preparation for and Conduct of Trials' (Working Paper, National Association of Women Judges) 9, citing Laurens Walker and John Monahan, 'Social Frameworks: A New Use of Social Science in Law' (1987) 73 *Virginia Law Review* 559, 560; Bradfield, above n 58; 'The Validity and Use of Evidence concerning Battering and Its Effects in Criminal Trials', above n 2.

<sup>145</sup> Buel, above n 28, 297, comments that one of the problematic aspects of Battered Woman Syndrome evidence 'is the notion of volition — that battered women stay in violent relationships even in the face of appealing alternatives. Learned helplessness conveniently ignores the myriad economic, social, psychological, and legal obstacles victims face'. See also Justice J Bruce Robertson, 'Battered Woman Syndrome: Expert Evidence in Action' (1998) 9 *Otago Law Review* 277, 285; *R v Zhou* (Unreported, High Court of New Zealand, Anderson J, 4 October 1993), in which the expert added lack of money and support systems, as well as pressure by family to stay in these relationships. For a fuller discussion of this trial, see Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories That Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472. Buel, above n 28, 278, says that 'an expert can explain why existing options were unavailable to a specific victim — perhaps because she lacked transportation, job skills, and childcare, or did not speak English, drive, or was not permitted to leave the home'; see also at 268.

United States scholar Evan Stark's<sup>146</sup> work is part of the shift in focus from the psyche of the victims to men's instrumental deployment of threats, controlling behaviours and violence to obtain material, economic, social, psychological and sexual benefits from women, as well as the social structures that support them in doing so. He argues that the full impact of domestic abuse cannot be measured simply by the occurrence of physical violence.<sup>147</sup> Truly harmful abuse occurs when one person exercises coercive control over their partner,<sup>148</sup> depriving them in the process of their very personhood, as is illustrated in the following example: 'Frank, not Donna, controlled the most basic acts that comprised her identity, including her movement and the speech act, what she said, whom she spoke to, even on the phone'.<sup>149</sup>

Someone exercising coercive control over their partner will employ a range of strategies<sup>150</sup> that are tailored to the intimate psychology of the particular target to control her even when she is not in the presence of the perpetrator — for example, while she is at work and, sometimes, even after he is dead. Physical abuse is only one of an array of abusive tactics and is used to reinforce the control that the perpetrator is imposing on his intimate partner. Violence does not have to be particularly severe to be effective: Stark says that the physical violence may be repetitive, minor abuse with a cumulative effect. He says that it is the 'cumulative intensity' rather than the severity of the abuse that can cause the victim to feel that she is being 'smothered alive'<sup>151</sup> and to experience a mounting 'sense of entrapment'.<sup>152</sup> Stark suggests that, whilst

<sup>146</sup> Professor Stark has appeared as an expert witness for the defence in many battered women's homicide cases.

<sup>147</sup> Professor Stark does not, however, suggest that physical abuse is acceptable: Evan Stark, 'Do Violent Acts Equal Abuse? Resolving the Gender Parity/Asymmetry Dilemma' (2010) 62 *Sex Roles* 201, 203, in which it is noted that for most women it is a continuous pattern of minor assaults with a cumulative impact, 'accompanied by a range of tactics designed to isolate, intimidate, exploit, degrade and/or control a partner in ways that violate a victim's dignity, autonomy and liberty as much as their physical integrity or security'.

<sup>148</sup> The concept of coercive control may have originated with United States sociologist Michael Johnson: see Joan B Kelly and Michael P Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476.

<sup>149</sup> Stark, *Coercive Control*, above n 1, 306.

<sup>150</sup> Stark, 'Do Violent Acts Equal Abuse?', above n 147, 207, comments that abuse usually involves 'violence, intimidation, isolation and control', the latter including 'constraints over everything from basic material resources (money, food, sleep, etc) to imposed "rules" about everyday living'.

<sup>151</sup> Stark, *Coercive Control*, above n 1, 300.

<sup>152</sup> *Ibid* 163.

men and women are equally capable of physical violence, women do not generally have access to the resources and social support necessary to exercise coercive control over their male partners.<sup>153</sup> Furthermore, the social expectation that to be a wife and a mother is to occupy a position of servitude, with corresponding constructions of masculine entitlement, can make the oppressive nature of coercive control invisible to those who are witnessing it.<sup>154</sup>

An example that chillingly illustrates Stark's point can be found in *Falls*. As noted above, the deceased had threatened to kill their youngest child if Susan Falls' mother came to visit as she planned to do. The Crown suggested that one of the lawful options that the accused had to defuse the deceased's threat to kill their child was to appease him by persuading her mother not to visit them.<sup>155</sup> Stark would likely respond that depriving a woman of lawful self-defence because she could have sacrificed her fundamental human right to associate with her own mother — in other words, because she failed to concede to the unreasonable and dehumanising demands of someone who had terrorised her for 20 years — is to throw the weight of the law behind her subjugation. That the Crown made this suggestion demonstrates Stark's point that coercive control is often invisible in a traditional heterosexual relationship where the woman is the target of the abuse.

The concept of coercive control provides an explanation of the abuse that links what might otherwise appear to be random, discrete or 'minor' incidents of violence. It moves beyond an episode-based analysis of the abuse to a systemic and cumulative understanding of the range of behaviours engaged in by the perpetrator.<sup>156</sup> Expert evidence about the relationship between a man's

<sup>153</sup> Ibid 199, 377–8.

<sup>154</sup> Stark, 'Do Violent Acts Equal Abuse?', above n 147, 207. The model of coercive control

linked men's greater capacity than women to deploy coercive control to their ability to exploit persistent gender inequalities; identified women's enactment of stereotypic gender roles as the principal target of control tactics, particularly their roles as housekeepers, wives and mothers; and depicted coercive control as a 'liberty' crime that caused a range of harms to women's autonomy, dignity, personhood, and capacity to fulfill their responsibilities as citizens as well as to their physical security. Because the domestic roles targeted in this form of abuse are already devalued by their default consignment to women, the micro-management of daily activities that often accompanied coercive control was typically 'invisible in plain sight.'

<sup>155</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 10, 13 (G J Cummings).

<sup>156</sup> Note that the New Zealand Court of Appeal in *R v Suluape* (2002) 19 CRNZ 492 emphasised the need to make a circumstantial and cumulative assessment of the impact of violence on the accused in homicide cases where battered defendants have killed their partners. See also Bradfield, above n 58, 184; Buel, above n 28, 233.

use of coercive control and a woman's resort to homicide may be particularly important where there is no apparent increase in the deceased's physical violence nor any new and catastrophic threat. Thus, for women responding to the general threat posed by an abusive relationship from which they cannot safely extricate themselves rather than a specific threat, it elucidates the full nature of the harm that the relationship presents and why an attempt to challenge the perpetrator's control — for example, by leaving the relationship — may escalate his violence and its lethal potential.<sup>157</sup>

Furthermore, Stark points out that coercive control is one of the top risk factors for domestic homicide, along with separation and access to a weapon.<sup>158</sup> Expert testimony that draws on the literature on the lethality risk indicators for intimate partner violence homicide can provide critical information for the jury.<sup>159</sup> The Victorian Domestic Violence Resource Centre found that such factors are not always put before the courts.<sup>160</sup> They draw on the case of *R v Edwards*<sup>161</sup> to illustrate the potential value of such evidence to demonstrate that the accused's belief that she was facing life-threatening danger was reasonable.

### C *The Quality and Availability of Expert Testimony*

Choosing an expert who has a sophisticated understanding of contemporary theoretical approaches to intimate partner violence, and who understands the legal framework within which their testimony will be applied, is essential. In some cases it appears likely that the nature of the testimony given by the expert has undercut the defence submissions on self-defence,<sup>162</sup> and concern that this will happen has informed defence counsel's decision not to use

<sup>157</sup> If coercive control is present then attempts to protect the victim, like leaving, might trigger increased efforts to quell and control her: Bradfield, above n 58.

<sup>158</sup> Stark, *Coercive Control*, above n 1, 276–7. See also Jacquelyn C Campbell et al, 'Intimate Partner Homicide: Review and Implications of Research and Policy' (2007) 8 *Trauma, Violence, & Abuse* 246.

<sup>159</sup> See Campbell et al, above n 158, for a review of this literature.

<sup>160</sup> 'Justice or Judgement?', above n 3, 47.

<sup>161</sup> [2012] VSC 138 (24 April 2012).

<sup>162</sup> See Transcript of Proceedings, *R v Gilbert* (Unreported, Supreme Court of Western Australia, 280/1993, Scott J, 13 October 1993) 13 (Scott J); Stubbs and Tolmie, 'Race, Gender, and the Battered Woman Syndrome', above n 140, 128, 154–7, citing Transcript of Proceedings, *R v Hickey* (Supreme Court of New South Wales, 70 215/90, Slattery AJ, 16 April 1992) 120 (Peter Zahra, William John Taylor).

expert testimony in other instances.<sup>163</sup> This problem is particularly acute since experts are generally drawn from the disciplines of psychology or psychiatry. These disciplines are often characterised by a tendency to construct and view social problems through the lens of individual psychological dysfunction — potentially an unhelpful approach in a self-defence context — although, as discussed below, some psychiatrists have a more expansive approach. In small jurisdictions like New Zealand, and given the rarity of these types of cases, it may be particularly difficult to find local psychologists or psychiatrists who have sufficient expertise to testify appropriately. One way of addressing this problem would be to employ the expertise of those working in community-based organisations that support family violence victims.<sup>164</sup> In *R v Gadd*, for example, a refuge worker provided expert testimony.<sup>165</sup>

#### D Expert Testimony in Falls

In *Falls* the defence presented two expert witnesses, perhaps anticipating the difficulties that her defence would pose for jurors and hoping to cast a wide theoretical net to account for her acts.<sup>166</sup> Both experts were psychiatrists who testified under the rubric of Battered Woman Syndrome evidence, but their testimony owed little to the original narrow understanding of this form of evidence.<sup>167</sup> A substantial part of their testimony described the phenomenon

<sup>163</sup> As happened in *Dzuiba* (Unreported, Supreme Court of Western Australia, Johnson J, 14 May 2007): Email from Jeremy Scudds to Julia Tolmie, 20 June 2007 (on file with authors).

<sup>164</sup> Note that the Law Commission (NZ), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 6 [14], made it clear that those qualified to give evidence 'could include ... refuge workers and social scientists', although the authors are not aware of a case in which this has taken place in New Zealand. 'Justice or Judgement?', above n 3, 47, commented that

[t]here was little, if any, indication in our study that a broad range of experts with specific family violence training is being called upon by legal counsel. Rather, we found that in these cases expert evidence was confined to that provided by forensic psychiatrists and psychologists who undertook psychological assessments of the women and did not appear to provide evidence relating to the broader social context of family violence.

<sup>165</sup> Transcript of Proceedings, *R v Gadd* (Supreme Court of Queensland, 355/1994, Moynihan J, 30 March 1995) 189 (J Jerrard, Catherine Ann Miller).

<sup>166</sup> These were Dr Joan Lawrence, specialist in homicides involving female killers and Adjunct Professor at The University of Queensland, and Dr Carolyn Quadrio, Associate Professor at The University of New South Wales and specialist in post-traumatic stress disorder, domestic violence and child abuse.

<sup>167</sup> See Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Apple-garth J, 31 May 2010) 12–15 (J R Hunter, Carolyn Quadrio), 44 (J R Hunter, Joan Lawrence). Both experts were clear that the term 'syndrome' is used very loosely in this field and not in

of ‘battering’ as being about the abuser’s process of isolating the victim from her community in order to become the ‘primary influence on her life’,<sup>168</sup> and then using physical violence to reinforce the dynamics of dominance and control. Thus, Dr Quadrio said:

although the physical battering is something that we emphasise ... the most important aspect of an abusive relationship is the dominance and control. ... [A]nd often it is control over every aspect of the victim’s life ... So the control usually extends to things like what you can wear, where you can go, who you can talk to, how much money you can spend, what you can spend it on.<sup>169</sup>

Both experts also described the social framework within which such violence took place — the limited solutions available to women struggling to deal with extreme violence and that leaving a violent relationship was often not a reasonable option because it was too dangerous.<sup>170</sup> Martha Mahoney has used the term ‘separation assault’ to describe the potentially lethal responses of coercive men who escalate their violence when their partners attempt to exit.<sup>171</sup> Murder is the ultimate control tactic that such men may resort to when they fear they have lost control over the woman. Dr Quadrio said:

there’s been a lot of research done now that shows that actually when women are in a domestic violence situation they’re usually quite intuitively correct in assessing the danger that they’re in. ... So if she says, ‘If I try to leave he’s likely to kill me or hurt me more severely,’ then she’s probably right. The other aspect that sadly has been shown to be true is that when she says, ‘Well, the police can’t protect me,’ that’s also been shown to be true. That, you know, a lot of times when people are killed in domestic violence situations there are restrain-

the sense of a diagnostic assessment — it is more a group of behaviours which have been noted because they occur in certain circumstances and more commonly than statistically average: see at 7 (J R Hunter, Carolyn Quadrio); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 97 (G J Cummings, Joan Lawrence). See also the expert testimony in *R v Irsigler* (Unreported, Supreme Court of Queensland, Mullins J, 24 February 2012), cited in Douglas, ‘A Consideration of the Merits’, above n 24, 376.

<sup>168</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 80 (Joan Lawrence).

<sup>169</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 13.

<sup>170</sup> Note that the value of social framework evidence in cases involving domestic violence has been increasingly accepted in Australia: see, eg, the useful discussion in *The Partial Defence of Provocation*, above n 7, 178–86 [8.102]–[8.138].

<sup>171</sup> See Mahoney, above n 2.

ing orders in place but it hasn't stopped the fatal outcome. ... Then there are other reasons, and usually there's not one reason but the constellation of reasons that keeps people there. Often there's a lack of financial independence. Often the feeling that there's nowhere to go. Concern about the children and how you'll survive without someone bringing in an income. And then often there have been attempts to leave and those attempts have failed for some reason and then the woman feels more fearful of trying another time, or she's left and she's gone back. She's either been cajoled or threatened or been promised, you know, 'I'll be different. It won't happen any more,' and she's gone back and then the situation continues exactly the same, so many women then feel ashamed to go for help or ashamed to admit that they've gone back to the same situation, that they've been foolish enough to believe the promises. ... [A]nd then sometimes women in these situations become so depressed that they're ... unable to really take the initiative and protect themselves or they become ... incapacitated with trauma symptoms or anxiety symptoms ...<sup>172</sup>

Dr Quadrio also pointed out that in this case the threats involved other people, so that Susan Falls might have been able to make herself safe but she could not make her children, her parents, her sister, or her sister's family safe.<sup>173</sup>

Both experts confirmed the accused's account of the escalation of threat. The deceased's threats to kill (directed at the children) had become specific and detailed. They assessed his threats as 'common', and the accused's perceptions that these threats were serious as 'accurate'.<sup>174</sup> They said that it was 'usual' for battered women to use a weapon and to wait until the perpetrator is disabled in some way before using defensive force, 'because you can't respond with physical force with that much stronger opponent'.<sup>175</sup>

<sup>172</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 8–9; see also at 17. Dr Lawrence explained that 'we also know from the research that's been done that ... when the woman in this situation does try to leave ... it is the most dangerous period': Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 81. She also said that protection orders are frequently not effective and can in fact increase the woman's endangerment: at 82. See also Jenny Mouzos and Catherine Rushforth, 'Family Homicide in Australia' (Trends & Issues in Crime and Criminal Justice No 255, Australian Institute of Criminology, June 2003).

<sup>173</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 17.

<sup>174</sup> *Ibid* 9 (Carolyn Quadrio).

<sup>175</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 87 (Joan Lawrence). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 17–18 (Carolyn Quadrio).

Information about the hidden nature of domestic violence assists juries to understand why there may be limited corroborative evidence of the violence and to make appropriate evaluations of the available evidence. In *Falls* the experts gave evidence that it was typical for abused women to be isolated, to hide their abuse, to lie about the cause of their injuries, to have memory loss because of trauma, and to fail to seek medical help.<sup>176</sup> Of course, in some cases it may be possible for defence counsel to use the testimony of police witnesses with experience working with domestic violence victims to put this evidence before the jury.<sup>177</sup>

The acknowledgement that abuse may have psychological consequences, such as memory loss and impaired reasoning, may be vital to explain some aspects of the evidence, or a lack of evidence, but can raise problems for the defence because it may function to undermine the reasonable basis of self-defence. In *Falls*, both experts emphasised that the accused was under an objectively serious and escalating threat without reasonable lawful options to deal with it, and *also* that her psychological trauma and deterioration in thinking as a consequence of surviving severe violence contributed to the killing.<sup>178</sup> Thus Dr Lawrence said that, although the accused was a surprisingly resilient and capable woman who did not have a mental illness, her depression and anxiety at the time of the killing interfered with her ability to think things through logically and arrive at a reasonable conclusion.<sup>179</sup> In some cases, especially those involving non-traditional self-defence scenarios,<sup>180</sup> evidence of psychological impairment may engage the jury's sympathy for the plight of the accused. Women presented as resourceful and rational are

<sup>176</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 80–1, 82–3 (Joan Lawrence); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 13, 15 (Carolyn Quadrio).

<sup>177</sup> See the defence work of Don Worme in *R v Kay* (Unreported, Court of Queen's Bench for Saskatchewan, Maurice J, 18 June 1994), cited in Sheehy, above n 6, 166–8.

<sup>178</sup> See also 'Justice or Judgement?', above n 3, 23, citing *R v Edwards* [2012] VSC 138 (24 April 2012).

<sup>179</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 92, 94.

<sup>180</sup> *Dzuiba* (Unreported, Supreme Court of Western Australia, Johnson J, 14 May 2007), in which Battered Woman Syndrome was not used, can be contrasted here. Because it involved a traditional self-defence scenario where the accused had stabbed the deceased whilst she was under physical attack from him, the defence focused primarily on reconstructing the circumstances immediately surrounding the killing to corroborate her account of what had happened. Past evidence about their relationship and his violence towards other people was proffered to lend credibility to her description of what he had done to her on the day in question and her fears about the violence he was capable of inflicting at that time.

perhaps at risk of being seen as cold-blooded killers deserving of criminal condemnation, particularly when there is an element of planning and premeditation in their actions.<sup>181</sup> It is also possible that the woman's trauma must be emphasised as another means of proving that serious abuse took place, given the hidden nature of the phenomenon. As Belinda Morrissey argues, women who kill need a 'new legal narrative' to uphold their claims of self-defence based 'upon a concept of determined agency'.<sup>182</sup>

### *E Rhetorical Devices to Frame the Experience of Violence*

The accused, defence counsel and the experts in *Falls* all drew on metaphors and analogies to attempt to convey to the jury the lived reality for the accused of the deceased's violence. Defence counsel said that the accused's home was a 'totalitarian regime'.<sup>183</sup> In describing how it worked he drew an analogy to the Democratic People's Republic of Korea ('North Korea'):

You might realise that North Korea don't like to let people into the country without supervision because they might find out what it is really like and go away and tell people. North Korea doesn't let people out of the country either without supervision because they might see what it is like for everybody else. They might tell someone what is going on inside and they might not come back.<sup>184</sup>

Dr Carolyn Quadrio compared living in a situation of ongoing domestic danger to being a prisoner of war. She said that such people 'become highly attuned to their captors so they can read the signs if the situation's more dangerous than usual ... [and] try and find ways of appeasing or allaying the violence, if they can'.<sup>185</sup> When Dr Quadrio asked the accused what she was feeling at a certain time in the past, Falls would often respond with an appraisal of the deceased, which 'really reflected that her mental state had

<sup>181</sup> See, eg, *Osland* (1998) 197 CLR 316.

<sup>182</sup> Belinda Morrissey, *When Women Kill: Questions of Agency and Subjectivity* (Routledge, 2003) 102.

<sup>183</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 32 (J R Hunter).

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

<sup>185</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 10.

gotten into not thinking about her own feelings but reading him constantly'.<sup>186</sup>

## V THE ACCUSED'S TESTIMONY

In many instances, as in *Falls*, the hidden nature of domestic violence means that the primary account of the violence, and the only account of its escalation, must come from the accused. The credibility of the accused in giving her testimony will be crucial for the jury in deciding whether or not they believe her self-defence case. This will be particularly so if, as in *Falls*, she has been untruthful at some point or her account of what happened has taken some time to emerge in its entirety and has changed at different points in that process.

### *A Assistance with Recovery from Trauma*

A woman may not have been a particularly good advocate for herself even *prior* to surviving severe and long-term abuse. Long-term abuse often will further undercut a woman's self-confidence and her ability to communicate her experience and, at the same time, inflame her defensiveness. Survivors can appear to others to be wooden, 'sullen',<sup>187</sup> disassociated, stoic, unsympathetic, or guilt-ridden.<sup>188</sup> As Sarah Buel remarks: 'some survivors are too traumatized, depressed, angry, catatonic, inarticulate, or ashamed to present the facts sufficiently. They may have trouble remembering the horrific events or be grief-stricken from killing a partner they loved'.<sup>189</sup>

It is crucial in these cases to obtain trauma therapy for the accused as soon as possible.<sup>190</sup> A full and accurate picture of the accused's situation is unlikely to emerge until her shock and trauma have been treated, which may require some time. The accused may have survived the abuse by putting in place

<sup>186</sup> Ibid.

<sup>187</sup> Teresa Craig was so described by a police officer who interrogated her after her arrest for killing her abuser: Transcript of Proceedings, *R v Craig* (Ontario Superior Court of Justice, R Maranger J, 16 April 2008) 167 (Glen Ferland).

<sup>188</sup> See *R v Wickham* (Unreported, High Court of New Zealand, Ellis J, 14 October 2010); 'Detention for Wife Who Killed Husband', *The New Zealand Herald* (online), 21 December 2010 <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10695705](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10695705)>; Patricia Eastel, Lorana Bartels and Sally Bradford, 'Language, Gender and "Reality": Violence against Women' (2012) 40 *International Journal of Law, Crime and Justice* 324.

<sup>189</sup> Buel, above n 28, 278; see also at 264.

<sup>190</sup> Herman, above n 142, ch 8.

psychological defences that she is unable to drop without an extended experience of safety and professional assistance. For example, women who are victimised often normalise and minimise the abuse they experience.<sup>191</sup> Certain aspects of the experience of abuse — particularly sexual abuse — may be too difficult to talk about without emotional and physical recovery.<sup>192</sup> Until there has been some recovery, discussing the abuse may also trigger renewed trauma. Furthermore, the accused's memory and ability to clearly and logically recount her experiences can be affected by the trauma caused by ongoing violence, particularly if she has coped with her victimisation by self-medicating with drugs and alcohol.<sup>193</sup>

A battered woman's understanding of what happened to her may shift with her emotional recovery. For example, her immediate feelings of guilt may colour her initial interpretation of events.<sup>194</sup> She may be resistant to seeing herself as a 'battered woman' and therefore it may be important not to take her self-definition at face value.<sup>195</sup> It follows that it is desirable that the accused exercise her right to silence and not be assessed by Crown doctors and experts until she has received treatment.<sup>196</sup> Defence counsel in *Dzuiba*, in part, attribute their success in that case to ensuring that the accused exercised her right to silence whilst she was initially in the custody of the police — and they attended the station in person to ensure that this happened.<sup>197</sup> However, it is not uncommon for battered women who have killed an intimate partner

<sup>191</sup> See, eg, *R v Wihongi* [2012] 1 NZLR 775, 780 [25] (O'Regan P for O'Regan P, Arnold and Stevens JJ) (Court of Appeal); *R v Black* [2011] VSC 152 (12 April 2011) [7] (Curtain J); Viveka Enander, "A Fool to Keep Staying": Battered Women Labeling Themselves Stupid as an Expression of Gendered Shame' (2010) 16 *Violence against Women* 5; Emma Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16 *Violence against Women* 1412, 1417.

<sup>192</sup> *R v Kina* (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993).

<sup>193</sup> See Sheehy, above n 6, chs 5, 7.

<sup>194</sup> For example, it has been noted that battered women often ring the police immediately after the homicide and make a full confession: see Cynthia K Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* (Ohio State University Press, 1989) 15.

<sup>195</sup> See *Mahari* (Unreported, High Court of New Zealand, Winkelmann J, 14 November 2007).

<sup>196</sup> For an example of the potentially disastrous consequences of premature assessment by an expert retained by the Crown, see the prosecution of Lilian Getkate, discussed in Sheehy, above n 6, ch 6.

<sup>197</sup> (Unreported, Supreme Court of Western Australia, Johnson J, 14 May 2007); Email from Jeremy Scudds to Julia Tolmie, 20 June 2007 (on file with authors); Transcript of Proceedings, *R v Dzuiba* (Supreme Court of Western Australia, 80/2006, Johnson J, 26 April 2006) 126 (J J Scudds).

to contact the police, report the incident and take full responsibility for what has occurred in the immediate aftermath of the incident, before they have access to legal advice.

It is notable that by the time Susan Falls testified at trial, she had worked with psychiatrists and had three years to recover from her trauma and begin to rebuild her life. Nonetheless, her story had taken six months of psychiatric therapy to emerge in its entirety — more than a year after the events in question took place. During that process there was some time during which she had continued to lie about certain aspects, and had been unable to reveal specific details about other events.<sup>198</sup>

The unfortunate reality is that some women may never arrive at a point where they are able to provide compelling testimony on their own behalf. In these cases the role of experts in rehabilitating their credibility, and elaborating on, framing, and explaining their testimony will be crucial.

### B *Building Trust and Eliciting a Detailed Account*

Patricia Easteal and Anthony Hopkins discuss the importance for lawyers representing battered defendants on homicide charges of taking time to establish trust, engaging in open-ended dialogue to elicit information (as opposed to direct questioning), and taking a crisis worker, Indigenous field officer or interpreter along to interviews for Indigenous or immigrant clients, even when language does not at the outset appear to be a major barrier to communication.<sup>199</sup> Evidence about sexual abuse, in particular, may take time and a relationship of trust to emerge; lawyers will need to be careful to make sure that they have elicited this information.<sup>200</sup>

*R v Kina*,<sup>201</sup> a case in which there was a miscarriage of justice, is a classic illustration of the dangers present here. Robyn Kina, an Aboriginal woman, was convicted of murder for killing her abusive partner of three years and

<sup>198</sup> Even a year after killing the deceased, Falls could not tell her psychiatrist which child had been threatened because she had not sat down and told the children about it. The psychiatrist described this fact as ‘chilling’: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 90 (Joan Lawrence).

<sup>199</sup> Easteal and Hopkins, above n 140, 112–14. See also Buel, above n 28, 220, 226, 261; Herman, above n 142.

<sup>200</sup> Buel emphasises the importance for counsel of asking direct and targeted questions about sexual abuse: Buel, above n 28, 263. Clearly some ground work needs to be laid first to ensure that the client is comfortable responding to such questioning.

<sup>201</sup> (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993).

sentenced to life imprisonment after a trial lasting less than one day. It was not until five years later, after she had spent years speaking to a particular social worker in prison about her experiences, that her story emerged, one that exculpated her acts. The information critical to her defence had been submerged by ‘the combination of her defense lawyer’s approach in interviews and her shame, guilt, and embarrassment at what [her partner] Black had done to her’.<sup>202</sup>

She was, as a result, left without any evidential basis to support a defence to murder. What was key in *R v Kina*, and particularly difficult for the accused to talk about, was the extreme and brutal sexual abuse she had experienced and the threats the deceased had begun to make to her young niece who was living with them.<sup>203</sup>

### C Use of Emotional ‘Affect’ to Support the Accused’s Credibility

In *Falls* the Crown described the accused as a ‘careful, calculating liar’,<sup>204</sup> who was both manipulative<sup>205</sup> and convincing.<sup>206</sup> The homicide was cast as ‘a cold, methodical killing where the habits of the prey ... were exploited to the hilt’.<sup>207</sup> The defence, on the other hand, suggested that her lies were reluctant,

<sup>202</sup> Linda Hancock, ‘Aboriginality and Lawyering: Problems of Justice for Aboriginal Defendants — Focus on Partner Homicide’ (1996) 2 *Violence against Women* 429, 431. See also Diana Eades, ‘Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina’ (1996) 16 *Language & Communication* 215; Robbie Kina, ‘Through the Eyes of a Strong Black Woman Survivor of Domestic Violence: An Australian Story’ in Julia Sudbury (ed), *Global Lockdown: Race, Gender, and the Prison-Industrial Complex* (Routledge, 2005) 67.

<sup>203</sup> The same reluctance can be evidenced in the courts’ treatment of sexual abuse. In *R v Wihongi* [2012] 1 NZLR 775, 788 [63] (O’Regan P for O’Regan P, Arnold and Stevens JJ) (Court of Appeal), the Court described the deceased as ‘forc[ing] himself sexually on her’, without using the word ‘rape’. See also *R v Black* [2011] VSC 152 (12 April 2011) [12]–[13], [18] (Curtain J).

<sup>204</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 37 (G J Cummings). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 69 (G J Cummings); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 5 (G J Cummings).

<sup>205</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 5 (G J Cummings).

<sup>206</sup> *Ibid* 8 (G J Cummings).

<sup>207</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 17 May 2010) 37 (G J Cummings). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 2, 8 (G J Cummings).

unsophisticated, and not motivated by self-interest.<sup>208</sup> Falls' credibility was rehabilitated in two ways: by her own testimony during her trial and via the expert witnesses who supported her account.

By suggesting that she suffered from Battered Woman Syndrome and that her emotional and behavioural reactions were 'typical' of someone in her situation, the experts were able to 'normalise' her responses to her situation and give her account some plausibility.<sup>209</sup> They were also able to support her credibility by speaking as highly experienced professionals who started listening to her with a preparedness to disbelieve her, but who arrived at the opinion that she was telling the truth.<sup>210</sup> Dr Quadrio, for example, said it would be very hard to confabulate the symptoms of post-traumatic stress disorder because it is not a matter of reciting symptoms. When people talk about their trauma they go into the state of arousal that they were in at the time of the events. It is difficult to feign experiencing such flashbacks, which have an authenticity that is compelling. Dr Quadrio spoke of this phenomenon as 'affect'.<sup>211</sup>

Further, on the stand Susan Falls was a compelling witness in her own defence. After her testimony her counsel developed the theme of her 'emotional affect', asking jurors: 'Were there times when you could feel the emotion and were there times when her emotion moved you in a visceral way?'<sup>212</sup>

In *Dzuiba* both lawyers had background training as social workers and saw this as assisting them to consider the emotional needs of their client whilst she was on remand and on trial.<sup>213</sup> They ensured that she had counselling while she was awaiting trial but, interestingly, were careful to ensure that the

<sup>208</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 38, 42 (J R Hunter).

<sup>209</sup> See, eg, *ibid* 51–2 (J R Hunter).

<sup>210</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 91 (Joan Lawrence); Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 10–11 (Carolyn Quadrio).

<sup>211</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 31 May 2010) 25.

<sup>212</sup> Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 37 (J R Hunter). See also Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 2 June 2010) 55 (C L Morgan). The details of her account were also stressed as something that she could not have 'just made up', for example, her account of pouring milk on the deceased's Coco Pops when she heard his hair dryer in the morning so they were just how he liked them when he got to the table — not too crunchy and not too soft: Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 1 June 2010) 42 (J R Hunter).

<sup>213</sup> Email from Jeremy Scudds to Julia Tolmie, 20 June 2007 (on file with authors).

counselling did not cover ‘in much detail the final moments of the fight which resulted in the death of the man attacking her’<sup>214</sup> in order to preserve her full range of emotion when she gave evidence about that. In other words, they wanted the jury to be able to assess her unrehearsed ‘emotional affect’.

## VI CONCLUSION

To obtain an acquittal for a battered woman on the basis of self-defence in a non-confrontational self-defence case, as occurred in *Falls*, remains an unusual outcome. In spite of reforms intended to address the difficulties battered women have in raising self-defence, self-defence is rarely available where a physical attack is not actually in progress or ‘imminent’.<sup>215</sup> Whether the *Falls* case illustrates the power of an accused woman who was able to act as a compelling advocate when giving testimony on her own behalf, the power of certain gender, class and ethnic stereotypes that the accused in this case fell within,<sup>216</sup> the power of good legal representation or the co-occurrence of all of these things is impossible to determine.

Domestic violence is particularly difficult to convey in the criminal justice context because it spans a period of time (often lengthy), has a cumulative impact on those who survive it that affects how they see and respond to the world, is a pattern of behaviour rather than an event or events, is hidden, has been culturally minimised, and is more complex than an account of the physical incidents of violence that have taken place would suggest. In this article we have documented aspects of the defence advocacy in *Falls* that were particularly well-suited to addressing some of these difficulties. We have described how the legal requirements for self-defence were interpreted expansively (with the support of the judge), the detailed testimony corroborating and substantiating the history of abuse that was provided for the jury, the use of expert testimony and rhetorical devices to explain the impact of family violence, and strategies to support the accused’s recovery and eventual testimony.

<sup>214</sup> Email from Lindy Porter to Julia Tolmie, 1 August 2011 (on file with authors).

<sup>215</sup> See above nn 12–17 and accompanying text.

<sup>216</sup> Douglas, ‘A Consideration of the Merits’, above n 24, 377 (citations omitted), describes these cases as involving “‘benchmark” battered women’ in that they are ‘smaller than their partners, white, drug-free, monogamous and without a criminal record’, who have ‘suffered fierce physical abuse over many years ... had attempted to leave the relationship and ... had sought assistance from the police’. The killing is the first time that they have fought back.

What is clear is that the framing of the legal requirements of self-defence and the linking of those requirements to the facts was only a part of the lawyering that was so effective in this particular case. There were also evidentiary, academic, rhetorical and therapeutic dimensions to the work that was done by the defence team. As well as shifting the framing of self-defence so that it accommodated the bigger story that needed to be told, there was painstaking work entailed in rehabilitating, supporting and corroborating that story so that, in Tyson's words, 'authority' could be attributed to it for the purpose of producing legal outcomes.<sup>217</sup>

<sup>217</sup> Tyson, above n 123, 91.