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## **Model case note**

### **Summary**

*Osland v R is significant as an exposition of the psychological concept of Battered Woman Syndrome (BWS), as it relates to the murder defences of provocation and self-defence. The majority in Osland indicates that expert evidence of BWS should not be conclusive in itself, but must be linked firmly to the facts of the case and the relevant legal principles.*

### **The Facts**

In 1996, Heather Osland was convicted of murdering her abusive husband, Frank. On the day of the killing, Heather and her son David dug a grave in the Osland's back yard. In the evening, Heather mixed sedatives into Frank's food to induce sleep. When Frank lost consciousness, David struck Frank a fatal blow to the head. At first instance, a forensic psychologist gave expert evidence about BWS and concluded that at the time of the killing, Heather fitted within BWS. Heather was convicted of murder and David was acquitted of all charges.

On appeal to the High Court, Heather contended that the trial judge gave the jury insufficient instructions on how they should consider the defences of self-defence and provocation, in the context of the expert evidence of BWS. The majority, per McHugh, Kirby and Callinan JJ, dismissed the appeal. The justices held that the directions to the jury were adequate and BWS could not provide Heather with an excuse for killing her husband. Heather's actions did not fit into provocation or self-defence because it was a planned, pre-meditated killing. Gaudron and Gummow dissented.

## ***Battered Woman Syndrome***

BWS is a psychological phenomenon that is used to describe the state of mind some women suffer due to the traumatic experience of being systematically physically, psychologically or sexually abused by a partner. It includes a 'collection of responses, thoughts, feelings and attitudes'<sup>1</sup>, which compels women, who are in an abusive relationship, to stay with their violent partner. The essence of these feelings is that the woman feels a 'learnt helplessness' and becomes convinced that any attempt to leave the abusive situation will result in escalation of the abuse.<sup>2</sup> A series of decisions prior to *Osland* indicates that in Australia, expert witnesses can provide details of BWS to help explain why the woman on trial may have acted as she did.<sup>3</sup>

## ***The High Court Decision as to Expert Evidence of BWS***

Firstly, the justices in *Osland* gave High Court recognition that prima facie, expert evidence of BWS could be admissible in court. Gaudron and Gummow acknowledged that BWS evidence is based on 'a reliable body of knowledge and experience'.<sup>4</sup> Kirby J said likewise.<sup>5</sup>

Secondly, the justices highlighted that juries need to consider BWS evidence because it gives them an insight into the unique perceptions that battered women may hold, which can cause them to murder their abuser.<sup>6</sup> Studies have shown that the average juror cannot understand why women stay in an *Osland*-type

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<sup>1</sup> Dr Byrne, Clinical and forensic psychologist, in *Osland v The Queen* (1998) 159 ALR 170, paragraph 198 ( [1998] HCA 75 from [www.austlii.edu.au](http://www.austlii.edu.au))

<sup>2</sup> *Ibid*, paragraph 198.

<sup>3</sup> *R v Runjanjic and Kontinnen* (1991) 56 SASR 114 ; *R v Hickey* , unreported, Supreme Court of New South Wales, 14 April 1992 ; *Chhay* (1994) 72 A Crim R 1.

<sup>4</sup> *Osland v R*, per Gaudron and Gummow JJ, paragraph 54.

<sup>5</sup> *Osland v The Queen*, per Kirby J, paragraph 159.

<sup>6</sup> *Osland v The Queen*, per Gaudron and Gummow JJ, paragraph 67 ; per Kirby J, paragraph 167.

abusive relationship.<sup>7</sup> BWS evidence can provide them with some understanding of why a reasonable person in the accused's situation, could act like she did.

Even so, Kirby, Callinan, Gaudron and Gummow JJ, exhibited concern about the weight to be given to expert evidence of BWS in the context of a murder trial. Kirby and Callinan JJ noted that a jury might place disproportionate emphasis on BWS, whilst neglecting to consider the actual facts of the case. They argued that BWS is an artificial construct that should not be given too much weight. Because an accused's motivations will be unique, each case should be decided on its own merits, with BWS being only one consideration among others.<sup>8</sup> Thus, the majority soundly rejected any suggestion that BWS should be treated as a separate defence to a charge of murder.<sup>9</sup>

### **Self defence and provocation**

The majority justices indicated that, in relation to the facts of *Osland*, BWS should be given a limited application. That is, as it bore on upon the legal issues in the trial, relating to the defences of self-defence and provocation.<sup>10</sup> BWS can be useful in this area because it adds weight to a battered woman's claim to self-defence, which may otherwise be weak due to the gendered bias inherent in the law of self defence and provocation. Self-defence pleas most often arise where the killing occurred in the heat of the moment and the accused had no alternative but to lash out with intent to cause harm. A barroom brawl situation between two males is a classic example. Perhaps a jury will be less likely, in the absence of BWS evidence, to rule in favour of a woman in an *Osland* situation, because there is no imminent danger.

Nevertheless, the majority justices differed in their opinion as to how exactly the jury should make use of BWS evidence in the context of self-defence and

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<sup>7</sup> Patricia Wieser Easteal, 'Battered Woman Syndrome: Misunderstood?', (1992) 3, *Current Issues in Criminal Justice*, (3), 358.

<sup>8</sup> *Osland v The Queen*, per Kirby J, paragraph 161.

<sup>9</sup> *Osland v The Queen*, per Callinan J paragraph 238 ; per Kirby J, paragraph 169.

<sup>10</sup> *Osland v The Queen*, per Kirby J paragraph 169.

provocation. Gaudron and Gummow JJ seemed to favour a narrow interpretation of BWS that operates on the subjective limbs of the defence. They ruled that BWS may be relevant to the question of whether the 'battered woman believed she was at risk of death or serious bodily harm and her actions were necessary to avoid that risk.'<sup>11</sup> Kirby J on the other hand, referring to the defence of provocation, took a broader approach. He favoured using BWS to determine whether the battered woman's loss of self-control was 'reasonable' for an 'ordinary person' in the position of the accused.<sup>12</sup>

Ultimately, the argument on appeal in *Osland* was that the trial judge failed to make clear the connection between the evidence of BWS and the law of provocation and self-defence. The majority overruled this ground, holding that the instruction to the jury was 'appropriate and adequate'<sup>13</sup> because the connection was properly drawn.<sup>14</sup> Thus, jury was open to find that Heather's actions did not fit into provocation or self defence, due to the premeditated nature of the killing. The digging of the hold in the back yard prior to the murder was crucial evidence in this regard.<sup>15</sup>

## **Analysis**

In summary, the majority in *Osland* emphasised that the introduction of evidence showing that a defendant experienced BWS, is not in itself conclusive but must be linked to relevant legal principles and the particular facts of the case. On the facts in *Osland*, it was held that BWS evidence could only go to proving self-defence and provocation. As such, there is no separate defence of BWS in Australian law. In this regard, Kirby J, who provided the most comprehensive

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<sup>11</sup> per Gummow and Gaudron JJ in *Osland v The Queen*, paragraph 56.

<sup>12</sup> *Osland v The Queen*, per Kirby J, paragraph 170.

<sup>13</sup> *Osland v The Queen*, per Kirby J, paragraph 170.

<sup>14</sup> *Osland v the Queen*, per Kirby J, paragraph 240.

<sup>15</sup> *Ibid*, paragraph 173.

elucidation of BWS, insisted that evidence of BWS should not afford a person in the position of Heather Osland a 'blank cheque' to kill her abuser.<sup>16</sup>

Even so, *Osland* has not fully explicated the phenomenon of BWS as it pertains to Australian law. Because Heather Osland was convicted despite evidence of BWS being admissible, the facts of the case are somewhat negligible. It is suggested that *Osland* merely provides a commentary about BWS and is not a definitive statement about how exactly BWS can be used in any given case. It is unclear as to whether future courts in Australia will give BWS as restrictive an interpretation as Callinan and Kirby JJ.

The fact is that many still regard the idea of introducing BWS evidence in court as problematic. Firstly, it can be contended that the scientific basis for BWS is inadequate.<sup>17</sup> If this is the case, BWS evidence will have prejudicial rather than probative value in court. Indeed, explanations relying too heavily on psychological constructs to explain away battered women's behaviour may take the emphasis off the violent behaviour of the abuser, as a basis for understanding the battered woman's behaviour. Perhaps expert evidence of BWS provided by psychologists, should be complemented by evidence from social workers that see the effects of domestic violence every day. This evidence would be firmly based on the reality of a variety of battered women's experiences, rather than questionable scientific reasoning.

Hence, BWS can be regarded as dubious because BWS cannot possibly fit all abused women's experiences. Feminists are concerned about women who do not fit the battered woman stereotype. The syndrome had been developed in a way that women can be labelled with suffering from BWS if they exhibit 'classic signs' of BWS.<sup>18</sup> Women who come from different cultural backgrounds or income levels may have their attempts to mount self defence and provocation

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<sup>16</sup> Ibid, paragraph 170.

<sup>17</sup> *Osland v The Queen*, per Kirby J, paragraph 164

<sup>18</sup> Ibid, paragraph 161.

arguments undermined, because their experiences do not quite fit the BWS model.<sup>19</sup> Kirby J fielded the possible application of BWS beyond the traditional battered heterosexual woman scenario.<sup>20</sup> It is suggested that BWS should not be extended too far yet, because the empirical basis of BWS is only grounded in research about heterosexual women's particular psychology. Far more scientific analysis is needed before BWS can justifiably be used in less traditional battered person cases.

To conclude, Osland highlights how expert evidence of BWS can be used to assist juries who face problems when self-defence or provocation is pleaded for a premeditated murder. The case shows that it is important that BS is not narrowly construed. Expert witnesses providing testimony concerning BWS should focus primarily on the context in which the accused finds themselves, rather than their psychology.

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**Lecturer's comments:**

*A well-written piece. Good clarity and understanding. Even more discussion of some points and more empirical references would have been more persuasive.*

**70 D.**

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<sup>19</sup> Elizabeth A Sheey and Julie Stubbs et al, Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations, (1992) 16, *Criminal Law Journal*, 369 at 386.

<sup>20</sup> Ibid, paragraph 159, 160.

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