Proposals for Reforming the Law of Self-defence

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Abstract The English law of self-defence has attracted significant attention following the controversial decision of the Court of Appeal in *R* v *Martin*. At the heart of the controversy is the determination of the reasonableness of a defendant's apprehension of the necessity to use a particular amount of force in self-defence. When comparing the defendant's apprehension and actions to those of a reasonable person in the same circumstances, what characteristics of the defendant must be attributable to the reasonable person in order for the test to be appropriate? This article argues that while the Court of Appeal's reluctance to allow a psychologically individualised standard of reasonableness may have been correct, the court should have reformulated the purely objective standard into a contextual objective standard. It is suggested that unless such reform is undertaken, the English law of self-defence will remain unduly constrained. Reform proposals by the Law Commission have made it clear that such reform is not on the horizon. As an alternative, the Law Commission proposed a reformulated defence of provocation. While this alternative is commendable, it does not remove the need to reform the objective standard of reasonableness in the law of self-defence.

Keywords Criminal law; Self-defence; Objective standard of reasonableness; Provocation

In *R* v *Canns (Jason)*,[1] the Court of Appeal applied its earlier controversial decision in *R* v *Martin*.[2] Martin, the defendant in *R* v *Martin*, claimed that he shot and killed an intruder in self-defence. To establish self-defence Martin's apprehension of the necessity to use lethal force had to be reasonable. Reasonableness is determined by an objective test: whether a hypothetical ordinary 'reasonable person' (more commonly referred to as the 'reasonable man') would have also apprehended the necessity to use force in self-defence under the same circumstances, and if so, whether he would have used the same amount of force. Martin failed to raise self-defence because he was found to have used excessive force.

On appeal, counsel for Martin argued that it was reasonable for a person suffering from Martin's mental condition to have apprehended a greater threat than what an ordinary person, not affected by the same mental condition, would have apprehended.[3] The Court of Appeal had

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1 *R* v *Canns (Jason)* [2005] EWCA Crim 226.

2 *R* v *Martin* [2003] QB 1.

3 After Martin's trial, new evidence was introduced based on the findings of the psychiatrist Dr Joseph. In Dr Joseph's opinion, at the time of the killing Martin suffered from a disease of the mind, and under such a condition he 'would have perceived a much greater danger to his physical safety than the average person' ([2003] QB 1 at 15).

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to decide whether the standard of reasonableness ought to remain purely objective, or whether it should instead assess reasonableness based on the subjective perspective of the defendant. Had it chosen the latter option, it would have had to allow the fact-finder to attribute to the 'reasonable man' the mental characteristics of the defendant in order to see the situation from the perspective of the defendant. Stated differently, it would have had to psychologically individualise the 'reasonable man'. Such a departure from the purely objective standard of reasonableness was not alien to English law. Shortly prior to *R* v *Martin*, the House of Lords, in *R* v *Smith (Morgan)*,[4] modified the objective standard in the law of provocation. Despite the precedent set by the House of Lords, the Court of Appeal provided policy reasons for distinguishing between provocation and self-defence, and held that the jury ought to apply to the 'reasonable man' only the defendant's physical characteristics.[5]

This article provides a critical assessment of the Court of Appeal's decision in *R* v *Martin*. On the one hand, it presents arguments in support of the court's refusal to allow a psychologically individualised standard of reasonableness. On the other hand, it is argued that the Court of Appeal ought to have reformed the objective standard in two ways. First, the fact-finder should be allowed to take into consideration whether differences in physical size and strength between the defendant ('D') and her aggressor ('X') have affected D's apprehension of danger. Secondly, the purely objective standard should be modified into a 'contextual objective standard', in order for the fact-finder to consider how contextual factors may have influenced D's apprehension of danger. Unless such reform is undertaken, the English law of self-defence will remain unduly constrained.

1. Overview of the English law of self-defence

The classic pronouncement of the English common law of self-defence is that of the Privy Council in *Palmer* v *R*.[6] If D is attacked or honestly believes she (or another person sharing some proximity to D,[7] or even D's property[8]) is threatened by an imminent attack, even if this belief is unreasonable,[9] D is justified in taking as much immediate defensive action against X as is reasonably necessary to avert the actual or imminent danger. For the amount of force to be deemed reasonable it must

4 *R* v *Smith (Morgan)* [2001] 1 AC 146.
5 *R* v *Martin* [2003] QB 1 at 6–7.
6 *Palmer* v *R* [1971] AC 814. The case was approved and followed by the Court of Appeal in *R* v *McInnes* [1971] 1 WLR 1600.
7 In *R* v *Duffy* [1967] 1 QB 63 at 64, the court went even further by holding that 'apart from any special relations between the person attacked and the rescuer, there was a general liberty even as between strangers to prevent a felony'.
8 The court in *R* v *Hussey* (1924) 18 Cr App Rep 160 held that the defence may also be used in the protection of property. In this case, the accused had fired a gun through a hole made in the door of his landlady who was attempting (wrongly) to evict him from his home. The landlady was injured. Lord Hewart CJ said that the accused was in the same position as a man who was defending his home and that such actions could be lawful.
9 *Solomon Beckford* v *The Queen* [1988] AC 130.

be proportionate to the necessity arising in the particular situation.[10] This is a question of fact to be determined by the jury by applying an objective standard. Note that the use of excessive force would prevent D from successfully raising self-defence, even though D was in fact responding to an unlawful attack. As Lord Hoffmann explains, 'acting unreasonably in self-defence destroys the defendant's justification for deliberately injuring his attacker. Unless the defendant has acted in accordance with the standards of self-restraint to be expected of an ordinary citizen, his act remains criminal although in fact done in self-defence'.[11] Furthermore, once the danger is over the use of force is no longer justified.[12] While the English common law does not impose a duty to retreat, in *R* v *Bird (Debbie)*[13] the court held that evidence demonstrating that D did not want to fight would suggest that she acted reasonably and in good faith in self-defence.

In addition, or as an alternative, to raising the common law of self-defence, a defendant is also justified, under s. 3(1) of the Criminal Law Act 1967, to 'use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large'. While this statutory defence could be used in most self-defence scenarios where the triggering conduct was unlawful, there might be cases in which a defendant responded to harm that was not unlawful (e.g. an attack by a mentally ill person, or by a child under 10 years of age), in which case a defendant would rely on the common law defence.[14]

(a) Why have a rule of 'imminence'?

Because 'self-defence' results in acquittal, in order to prevent a dangerous loophole by which murderers can escape liability, it is of paramount importance for the law to limit the justification to circumstances of absolute necessity. The rule of imminence assumes that it is possible to identify necessity based on the timing of the act.[15] In *Palmer* v *R*,[16] Lord Morris explained that force is justified only when there is an immediate peril that can only be avoided by an instant reaction. Where the peril is

10 In *R* v *Owino* [1996] 2 Cr App Rep 128 the court established that a person may only use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be. However, the court in *Palmer* v *R* recognised that 'a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish the person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken' (*Palmer* v *R* [1971] AC 814 at 832).

11 *R* v *Smith (Morgan)* [2001] 1 AC 146 at 195. See also *R* v *Clegg* [1995] 1 All ER 334.

12 Lord Morris explained that 'if the moment is one of crises for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence': *Palmer* v *R* [1971] AC 814 at 831.

13 *R* v *Bird (Debbie)* [1985] 1 WLR 816.

14 A. Ashworth, *Principles of Criminal Law,* 4th edn (Oxford University Press : Oxford, 2003).

15 G. Fletcher, *Rethinking Criminal Law* (Little, Brown: Boston, Toronto, 1978) 795.

16 *Palmer* v *R* [1971] AC 814 at 814.

not imminent there is danger that the 'employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence'.[17] In addition to the concern that D may have acted with a purpose other than self-defence, the rule also assumes that it might not be necessary to resort to force beyond the moment of imminent danger. Alternative ways of saving one's life may be available to those who dread the prospect of a future attack.[18] As Madame Justice Wilson explains:

> In the paradigmatic case of a one-time barroom brawl between two men of equal size and strength, this interference makes sense. How can one feel endangered to the point of firing a gun at an unarmed man who utters a death threat, then turns his back and walks out of the room? One cannot be certain of the gravity of the threat or his capacity to carry it out. Besides, one can always take the opportunity to flee or call the police . . . these are the tacit assumptions that underlie the imminence rule.[19]

R v *Whynot*[20] is the classic Canadian example of a case in which the defendant failed to establish self-defence because the requirement of imminence was not satisfied. D was charged with murder after killing her husband (X) while he was asleep in his truck. X had threatened to burn down a neighbour's house and 'deal with' D's son when he woke up. There was considerable evidence at the trial that he had been a violent man, well capable of carrying out his threats, which included threats to kill D's family (had she decided to leave him). Because D used force during a non-confrontational circumstance the jury found that the danger was not imminent and therefore using force in self-defence was unreasonable.

(b) The objective standard of reasonableness

The Court of Appeal in *R* v *Martin* affirmed that reasonableness in the law of self-defence is determined by an objective standard: reasonableness depends on whether the fact-finder (typically a jury) finds that a hypothetical 'reasonable man'[21] would have held the same apprehensions of danger and would have responded in the same manner as the defendant under the same circumstances. Lord Simonds, in *Bedder* v *Director of Public Prosecutions*,[22] explained the purpose of an objective standard as follows: 'Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and

17 *Palmer* v *R* [1971] AC 814 at 823. See also the view of G. Caplan and M. N. Rothbard, 'Battered Wives, Battered Justice', *National Review*, 25 February 1991, 39–43, available at *http://www.findarticles.com/p/articles/mi_m1282/is_n3_v43/ai_10458668*, accessed 4 August 2008.

18 A. McColgan, *Women under the Law: The False Promise of Human Rights* (Longman: Harlow, 2000).

19 *Lavallee* v *R* [1990] 1 SCR 852 at para. 46.

20 *R* v *Whynot* (1983) CCC (3d) 449.

21 Gillespie notes that the concept of the 'reasonable man' developed in the English common law around the year 1200 (C. Gillespie, *Justifiable Homicide: Battered Women, Self-Defence and the Law* (Ohio State University Press: Columbus, 1989).

22 *Bedder* v *Director of Public Prosecutions* [1954] 1 WLR 1119 at 1123.

with this object the "reasonable" or the "average" or the "normal" man is invoked'. Another noteworthy explanation was provided by Kazan:

> When two persons confront one another, each party assumes certain risks: the person who perceives a threat bears the risk of a potentially life-threatening attack if she does not respond in self-defence, and the person who allegedly poses this threat bears the risk that the victim wrongly perceives him to be a threat and will react with lethal defensive force. In order to ensure that both parties to a confrontation bear these risks equally we must ensure that: (i) the alleged victim is protected from unreasonable threats; and (ii) the alleged assailant is protected from unreasonable self-defence. Ensuring that the parties face equal risks requires that we impose an objective standard of reasonableness on a person claiming self-defence . . .[23]

The objectivity of the hypothetical 'reasonable man' depends on conceptualising a person that possesses universal characteristics, rather than characteristics that are personal and peculiar to the defendant. Hence, with respect to mental characteristics, it is assumed that generally people are mentally sound, rational and prudent. The ordinary person is therefore referred to as a 'reasonable man'. Any peculiar mental conditions affecting the defendant's apprehensions are not applied to the 'reasonable man'.[24] As for physical characteristics, the Court of Appeal in *R* v *Martin* directed that the physical characteristics of the defendant should be attributed to the 'reasonable man'. What are these physical characteristics? Some guidance is available from the House of Lords decision in *Bedder* v *Director of Public Prosecutions*. In this case the court considered the objective standard in the law of provocation. It held that the fact-finder should not attribute to the 'reasonable man' any peculiar physical characteristics of the defendant. Only the age and sex of the defendant may be considered. By limiting the ambit of physical characteristics, the courts are still able to preserve the hypothetical construct as impersonal and universal.[25]

It is not precisely clear what is the standard expected of a reasonable person. As Saltman explains, 'the reasonable man as a universal concept has a somewhat dubious standing. It is not clear whether judges everywhere are relying on predetermined perfectionist standing of behavior, or on the more limited consideration of what might be considered reasonable under the specific circumstances, or by some instinctive personal appraisal of what "reasonable" may mean to any particular

23 P. Kazan, 'Reasonableness, Gender Difference and Self-defence Law' (1997) 24(3) *Manitoba Law Journal* 563–4.

24 However, Lord Taylor has noted that 'the endorsement of the New Zealand authority in *R* v *Newell*, 71 Cr App R 331, shows that characteristics relating to the mental state or personality of an individual can also be taken into account by the jury, providing that they have the necessary degree of permanence' (*R* v *Ahluwalia* (1993) 96 Cr App R 133 at 140–1).

25 In *R* v *Smith (Morgan)*, however, Lord Slynn expressed the view that 'personal characteristics other than age and sex could be taken into account when considering whether the reaction to the provocation was that of a reasonable man' ([2001] 1 AC 146 at [29]).

judge'.[26] According to *The Oxford Companion to Law*, 'in truth the reasonable man is a personification of the court or jury's social judgment'.[27] In the contexts of a confrontation, for example, the reasonable person represents society's rules about how a person is expected to behave. 'He stands and faces his adversary, meeting fists with fists. He isn't frightened or provoked to violence by mere threats; he doesn't use a weapon unless one is being used against him . . .'.[28]

2. Three criticisms of the law of self-defence

Criticism 1

While it is plausible to hold that people generally share a rational capacity and can therefore be expected to satisfy a common threshold of reasonableness, there are also aberrant cases of persons who, due to some peculiar mental condition, act more fearfully than ordinary people. Hence, according to the first criticism, an objective standard makes the defence inaccessible to persons in these aberrant cases. Recall, for example, the defendant in *R* v *Martin* who suffered from depression. Another example, which will be discussed in greater detail below, involves battered women who, according to the forensic psychologist Dr Lenore Walker, suffer from Battered Woman Syndrome ('BWS'). Critics have therefore argued that the test should not be what an 'outsider' would have reasonably perceived, but instead what the accused reasonably perceived from her subjective perspective.[29] Such a departure requires allowing a psychologically individualised standard, and consequently opens the gates to different standards of reasonableness, determined on a case-by-case basis, instead of a universal standard that applies to all.

Criticism 2

The requirement that only a reasonable amount of force ought to be used in self-defence has traditionally been associated with an expectation that a person should only resort to a weapon if he is threatened with a weapon, but otherwise fists should be met with fists. According to the second criticism, this expectation is only sensible in cases where the parties are of relatively equal size and strength, so that each is capable of protecting himself by physical force. Where, on the other hand, the

26 M. Saltman, *The Demise of the 'Reasonable Man': A Cross-Cultural Study of a Legal Concept* (Transaction Publishers: New Brunswick and London, 1991) 11.

27 D. W. Walker, *The Oxford Companion to Law* (Oxford University Press: Oxford, 1980) 1038.

28 Gillespie, above n. 21 at 99.

29 Ammons explains that 'Feminism and feminist theory had to be created because the stories were only half told. Because "absolute power corrupts absolutely," those in power failed to make sure that all of the laws worked for all of the people, including the female people. Feminist legal theory is an attempt to set the record straight and straighten out the law'. (L. Ammons, 'Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection' (2001) 4 *Buffalo Criminal Law Review* 911).

aggressor has superior size and strength, it may be reasonable for the defendant to fear that the aggressor's use of physical force could be as deadly as a lethal weapon. In such a case, it seems unfair to ignore the influence of this factor on the defendant's apprehension of danger and her assessment of what action was necessary to protect herself. To accommodate such circumstances sensibly and fairly, the requirements of proportionality and imminence ought to be applied flexibly.

Criticism 3

Domestic violence cases illustrate that a fair and comprehensive assessment of the defendant's apprehension of danger and choice of action may require consideration of the contexts that affected the defendant. For example, the contexts may explain why the alternatives of escape or getting help were not available or viable, even though to an observer who is not aware of the contexts such alternatives may be assumed to have existed. Linked with the need to contextualise the reasonable person is the dependency on witness testimony to corroborate the defendant's contextual claims, as well as expert evidence to explain to the fact-finder contextual facts that are beyond the understanding or awareness of an ordinary person. The risk is that without awareness and understanding of the facts, the fact-finder will make sense of facts by reference to mislead information, such as myths and stereotypes.

3. Arguments in support of the Court of Appeal's decision against a psychologically individualised standard of reasonableness

(a) The Supreme Court of Canada rethinks the law of self-defence in Lavallee v *R*

In Canadian law, ss 34–37 of the Criminal Code define the various circumstances in which a person may act in self-defence.[30] Canadian law adopts the traditional English common-law requirements of imminence, proportionality and a duty to retreat.[31] With regards to the standard of reasonableness, in *R* v *Creighton*[32] the SCC applied a purely objective standard. It held that individual characteristics or contextual factors should not be considered. Subsequently, in *Lavallee* v *R*,[33] the SCC reconsidered its earlier decision, and followed the trend in the USA of modifying the standard by making it psychologically individualised. This required admitting mental health evidence based on mental health science, also referred to as 'soft science'. These North American developments are worthwhile to consider because they illustrate the problems that may arise with a psychologically individualised standard.

The facts of *Lavallee* v *R* exemplify the typical dilemmas that arise in domestic violence cases involving battered women. The defendant ('L')

30 J. Martine and E. Greenspan, *Martin's Annual Criminal Code* (Canada Law Book Inc.: Aurora, Ontario, 2004) 88–93.
31 S. Don, *Canadian Criminal Law: A Treatise*, 4th edn (Carswell: Toronto, 1999).
32 *R* v *Creighton* [1993] 3 SCR 3.
33 *Lavallee* v *R* [1990] 1 SCR 852.

feared a future attack by her battering partner Rust ('R'), and protected herself by pre-emptively shooting and killing him. The hurdle for L was to demonstrate that it was reasonable for her to act pre-emptively, contrary to the rule of imminence, and that it was reasonable for her to use a lethal weapon against an unarmed person. The SCC admitted evidence of BWS as relevant because (i) the facts of domestic violence are beyond the understanding of the common person, and there is danger that the jury's understanding of the facts may be distorted by myths and stereotypes, and (ii) evidence of BWS presented relevant and useful knowledge about the effects of domestic violence that was beyond the awareness and understanding of the common person.[34]

In her books *The Battered Woman*[35] and *The Battered Woman Syndrome*,[36] Lenore Walker claimed to have identified a set of distinct psychological symptoms resulting from prolonged exposure to situations of intimate partner violence, which affect the woman's perception and behaviour. She labelled these symptoms as BWS. She used two theories to identify syndromes characterised as BWS: (1) the 'cycle of violence' theory, and (2) the theory of 'learned helplessness'. The 'cycle of violence' theory is relevant to D's perception of the necessity to resort to self-defence. The 'learned helplessness' theory is relevant to the question why D stayed in the abusive relationship, and failed to get help, instead of resorting to the use of force.

Walker explains that women suffering from BWS will have at least two experiences with a cycle of violence.[37] This cycle consists of three phases. First is a *tension-building phase*, which may involve verbal abuse and lower-level physical and emotional abuse by the batterer towards D. This is followed by an *acute battering phase*, involving uncontrollable explosions of violence by the batterer inflicted on D. Finally, the batterer calms and pleads for forgiveness in the *loving contrition phase*, which tends to convince the woman to remain in the relationship with the hope that the relationship will improve.

Walker suggests that experiencing these cycles affects D's sensitivity to, and apprehension of, danger. The battered person develops 'a very finely tuned antenna for impending violence [which] . . . picks up low-level cues that people who have not been traumatized would not see'.[38] It is for this reason that a battered woman is able to apprehend danger of death or GBH even though the actual confrontation is not imminent.

In *Lavallee* v *R*, for example, L gave a statement to the police that following an intense argument with R, R gave her a gun, indicating to her that he expected her to kill herself. 'He said "wait till everybody leaves, you'll get it then" and he said something to the effect of "either you kill me or I'll get you" . . . He kind of smiled and then he turned

34 *Lavallee* v *R* [1990] 1 SCR 852 at paras 41–44.
35 L. Walker, *The Battered Woman* (Harper & Row: New York, 1979).
36 L. Walker, *The Battered Woman Syndrome* (Springer Publishing: New York, 2000).
37 Ibid. at 126–41.
38 This statement by Dr Lenore Walker was referred to by Chief Justice Durham J in *State* v *Janes* 121 Wash 2d 220 at 234.

around. I shot him'.[39] Of relevance here is the fact that L shot R after he had turned around so that the immediate danger was over. Under such circumstances, according to the rule of imminence, force might not have been necessary because (i) she could have escaped or alternatively it was not certain that R would have acted on his threat, or (ii) L may have shot R with a purpose other then to defend herself. Walker's 'cycle of violence' theory was used to show that, contrary to these assumptions, L had good reason to believe that an acute battering phase would indeed follow the tension-building phase she experienced right before she shot him. The defence successfully argued that had she waited for him to attack her when the guests left, she probably would not have been able to prevent him from killing her as promised. It was therefore reasonable for her to act pre-emptively in self-defence before the confrontation began by using the gun he provided for her.

The theory of 'learned helplessness' refers to another psychological consequence of being battered.[40] According to this theory, the battering experience diminishes the battered woman's will to escape. The theory is based on Seligman and Maier's 'learned helplessness' theory.[41] Seligman and Maier subjected caged dogs to repeated electric shocks.[42] When the dogs realised that they had no control over the shocks, and could not escape from or prevent the shocks, they gave up attempting to escape and fell into a helpless state. After some time, the cage doors were opened for them and they did not even attempt to escape. Seligman and Maier applied this theory to explain depression and helplessness in different contexts such as prisoners of war, political prisoners, and concentration camp detainees, among others.[43]

Walker, in turn, applied these findings to battered women. She explained that repeated battering, like electrical shocks in animal experiments, diminish the woman's will to escape.[44] The battered woman's 'cognitive ability to perceive success is changed and she does not believe anything she does will alter any outcome', and she consequently becomes more prone to depression and anxiety'.[45] Some women 'become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the

39 *Lavallee* v *R* [1990] 1 SCR 852 at para. 3.
40 Walker, above n. 36 at 116–26.
41 For more information, see *http://www.psych.upenn.edu/seligman/lh.htm*, accessed 4 August 2008.
42 D. Faigman and A. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39(1) *Arizona Law Review* 67–115.
43 E. Gondolf and E. Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (Lexington Books: Toronto, 1988).
44 While the criticism is not addressed comprehensively here, it should be noted that this theory has been criticised as being illogical. As Downs explains, 'it is unlikely that a helpless woman would find the agency needed to repel or escape her batterer. BWS advocates reconcile this discrepancy in logic by pointing to the survival instinct and arguing that BWS prevents flight but not fight. Nevertheless, they have no scientific basis for this contention': D. A. Downs, *More Than Victims: Battered Women, The Syndrome Society, and the Law* (University of Chicago Press: Chicago, 1996) 227.
45 Walker, above n. 35 at 49–50.

situation'.[46] In the case of *Lavallee* v *R*, therefore, the theory of 'learned helplessness' provided a medical explanation for L's failure to escape from the abusive relationship.

Feminists, among others, initially hailed the decision in *Lavallee* v *R* as a breakthrough that brought women one step closer to equal treatment under the law. As explained by Justice L'Heureux-Dubé in *R* v *Malott*: 'the perspective of women, which have historically been ignored, must now equally inform the "objective" standard of the reasonable person . . .'.[47] A psychologically individualised objective standard initially appeared to have accomplished this objective.

(b) A psychologically individualised standard of reasonableness may make the defence exorbitant

The Royal Commission on Capital Punishment (September 1953) considered the criticism that it is unfair to impose a standard of an ordinary person on a defendant who was not capable of achieving such a standard due to some peculiar mental condition. It stated the criticism as follows:

> The test, it is said, is inequitable. If the accused is mentally abnormal or is of subnormal intelligence or is a foreigner of more excitable temperament or is for some other reason peculiarly susceptible to provocation, it is neither fair nor logical to judge him by the standard of the ordinary Englishman . . . the jury should be permitted to determine the effect of the provocation on this particular man whom they have seen and may have heard and whose whole circumstances have probably been described to them.[48]

Assume that the Court of Appeal would reconsider its refusal to individualise psychologically the 'reasonable man' in line with the criticism identified by the Royal Commission and in line with the House of Lords decision in *R* v *Smith (Morgan)*. If that were the case, diagnoses of many types of disorders might qualify for consideration, so that different standards of reasonableness would emerge. Trowbridge identified a whole range of disorders recognised by the Diagnostic and Statistical Manual of Mental Disorders ('DSM–IV') that might qualify:

> A person suffering from paranoid personality disorder (DSM IV 301.0) is someone who is in general especially suspicious and frightened. Besides post-traumatic stress disorder (DSM IV 309.81) any number of other anxiety disorders would appear to qualify, such as panic disorder without agoraphobia (DSM IV 300.01), panic disorder with agoraphobia (DSM IV 300.21), social phobia (DSM IV 300.23), acute stress disorder (DSM IV 308.3), generalized anxiety disorder (DSM IV 300.02), and possibly substance-induced anxiety disorder (DSM IV 292.89). A retarded person, or a person with borderline intellectual functioning (DSM IV V62.89),

46 *United States* v *Kelly* 478 A2d 364 at 3 (electronic version), available at *http://www.state.wv.us/wvsca/DVBenBook/OStateCases/OstateKelly.pdf*, accessed 5 August 2008).

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

48 Royal Commission on Capital Punishment—Great Britain, *Royal Commission on Capital Punishment 1949–1953 Report*, Cmd 8932, September 1953, 52. Note: the Royal Commission was discussing the objective test in the context of provocation, but its discussion is also relevant to the objective test in self-defence.

> might arguably misjudge the seriousness of a situation and act in what he thought was justifiable self-defence where other 'normal' persons would not do so. Indeed, retarded individuals on average have been abused more frequently during their lives than persons who are not retarded, and they thus may be more frightened in threatening situations.[49]

This departure towards a subjective standard would be undesirable because it would undermine the very purpose of the objective standard, and could potentially introduce a dangerous loophole to the law. This concern was eloquently explained by Chief Justice Durham J, of the Supreme Court of Washington, in the case *State* v *Janes*: the objective test 'serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions. In essence, self-defence would always justify homicide so long as the defendant was true to his or her own internal beliefs'.[50] The Chief Justice also made reference to the insightful remarks of Professor Susan Estrich:

> [I]f the reasonable person has all of the defender's characteristics, the standard loses any normative component and becomes entirely subjective. Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not and who blind themselves to opportunities for escape that seem plainly available. These unreasonable people may not be as wicked as (although perhaps more dangerous than) cold-blooded murderers . . . but neither are they, in practical or legal terms, justified in causing death.[51]

In addition to the risk of focusing on the subjective beliefs of the defendant, Downs explains that 'without clear standards to guide them, juries are left to rely on their subjective sense of justice . . . leaving such questions solely to the jurors' subjective weighing of equities will often lead to judgments grounded in common prejudice rather than common wisdom'.[52]

The Royal Commission therefore provided good advice by its decision to uphold the principle that the criminal law 'should be based on a generally accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed. Any departure from it might introduce dangerous latitude into the law'.[53] Lord Hoffmann, in *R* v *Smith (Morgan)*, also noted that without the objective standard the defence would 'be liable to become an exorbitant defence'.[54] However, as discussed below, this should not be a *purely objective standard*; rather it should be a *contextual objective standard*. 'It is better to apply a single standard to all, which can incorporate situational

49 B. Trowbridge, 'Self Defence as a Mental Defence' (2001) 19(4) *American Journal of Forensic Psychology*, available at *http://www.trowbridgefoundation.org/docs/self_defense.htm*, accessed 4 August 2008.
50 *State* v *Janes* 1212 Wash 2d 220 at 239.
51 Ibid. at 240.
52 Downs, above n. 44 at 225–6.
53 Royal Commission on Capital Punishment, above n. 48 at 53.
54 *R* v *Smith (Morgan)* [2001] 1 AC 146 at 195.

differences and demands placed on battered women's shoulders. This is the best way to reconcile differences with equal treatment.'[55]

Where the defendant cannot attain the standard of an ordinary person due to some mental incapacity, the more proper defence would be one that accommodates that mental incapacity. Walker, while giving testimony in a homicide case, herself conceded that symptoms of BWS may represent a mental disorder; in which case the proper defence would be based on mental incapacity rather than self-defence. As Walker explained, '[i]f her perception had been based on reality, then she'd shot [her husband] in self-defence; if her perception had been tainted by mental illness, she would have to plead either insanity or diminished capacity . . . .'.[56]

(c) Scientific evidence should be admitted with caution

What if the English courts were to pursue the objective of making the defence equally accessible to all by introducing a more subjective standard? The North American experience with this approach demonstrates the importance of caution. Two concerns are noteworthy. First, mental health evidence must be reliable. Unless English law adopts adequate rules of evidence, such as the new reliability standard established in the USA and adopted in Canada, mental health evidence based on 'soft science' is best kept out of the courtroom. Regrettably, however, English courts have already admitted BWS to support claims of other defences, as was the case in *R* v *Thornton (No. 2)*.[57] Secondly, the evidence ought to be scrutinised to ensure that it in fact fulfils the objective of making the defence more accessible.

The danger of 'junk science'

The term 'junk science', coined by Peter Huber,[58] refers to unreliable and precarious scientific expert evidence.[59] The admission of such evidence was made possible by lax standards of admissibility; namely, the 'general acceptance' and the 'relevance' tests.

As Bernstein explains, the debate over the admissibility of scientific evidence has been most dynamic in the American legal scene, and American developments have often been examples for other commonwealth countries.[60] The predominant standard was initially the 'general acceptance' test (also referred to as the '*Frye* test') established in the American case *Frye* v *United States*.[61] In this case, the court explained that the threshold to be satisfied is whether the 'scientific principle or

55 Downs, above n. 44 at 242.
56 Kazan, above n. 23 at 561–2.
57 *R* v *Thornton (No. 2)* [1996] 2 All ER 1023.
58 For more, see P. Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books: New York, 1991).
59 D. Bernstein, 'Junk Science in the United States and the Commonwealth' (1996) 21(123) *Yale Journal of International Law*) 124.
60 Ibid. at 126.
61 *Frye* v *United States* 293 F 1013 (DC Cir. 1923).

discovery', which forms the basis of the expert's opinion, has 'gained acceptance in the particular field in which it belongs'.[62] The *Frye* test attracted significant criticism, prompting Professor Charles McComick to propose an alternative 'relevancy' test.[63] Ever since the statutory US Federal Rules of Evidence[64] came into effect in 1975, an increasing number of US courts began to adopt the 'relevancy' test.[65] Until recently, these were the two dominant tests for admissibility of expert scientific evidence in the USA.

Turning to the English law of evidence, it appears that thus far the English courts have not applied a uniform standard for admissibility of expert evidence, and have instead referred in different cases to both the 'general acceptance' test and the 'relevance' test. The 'relevance' test was affirmed by the Court of Appeal in *R* v *Turner.*[66] In that case, Lawton LJ applied the rules stated by Lord Mansfield in *Folkes* v *Chadd*:[67] 'the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury'.[68] More recently in *R* v *Gilfoyle*, on the other hand, the Court of Appeal seems to have approved the *Frye* test criterion that 'evidence based on a developing new brand of science or medicine is not admissible until accepted by the scientific community as being able to provide accurate and reliable opinion'.[69]

As for addressing the reliability of scientific evidence, Hobbs notes that in *R* v *Gilfoyle* the Court of Appeal 'observed that unfortunately the criteria for assessing reliability are not clearly explained in English case-law, even where a novel scientific technique is in issue'.[70] In English law it is expected that bogus evidence will be filtered out at the stage of cross-examination.[71]

The law of evidence in Canada has been in a state of flux similar to that in the USA and England. Some courts have adopted the 'general

62 Above n. 61 at 1014.
63 McCormick described the test as follows: 'Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, unfair surprise and undue consumption of time': C. McCormick, *Handbook of the Law of Evidence* (West Publishing Co.: St Paul, Minn, 1954) 363–4, quoted in Bernstein, above n. 59 at 127).
64 Of particular relevance are Rules 702–706.
65 Bernstein, above n. 59 at 129.
66 *R* v *Turner* [1975] QB 834. *Turner* was recently approved by Lord Osborne in *HM Advocate* v *Grimmond (David)* 2002 SLT 508.
67 *Folkes* v *Chadd* (1782) 3 Doug KB 157.
68 *R* v *Turner* [1975] QB 834 at 841.
69 *R* v *Gilfoyle* [2001] 2 Cr App R 5 at H10.
70 T. Hobbs, 'Parental Alienation Syndrome and UK Family Courts, Part 1' [2002] 32 *Family Law* 182–9.
71 A. Gold, *Expert Evidence in Criminal Law: The Scientific Approach* (Irwin Law: Toronto, 2003) 36–7.

acceptance' test[72] while others, such as the Supreme Court of Canada in *Lavallee* v *R*, have opted for the 'relevance' test.[73]

The problem with relying on the 'relevance' standard is that it does not inquire 'into the integrity of the theory that the expert employed'.[74] In other words, it does not provide adequate scrutiny for ascertaining that the evidence is in fact reliable. The same shortcoming arises with the *Frye* test, which rests on a doubtful expectation that the witness's qualification provides adequate proof of the validity of what he says.[75] The expert's qualifications, as Redmayne explains, does not ensure that the evidence is reliable, and it does not provide adequate standards based on which to assess reliability.[76] Such a reliance on the qualifications of the expert is characteristic of the English law approach.[77]

This concern with integrity is more affectively addressed by the 'reliability standard' formulated by the United States Supreme Court in *Daubert* v *Merrell Dow Pharmaceuticals*.[78] The court in *Daubert* held that it is 'the Federal Rules of Evidence, not *Frye*, which provide the standard for admitting expert scientific testimony in a federal trial'.[79] It went on to explain that:[80]

> Rule 702 establishes the reliability standard, requiring that the testimony assist the trier of fact to understand the evidence or to determine a fact in issue.
>
> Furthermore, Rule 104(a) requires the trial judge to make a preliminary assessment of whether *the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue* . . . The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.
>
> Many considerations will bear on the inquiry, including:
> 1) whether the theory or technique in question can be (and has been) tested;
> 2) its known or potential error rate;
> 3) whether it has been subjected to peer review and publication; and
> 4) whether it has attracted widespread acceptance within a relevant scientific community.

According to the 'reliability' test, therefore, the expert's qualification, the general acceptance of the conclusions in the pertinent field, and the relevance of the conclusions are no longer enough to satisfy the standard of admissibility. The trial judge must act as a 'gatekeeper' to make

72 See, e.g., *R* v *Medvedew* 6 CR3d 185 (Man Ct App 1978).
73 Bernstein, above n. 59 at 140–2. See Section 3(a) above for Justice Wilson's explanation of why BWS was relevant.
74 D. Paciocco, 'Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence' (1994) *Criminal Reports (Articles)*, 4th Series, (27) 302, 312, referred to in Bernstein, above n. 59 at 142.
75 M. Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press: Oxford, 2001) 102–3.
76 Ibid. at 95–9.
77 See *R* v *Silverlock* [1894] 2 QB 834.
78 *Daubert* v *Merrell Dow Pharmaceuticals* 509 US 579 (1993).
79 Ibid. at 579. Note that because the *Daubert* decision only applies to courts at the federal level, the *Frye* test may still be used in the state courts.
80 Ibid. at 579–80.

sure that the evidence is also 'reliable' by taking into consideration the scientific validity of its reasoning or methodology.[81] 'They cannot, as was the practice under *Frye*, defer to the "pertinent field"'.[82] The framework in *Daubert* has since been expressly codified by amendments to the US Federal Rules of Evidence in December 2000.[83]

Would Walker's evidence of BWS have passed the 'reliability' test? Faigman and Wright examined this question in a widely noted study and concluded that BWS would not have satisfied the standards of 'reliability'.[84] BWS was evaluated based on the four considerations noted by the court in *Daubert*:

> *(1) Whether the theory or technique in question can be (and has been) tested*
>
> Faigman and Wright found that BWS has not been tested adequately. Craven also noted that Walker's results have yet to be replicated in order to gain external validation.[85] Craven notes that a study conducted by Dutton and Painter[86] in fact undermined Walker's 'cycle of violence' theory. Downs also refers to studies which show that battered women do not suffer from 'learned helplessness'.[87]
>
> *(2) Whether the error rates associated with the technique or science are acceptable, and whether there were standards of control*
>
> Faigman and Wright explain that 'to satisfy this test, syndrome experts should be required to specifically articulate what clinical indications qualify a woman as a battered women sufferer . . . So far, researchers have not offered any such criteria'.[88] Furthermore, Burke notes that 'Walker's selection of subjects is at once both too narrow and too broad. All of her subjects were battered women, with no control group for comparison against women who had never been abused. On the other hand, few of her subjects killed their abusers, and apparently none was accused of committing criminal behaviour in cooperation with her abuser.[89]
>
> *(3) Whether the study has been subjected to peer review and publication*
>
> Faigman and Wright note that the research on BWS has never been published in peer-reviewed publications. They suggest that

81 Gold, above n. 71 at 25–33.
82 Faigman and Wright, above n. 42 at 107–11.
83 Gold, above n. 71 at 25–33.
84 Faigman and Wright, above n. 42 at 107–11. For a conclusion similar to that of Faigman and Wright, see: J. Hoeffel, 'The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases' (2001) 24(41) *University of Arkansas at Little Rock Law Review* 48–51.
85 Z. Craven, 'Battered Women Syndrome' (2003) *Australian Domestic & Family Violence Clearinghouse*, available at *http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/battered%20_woman_syndrome.pdf*, accessed 4 August 2008.
86 D. G. Dutton and S. Painter, 'The Battered Woman Syndrome: Effects of Severity and Intermittency of Abuse' (1993) 63(4) *American Journal of Psychiatry* 614–22.
87 Downs, above n. 44 at 227.
88 Faigman and Wright (1997), above n. 42 at 107–11.
89 A. Burke, 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Women' (2002) 81(1) *North Carolina Law Review* 236.

this is not surprising considering that 'the audience, so far as can be determined by the research and its publication, was not scientists, but the public and the courts'.[90]

(4) Whether there was acceptance within the scientific community

In addressing the question whether the study has attracted widespread acceptance within a relevant scientific community, Fairgman and Wright bring to light the inadequacy of the 'general acceptance' test used in *Frye*:

> The [*Frye*] test queries the general acceptance in the *pertinent field*. If the *pertinent field* is defined narrowly enough, here to clinical psychologists with little or no training in scientific research methods, the test is extremely liberal. A survey asking clinical psychologists who practice in the area of domestic violence whether the battered women syndrome is generally accepted will have predictable results. The answer is yes because that is what they do for a living, not because what they do for a living has socially redeeming value. Although yet to be conducted, a more general sampling of experimental psychologists, almost certainly, would paint a very different picture. Like astronomers when asked about astrology, experimental psychologists who have considered the research methods actually used to study the phenomenon would be embarrassed that they might be perceived as playing the same trade.[91]

Similar doubts about relying on clinicians for 'scientific evidence' were discussed by Gold.[92] Gold refers to a number of commentators who are sceptical about relying on the views of clinicians.

Concern with the admission of behavioural science evidence is not confined to the requirement of reliability. In a recent article, Brodin questions whether such evidence is 'helpful' to the fact-finder, whether the evidence is truly relevant, and whether the costs of the expert testimony to the parties and the judicial system outweigh the benefits?[93] He found that (i) there is danger that behavioural science evidence may not be reliable, and (ii) such evidence may undermine the integrity of the fact-finding process. He therefore concludes that such evidence should be avoided in legal trials. While recognising the undeniable contributions of social scientists and mental health professionals, Brodin cautions that when it comes to legal proceedings, 'a courtroom is not a sociology class, and a trial is not a therapy session . . . the players (judge, jury, lawyers, witnesses) are assigned narrowly defined roles, and the data employed in the process must pass through evidentiary filters designed to minimize distortion and maximize the accuracy of the fact-finding. The goal of the entire enterprise is to ascertain the truth while at the same time avoiding "unjustifiable expense and delay"'.[94]

90 Faigman and Wright (1997), above n. 42 at 107–11.
91 Ibid.
92 Gold (2003), above n. 71 at 161–7.
93 M. Brodin, 'Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic' (2004) *Boston College Law School Faculty Papers*, Paper 24, available at *http://lsr.nellco.org/cgi/viewcontent.cgi?article=1024&context=bc/bclsfp*, accessed 4 August 2008.
94 Ibid. at 73.

There are optimistic signs that the Supreme Court of Canada concedes its mistake in admitting Walker's expert evidence. In *R* v *J-LJ*[95] the Supreme Court approved its earlier decision in *R* v *Mohan*[96] which 'moved in parallel with the "reliable foundation" test more recently laid down . . . in *Daubert v. Merrell Dow Pharmaceuticals, Inc.'*. While the court distinguished *Daubert* because it 'must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures', it recognised that 'the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science'.[97] What remains for the Canadian courts now is to move on to the next step of reconsidering the admissibility of BWS based on this 'reliability standard'. As the above mentioned analysis suggests, the court would find that evidence of BWS should not be admissible any longer.

It is also worthwhile to note the annotation to the case *R* v *Malott*,[98] which welcomed the Supreme Court of Canada's concession that in *Lavallee* v *R* battered women were described in a narrow and overly restricted way, and that its scrutiny of Walker's evidence was inadequate. As the annotation explains, when the SCC referred itself to Walker's study, it did not advise counsel that it will be relying on this study, and this prevented counsel from subjecting the evidence to cross-examination by presenting alternative sources on the issue. 'When the courts decide to use science to inform the law they will be better informed if the parties are engaged. The joint endeavour will improve the court's ability to recognize junk science when it comes across it.'[99]

It is unfortunate that, as Barsby and Ormerod point out,[100] the English Court of Appeal in *R* v *Gilfoyle* referred to *Frye* as authority, even though by that time the US Supreme Court had already rejected the *Frye* test as a sufficient standard of admissibility. For now, it seems that the English courts are reluctant to take the opportunity to adopt a standard of admissibility similar to that in *Daubert*. According to Mike Redmayne, 'The courts in England and Wales have proven reluctant to develop any exclusionary rules of evidence to prevent "junk" science or cowboy experts from being heard in the courtroom'.[101] Instead, their approach is focused on reforming the system of forensic science, though these attempts have had limited benefit, and many lingering issues and shortcoming remain.[102] For this reason, it is argued that allowing a psychologically individualised standard, which would involve admitting mental health evidence, is not advisable.

95 *R* v *J-LJ* [2000] 2 SCR 600 at 33.
96 *R* v *Mohan* [1994] 2 SCR 9.
97 *R* v *J-LJ* [2000] 2 SCR 600 at 33.
98 *R* v *Malott* [1987] 1 SCR 123 (annotation).
99 Ibid.
100 C. Barsby and D. C. Ormerod, 'Evidence: Murder—Whether "Psychological Autopsy" of Victim Admissible to Show Likelihood of Suicide' [2001] Crim LR 314.
101 M. Redmayne, 'The Royal Commission's Proposals on Expert Evidence: A Critique' (1994) 2(157) *Expert Evidence* 161.
102 Bernstein, above n. 59 at 170–3.

Has the evidence made the defence more accessible to all?

Initially, feminist legal advocates hailed BWS as a significant breakthrough in legal history.[103] Eventually, however, they have recognised that the admission of BWS has failed to make the defence more accessible to all women.

'Syndromization', as Professor Craven refers to it,[104] involves subsuming people's diverse problems under a single tag. 'This label becomes indexical, referring to an entire panoply of stereotypical traits, attributes and behaviours'.[105] This is exemplified by Walker's BWS. Based on a study of predominantly white, middle-class, heterosexual battered women, Walker formulated a rigid and narrow pathological profile of the 'battered woman'. She described her as physically and emotionally fragile and dependent, reacting to the experience of battering by developing symptoms of helplessness, passivity, and mental illness.

As identified by Allard[106] and other commentators,[107] inherent in Walker's profile of the 'battered woman' is an age-long stereotype. According to this stereotype, whereas men are portrayed as active, masculine and powerful, women are portrayed as passive, feminine and powerless. This profile encourages an expectation that unless the defendant exhibits the reactions and symptoms described by the profile, her perceptions and actions will not be treated as reasonable. 'To successfully defend herself, a battered woman needs to convince a jury that she is a "normal" woman—weak, passive, and fearful. If the battered woman deviates from these characteristics, the jury may not associate her situation with that of the stereotypical battered woman'.[108] This is a significant new hurdle for women defendants because 'it establishes boundaries between "real" battered women and others who may be battered but are viewed unsympathetically by courts and juries because they violate these boundaries. Women who are strong, competent, aggressive, and sexually active do not correspond to the imagery connoted by "learned helplessness"'.[109] BWS is therefore tantamount to a Trojan horse. It was admitted to the courtroom under the disguise of science with the expectation that it will help the fact-finder by demystifying myths and stereotypes about battered women. Once admitted, it

103 Craven, above n. 85 at 10.
104 Craven, above n. 85.
105 E. Dobash and R. Dobash, *Women, Violence and Social Change* (Routledge: London and NY, 1992) 228–35.
106 S. Allard, 'Rethinking Battered Woman Syndrome: A Black Feminist Perspective' (1991) 1(191) *UCLA Women's Law Journal* 198.
107 Elizabeth Schneider, one of the founders of the Women's Self-Defence Project, commented on this issue as follows: 'The "syndrome" reinforces and confirms the view of women victims as passive, sick, powerless and ruled by emotions, a view firmly implanted in the criminal justice system from at least the nineteenth century' (Dobash and Dobash, above n. 105 at 228).

See also: K. Ferraro, 'The Words Change, But the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women' (2003) 9(1) *Violence Against Women* 113; Craven, above n. 85 at 11.
108 Allard, above n. 106 at 193–4.
109 Ferraro, above n. 107 at 125–6.

injected into the courtroom new stereotypes, and affirmed old stereotypes, that placed a new hurdle on women who do not fit the pathological profile.

Craven warns that it is not accurate to described battered women based on a 'single theoretical construct'.[110] Such a construct fails to take into consideration the diversity of women's personal characteristics and experiences and the influence of different cultural and ethnic backgrounds, among other factors that may influence how they react to domestic violence. Recent studies affirm that Walker's pathological profile is too narrow and rigid. The criticisms of Craven and other commentators have also been recognised and acknowledged recently by the Supreme Court of Canada. Consider, for example, the statement of Justice L'Heureux-Dubé in *R* v *Malott*:[111]

> Concerns have been expressed that the treatment of expert evidence on battered women syndrome, which is itself admissible in order to combat the myths and stereotypes which society has about battered women, has led to a new stereotype of the 'battered woman'.
>
> It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.
>
> The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the *reasonableness* of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from battered woman syndrome.

Justice L'Heureux-Dubé notes that the pathological profile fails to encompass women who act as survivors, as well as women of colour. These examples are considered next in detail.

(i) Battered women often act as survivors who take the initiative to escape, and when that effort fails, they protect themselves by force

Research reveals that many battered women do not develop 'learned helplessness', despite having to endure severe and persistent violence and the emotional trauma associated with such experiences. Due to a range of possible factors, however, the attempts of some women to escape are futile, or alternatively women who have escaped end up being forced to return to the abusive relationship. Under such circumstances, they realise that their only means of survival is to act in self-defence using measures that make it possible for them to overtake their batterer (i.e. a pre-emptive strike before the confrontation begins, and/or using a lethal weapon). This reality was recognised by Chief Justice

110 Craven, above n. 85 at 11–12.
111 *R* v *Malott* [1998] 1 SCR 123 at 39-41

Wilentz in *United States* v *Kelly*,[112] and was referred to with approval by Justice Wilson in *Lavallee* v *R*. Chief Justice Wilentz catalogued a range of factors that may undermine a woman's ability to escape. The following are a few of the factors: they may not have where to go, they may not be able to sustain themselves independently and their children economically, they may be unwilling to confide in friends or the police because of shame or fear, they may be constrained by the traditional belief about the importance of keeping the family together, they may 'harbour a deep concern about the possible response leaving might provoke in their mates. They literally become trapped by their own fear'.[113]

In their book *Battered Women as Survivors: An Alternative to Treating Learned Helplessness*, Gondolf and Fisher present a study that supports the view of battered women as 'survivors'.[114] The empirical findings are based on a study of battered women in Texas shelters. Contrary to Walker's assertion that women gradually break down and give up, Gondolf and Fisher found that battered women are assertive and persistent in their efforts to get help and survive the abuse, particularly when the abuse escalates. Similarly, in England recent research shows that 60 per cent of the battered women escaped the relationship because they feared that they would be killed by their partner.[115] These studies are not meant to deny or overlook the fact that many victims of domestic violence do experience symptoms identified with Walker's diagnosis of helplessness, such as low self-esteem, depression, vulnerability, etc. However, as Gondolf and Fisher explain, 'the so-called symptoms of learned helplessness may in fact be part of the adjustment to active helpseeking. They may represent traumatic shock from the abuse, a sense of commitment to the batterer, or separation anxiety amidst an unresponsive community. All of these are quite natural and healthy responses . . .'.[116]

Gondolf and Fisher go on to explain that the reason battered women fail to escape, or escape but then return to their batterer, is because of inadequate sources of help.[117] See 'Contextualising the reasonable person' below for a detailed discussion about the inadequacies of sources of help for domestic violence victims.

(ii) Some groups of women are commonly assumed not to fit Walker's pathological profile

In her article *Rethinking the Battered Woman Syndrome: A Black Feminist Perspective*, Allard explains that in addition to excluding women who have acted assertively as survivors, Walker's stereotypical profile also excludes women who historically have been treated as deviants from

112 478 A2d 364.
113 Ibid. at 372.
114 Gondolf and Fisher, above n. 43.
115 Women's Aid Federation of England, *Domestic Violence Statistical Factsheet*—2002, available at *http://www.womensaid.org.uk/dv/dvfactsh2002.htm*, accessed 8 August 2008.
116 Gondolf and Fisher (1988), above n. 43 at 21–2.
117 Ibid. at 103–4.

the 'normal' feminine woman. Allard focused on the historical stereotypical view of coloured women. 'The dominant images of Black women as domineering, assertive, hostile, and immoral may hinder a judge's or juror's ability to comprehend a Black woman's act of self-defence as based on "learned helplessness".'[118] There is evidence to support Allard's concern that jurors are influenced by this racial stereotype, and consequently they are reluctant to accept syndrome evidence when it is presented by African American women. For example, Ferraro points out statistics that African American women have six times greater chance of incarceration.[119]

4. *Martin*: critique of the Court of Appeal's decision

(a) The relevance of size and strength differential between the defendant and the aggressor

The requirements of proportionality and imminence make sense when applied to 'the paradigmatic case of a one-time barroom brawl between two men of equal size and strength'.[120] When the victim's physical power is sufficient to protect himself against the aggressor's physical attack, acting pre-emptively using a lethal weapon may very well appear to be excessive and unreasonable. Society expects the ordinary person in such paradigmatic circumstances to face his attacker 'fists with fists . . . he [the reasonable man] doesn't use a weapon unless one is being used against him . . .'.[121] However, it is not possible, or indeed realistic, to assume that the parties in a confrontation are necessarily of equal size and strength. The Court of Appeal in *R* v *Martin* should have therefore explained that if the victim is significantly weaker and smaller than the aggressor, the fact-finder ought to consider the influence that this factor may have had on the victim's perception of danger and her assessment of how to respond.

Of course, a defendant's claim that strength and size differential reasonably led her to apprehend the necessity of using a weapon must be supported by evidence. It may be that the difference is self-evident, as between a small woman as against a larger and 'well-built' male, or between a child as against a large 'well-built' male, or between an aged and weak elderly person as against a young and 'well-built' adult. Particularly strong evidence would be a history of battering by the aggressor, such that D based on experience was already aware of the strength and size differential. This is illuminated by domestic violence cases involving male and female partners.

As Justice Wilson explained: 'I do not think it is an unwarranted generalization to say that due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand

118 Allard, above n. 106 at 204.
119 Ferraro, above n. 107 at 113.
120 *Lavallee* v *R* [1990] 1 SCR 852 at para. 46.
121 Gillespie, above n. 21 at 99.

combat'.[122] Indeed it appears to be common sense that a physical attack by a more powerful aggressor can potentially be as deadly as a weapon. Such a threat should be confronted by the means which objectively appear necessary and reasonable considering the strength differential. Therefore, 'a woman who feels ill-equipped to defend herself with fists may feel that her only resort is the use of a weapon'.[123] In the case of battered women, their experiences of abuse by their batterer make them well aware of this strength differential, and further supports their apprehension that alternative means for defending themselves are necessary.

> [Battered women] generally have firsthand experience of the strength differential and the batterer's willingness to use it to his advantage. They have learned a valuable survival lesson about the physical strength differential; they simply do not possess the skills or the physical strength to utilize such a coping method to end the violence. In the end, the victim has learned that if she has to participate in another one-on-one physical fight with the batterer to save herself and end the battering, she will have to utilize a weapon in order to have any reasonable chance to survival. This is a reasonable assessment of her situation, and it is unreasonable to expect a person to wait for her attacker to be ready before she act in her own defence.[124]

Hence, the Supreme Court of Canada's approach to the requirements of proportionality and imminence is commendable. The court sensibly accepted, as an objectively recognisable fact, that women are generally physically weaker than men. Moreover, L's awareness of this strength differential was supported by her past experience of being battered by R. Justice Wilson referred to evidence which showed that 'when the appellant and Rust physically fought the appellant invariably got the worst of it'.[125] The court therefore allowed a more flexible application of the proportionality requirement by breaking free from a strict expectation that the use of a weapon in self-defence is only reasonable when the aggressor himself is armed. Instead, the jury is granted the flexibility of finding that an ordinary person would have likewise recognised the need to use a weapon against an unarmed but physically stronger aggressor.

Furthermore, in relation to the requirements of imminence the Supreme Court of Canada decided not to follow the decision of the Nova Scotia Supreme Court, Appeal Division, in *R* v *Whynot*. As Justice Wilson

122 *Lavallee* v *R* [1990] 1 SCR 852 at para. 57. This observation was also noted by Robbin Ogle and Susan Jacobs: 'Women, in general, are not as physically strong as men are, which is likely related to their smaller stature and lower muscle mass. Additionally, women are not socialised into the use of aggression in our society, so they have little experience and practice in its use' (R. Ogle and S. Jacobs, *Self-Defence and Battered Women Who Kill: A New Framework* (Praeger: Westport, Connecticut and London, 2002) 73–4.

123 E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault' in E. Bochnak (ed.), *Women's Self-defence Cases Theory and Practice* (Michie Company Law Publishers: Charlottesville, Va, 1981) 23.

124 Ogle and Jacobs, above n. 122 at 73–4.

125 *Lavallee* v *R* [1990] 1 SCR 852 at para. 57.

explained, 'the requirement imposed in *R* v *Whynot* that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would . . . [be] tantamount to sentencing her to "murder by instalment"'.[126] The victim of ongoing violence may have to strike when the chance arises rather than wait until it is too late. This might involve attacking a sleeping or drunken abuser who has threatened her with death or GBH on his waking or sobering-up, or alternatively attacking him when he is not poised in a confrontational mode.

(b) Contextualising the reasonable person

The relevance of contextual factors in shaping the defendant's apprehensions[127]

In the paradigmatic case of a one-time brawl between strangers, it is plausible to expect the fact-finder to assess reasonableness solely based on the circumstances of the actual confrontation. However, there may be cases in which an understanding of the defendant's apprehensions requires consideration of relevant contextual factors in the defendant's history. Consideration of the contexts requires modification of the 'purely objective standard' into what Downs refers to as a 'contextual objective test'.[128] Again, domestic violence cases provide a luminous example.

In domestic violence cases, the contextual facts are typically most relevant to the question of why the battered woman failed to abandon the relationship or get help, instead of using force pre-emptively by means of a lethal weapon. In some cases, in order to answer this question adequately it is necessary to consider the history of the abuse and relevant socio-economic factors affecting the defendant. As the

126 Above n. 125 at para. 57.

127 Numerous commentators have recognised the need to reform the objective standard by contextualising the reasonable person. See, e.g., the proposals of: Downs, above n. 44 at ch. 8; Burke, above n. 89; M. A. Dutton, 'Understanding Women's Responses to Domestic Violence: a Redefinition of Battered Women Syndrome' (1993) 21(1191) *Hofstra Law Review* 1193–203.

Note that Dutton's proposals are vulnerable to criticism for failing to abandon reliance on BWS. Note, as well, that according to Sheehy feminists as early as 1985 have proposed a new 'defence of self-preservation or preservation of the life of another person': E. Sheehy, *What Would a Woman's Law of Self-Defence Look Like?* (Status of Women Canada: Ottawa, 1995) 31. The new defence would cease to resort to evidence of any 'syndrome'. The defence would take into consideration the contexts of the abusive relationship (i.e. the history of abuse) as well as the options (or lack of options) which D reasonably perceived herself to have had.

128 Downs, above n. 44 at 230.

As Kazan explains, contextualisation need not be seen as inconsistent with an objective standard. 'Legal standards will not be any less objective if they include a recognition of the fact that context may alter an individual's circumstances such that we may change our conception of what may reasonably be expected from that particular individual under those circumstances. Standards become subjective when the question of what is reasonable depends solely upon the perceptions of the accused. Contextualization . . . still requires that the individual satisfy an external test of what is reasonable. The Courts must be convinced that the defendant's reasons for acting were justifiably motivated by their individual circumstances such that if someone else found themselves in a similar situation, it would be reasonable for them to act in the same manner': Kazan, above n. 23 at 563–4.

Chief Justice Wilentz recognised in the American case *United States* v *Kelly*, 'external social and economic factors often make it difficult for some women to extricate themselves from battering relationships'.[129] For this reason they end up feeling alone and they resort to self-help by using force in self-defence.[130]

Economic dependency on male partners is a common constraint that prevents women from escaping a battering relationship. Chief Justice Wilentz recognised that 'even with the progress of the last decade, women typically make less money and hold less prestigious jobs than men, and are more responsible for child care. Thus, in a violent confrontation where the first reaction might be to flee, women realize soon that there may be no place to go'.[131] The experience of abuse may also prevent such women from acquiring income-earning skills.[132]

There is also a lack of social resources to help battered women. Shelters appear to be the dominant social resource, though the effectiveness of shelters is doubtful. For example, in the USA, the 'Senate Judiciary Committee noted in its 1992 report that there are about 1,200 known shelters in the United States serving thousands of women and children each year, although we know that between 2 and 4 million women face battering each year. The Senate report also notes that there are three times as many animal shelters in this country as there are battered women shelters, indicating the lower priority level given to battered women in our society'.[133] According to statistics compiled in the USA by the National Clearinghouse in Defence of Battered Women, 'In many U.S. cities, more than 50% of women and children seeking shelter are turned away due to lack of space'.[134] Similar disturbing statistics can be found in England. For example, according to a recent study, 40 per cent of all homeless women have been victims of domestic violence, which reflects on the lack of social services to help such victims make a successful escape as opposed to ending up on the streets.[135]

How effective are the shelter programmes? As Gondolf and Fisher discovered in their study, while shelter programmes, with the counselling and psychiatric services they offer, are helpful to those who do manage to get a place in a shelter, in many cases this is not enough to enable battered women to live independently, most often due to economic constraints.[136] Gondolf and Fisher therefore recommend expanding the shelter programme and providing additional services that help women put themselves (and their children) back on their feet once they leave their partner. For example, 'victims often lack work skills or a

129 *United States* v *Kelly* 478 A2d 364 at 372.
130 E. Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defence' (1980) 15(623) *Harvard Civil Liberties—Civil Rights Law Review* 626–7.
131 *United States* v *Kelly* 478 A2d 364 at 3 (electronic version).
132 Ogle and Jacobs, above n. 122 at 75.
133 Ibid. at 74.
134 Prison Activist Resource Centre, *Self Defense Is Not a Crime: Some Facts on Domestic Violence*, available at *http://www.prisonactivist.org/women/self-defense-not-a-crime.html*, accessed 4 August 2008.
135 Women's Aid Federation of England, above n. 115.
136 Gondolf and Fisher, above n. 43 at 103–4

work history as a result of the battering process, and therefore they need job training, financial assistance, and time to adequately support themselves and their children'.[137] Other needs that ought to be accommodated include housing and childcare. In England, the government has recently escalated its battle against domestic violence. In its recent Consultation Paper, titled *Safety and Justice: the Government's Proposals on Domestic Violence*, the government identified the need to provide a wide spectrum of social services to help victims of domestic violence, and has proposed a series of promising proposals for this end.[138]

Gondolf and Fisher emphasise that shelter programmes and other measures to help women achieve economic independence are not enough.[139] The government must establish legal intervention that makes the arrest and prosecution of abusive partners effective. In the USA, for example, according to statistics complied by the National Clearinghouse in Defence of Battered Women, '90% of battered women who reported assault to the police actually did sign complaints, but fewer than 1% of the cases were ever prosecuted'.[140] Where the batterer was prosecuted, the only recourse was a protection order 'which only works if enforced and, if violated, only involves a misdemeanour in most jurisdictions'.[141] The Home Office, in Part 3 of its Consultation Paper, addresses the need to improve the tactics and powers for arresting and prosecuting batterers.[142] It proposes promising measures that would help give added protection to victims.

Gondolf and Fisher also recognise that delivery of improved services will not in itself resolve the appalling phenomenon of domestic terror. On a social level, 'it requires a renewed and heightened awareness of abuse and its consequences'.[143] As the Home Office noted in its report, domestic violence has historically been tolerated or ignored, and this attitude has enabled the impression that such phenomenon is acceptable

137 Ogle and Jacobs, above n. 122 at 75.

138 Home Office, *Safety and Justice: The Government's Proposals on Domestic Violence*, Cm 5847 (June 2003), available at *http://www.crimereduction.homeoffice.gov.uk/domesticviolence/domesticviolence37.htm*, accessed 4 August 2008.

139 Gondolf and Fisher, above n. 43.

140 Prison Activist Resource Centre, above n. 134.

141 Ogle and Jacobs, above n. 122 at 75.

Positive initiatives have, however, been taken in the USA, and these are good examples for other jurisdictions. For example, Downs notes that states have increasingly introduced legislation requiring mandatory arrest for batterers, and have been stiffening the penalties for batterers who violate judicial restraining orders (Downs, above n. 44 at 224).

Another noteworthy initiative was the 1998 reform to the Social Security Administration in the USA. The former US Vice President Gore introduced a reform that would make it easier for battered women to get a new Social Insurance Number (SSN), in order to escape their abusers. In a White House Press Release, 4 November 1998, Vice President Gore explained the motive for the reform as follows: 'You have suffered enough without having to fight for the protections you need to start a new life for yourself and your children', he added, 'we offer you the protection you need to regain your safety and rebuild your life' (Office of the Vice President, The White House, Press Release, 4 November 1998, available at *http://clinton6.nara.gov/1998/11/1998-11-04-vp-announces-new-policy-for-victims-of-domestic-violence.html*, accessed on 5 August 2008).

142 Home Office, above n. 138.

143 Gondolf and Fisher, above n. 43 at 103–4.

or justified.[144] Ogle and Jacobs explain that some observers fail to report the abuse, either because they do not care or they fear getting involved.[145] Families may even pressure the victim to stay in the relationship in order to save face by hiding the abuse. Ultimately, this social apathy provides batterers with the support they need to continue the terror they inflict on their partners and children.

The need for evidence to corroborate contextual facts

Ogle and Jacobs explain that layperson testimony may be necessary to corroborate the testimony of the defendant.[146] They refer to *Weiand* v *Florida*[147] as an example. The defendant shot and killed her husband during an argument. She claimed to have been battered by him, and brought lay testimony to corroborate her claim of abuse. The trial court refused to allow the testimony, though the appellate court overruled the trial court's decision. The appellate court explained the importance of the evidence as follows:

> By excluding the witnesses in this case, the trial court deprived the defendant of eyewitness testimony. Furthermore, the exclusion of the three witnesses to prior incidents of domestic violence enabled the prosecutor to discredit Weiand's claims of abuse by arguing that no one had ever witnessed any injuries on Weiand or seen evidence of her husband's abuse of her.[148]

The need of expert evidence to explain contextual facts

According to 'The rationalist tradition of evidence scholarship', which is the dominant theory of evidence today:

> adult members of society can be assumed to have a 'general cognitive competence' that enables them to participate in adjudication as jurors, lay judges and witnesses. This consists of two elements: first, existing knowledge of or ability to understand the main components of the 'social stock of knowledge or beliefs',[149] and, second, an ability to apply ordinary principles of inferential reasoning to disputed questions of fact in adjudication.[150]

In other words, conclusions about the facts are inferred from 'background generalisations', and these generalisations are made up of a 'stock of knowledge or beliefs' that are part of shared culture. Hence, taking the objective standard of reasonableness as an example, the fact-finder assesses what is reasonable under the circumstances by applying generalisations of how an ordinary person would be expected to conduct himself under the same circumstances as the defendant.

144 Home Office, above n. 138.
145 Ogle and Jacobs, above n. 122 at 74–5.
146 Ibid. at 144.
147 *Weiand* v *Florida* No. 95-01121 (Fla 2d DCA Oct 22), available at *http://www.law.fsu.edu/library/flsupct/91925/op-91925.pdf*, accessed 5 August 2008.
148 Ibid. at 17.
149 'The social stock of knowledge' refers to generalisations that are more or less shared in the culture of the relevant society or community.
150 W. Twining, 'Evidence as a Multi-Disciplinary Subject' (2003) 2 *Law, Probability and Risk* 91 at 99. See also D. Martinson, 'A Forum on *Lavallee v R*: Woman and Self-Defence' (1991) 25 *University of British Columbia Law Review* 37–9.

Two problems with this rationalist tradition are noteworthy in this discussion. First, the 'general cognitive competence' can only operate effectively if the jury understands the facts, and if the 'background generalisations' based on which they draw conclusions about the facts are well informed and accurate. It is for this reason that expert testimony is admitted, when relevant, in order to explain to the jury complex evidence, 'as in fraud trials or white collar cases involving complex accounting evidence'.[151] The jury may also be unable to understand certain social situations, such as facts in domestic violence cases. According to the March 2004 report of the Crown Prosecution Service, entitled *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence*, sociological and psychological research studies show that juries are perplexed by the facts of domestic violence cases.[152] In *Lavallee* v *R*, Justice Wilson explained the reason for this as follows:

> If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'. [153]

As explained above, the 'rationalist tradition' assumes that people infer conclusions about facts based on 'background generalisations', and these generalisations are drawn from their 'stock of knowledge'. As Twining explains, the 'stock of knowledge' of every person is made up of 'ill-defined agglomerations of beliefs which typically consist of a complex soup of well-grounded information, sophisticated models, anecdotal memories, impressions, stories, myths, wishes, stereotypes, speculations, and prejudices'.[154] The second problem to note, therefore, is the potential that without understanding the facts a jury may end up referring to, and drawing conclusions based on misleading and misinformed stereotypes and myths about the facts and the defendant.

The CPS explains in its report that 'when the fact finder is unable to understand the complex and counter-intuitive dynamics of domestic violence, this void in understanding is often filled with the power of myth'.[155] Myths about domestic violence are alarming because they 'are pervasive, relentless and destructive to the fact-finder's ability to examine the factual evidence at trial rationally and impartially'.[156] Two common myths about women may influence fact-finders in domestic violence cases. Gondolf and Fisher[157] describe the myth that women are masochists who are inclined to stay in violent relationships because they

151 Twining, above n. 150.
152 Crown Prosecution Service, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence* (March 2004), available at *http://www.cps.gov.uk/publications/docs/expertwitnessdv.pdf*, accessed 5 August 2008.
153 *Lavallee* v *R* [1990] 1 SCR 852 at para. 43.
154 W. Twining, 'Civilians Don't Try: A Comment on Mirjan Damaska's "Culture and Proof"' (1997) 5 *Cardozo Journal of International & Comparative Law* 69 at 74.
155 Crown Prosecution Service, above n. 152 at 9.
156 Ibid. at 10.
157 Gondolf and Fisher, above n. 43 at 13–15

experience emotional or existential exhilaration in being victims. They make reference to a number of clinicians who have supported and advocated this view. Most notable is the view of Sigmund Freud who suggested that women are naturally predisposed to masochism.[158] Another common myth is that 'if the battering was really as bad as she claims, she would have escaped'.[159]

The expert witness, therefore, plays a vital role in negating myths and stereotypes. The expert witness 'clears the way for fact-finders to deliberate regarding the actual facts of the case and the logical conclusions that follow from such facts, rather than focusing upon the falsehoods created when the evidence is viewed through the distorting lens of myth'.[160] These considerations have lead the Supreme Court of New Jersey in *United States* v *Kelly* to conclude that the battering relationship is subject to a large group of myths and stereotypes', and as such it is beyond the ken of the average juror and thus is suitable for explanation through expert testimony.[161] The Supreme Court of Canada in *Lavallee* v *R* noted and followed the example of the Supreme Court of New Jersey.

What type of expert evidence would be required to explain contextual facts, and what admissibility issues may arise? Some generalisations about human behaviour have been the subject of social science research. Walker and Monahan have termed such evidence as 'social framework evidence',[162] and a broader conceptualisation of this type of evidence is offered by Vidmar and Schuller.[163] 'Social framework evidence' provides the social and psychological context for fact determinations. In the USA, the *Daubert* standard of reliability applies to social science evidence, as it does to mental health science. Similarly, if English courts were to admit social science evidence to explain contextual facts, such evidence must satisfy an adequate standard of 'reliability'.

Ever since the reliability standard was introduced in the USA, additional measures have been taken to ensure the reliability of expert witness testimony. Consider, for example, social workers. As Andrews explains, 'the social worker as expert witness informs the sentencer about the defendant's social history and social functioning and the social context of the crime. He or she interprets this information, using social research and theory, to explain the defendant's behavior'.[164] Recently, the National Association of Social Workers ('NASW')[165] has taken progressive measures to ensure the reliability of evidence presented by social workers. The NASW's new Code of Ethics requires social workers

158 Above n. 157 at 14–15. See also Downs, above n. 44 at 87.
159 Crown Prosecution Service, above n. 152 at 9.
160 Ibid. at 2.
161 *United States* v *Kelly* 478 A2d 364 at 8 (electronic version).
162 L. Walker and J. Monahan, 'Social Framework: A New Use of Social Science in Law' (1987) 73 *Virginia Law Review* 559–98.
163 N. Vidmar and R. Schuller, 'Juries and Expert Evidence: Social Framework Testimony' (1989) 52 *Law & Contemporary Problems* 133–77.
164 A. B. Andrews, 'Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings' (1991) 36(5) *Social Work* 440.
165 For further detail see the NASW website at *http://www.naswdc.org/*, accessed 5 August 2008.

to 'keep current with their knowledge base through continuing education and to critically examine research evidence and evaluations of practice methodologies'.[166]

It is, however, questionable whether social science evidence is necessary to explain the typical contexts of domestic violence cases. Instead, non-scientific expert evidence presented by persons with knowledge of the contexts that battered women typically face, and knowledge of the actually situation faced by the defendant, would be sufficient. What the fact-finder requires is merely to become aware of the relevant factors that existed in such contexts, such as the history of the abuse, economic constraints, inadequate protection by the legal system, family pressures, previous failed attempts to escape, etc. Once these facts are presented to the jury, it seems plausible that the ordinary juror, using his common sense, would be able to assess whether the defendant's apprehensions and behaviour were reasonable, even though they may not have accorded with the requirements of proportionality and imminence. As for the standard of admissibility of non-scientific evidence, *Daubert* did not apply to non-scientific evidence, and there is some uncertainty and inconsistency between US courts as to the appropriate standard.[167]

5. Reform proposals: significance and sufficiency

The Court of Appeal's decision in *R* v *Martin* left an impression that the law of self-defence is in need of reform. As argued in the previous section, reform is indeed necessary. The *purely objective standard* should be modified into a *contextual objective standard*, and the influence of size and strength differentials should be taken into consideration when assessing reasonableness. Nevertheless, in 2005, Prime Minister Tony Blair's spokesman said that the current formulation of the law was sound and should not be reformed.[168] According to the then Director of Public Prosecutions, Sir Ken McDonald QC, what the public required was a clarification of the law, and the 'Crown Prosecution Service and the Association of Chief Police Officers (ACPO) would publish joint guidance to help the public understand their rights so that any citizen who confronts a criminal in defence of their property, themselves or another, and who uses reasonable and proportionate force, does so in

166 S. Sarnoff, 'Social Workers and the Witness Role: Ethics, Laws, and Roles' (2005) 2(1) *Journal of Social Work Values and Ethics*, available at *http://www.socialworker.com/jswve/content/view/10/*, accessed 5 August 2008.
See also F. Reamer, *Ethical Standards in Social Work* (National Association of Social Workers Press: Washington, DC, 1998).

167 D. Faigman, 'Making The Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony' (1996) 35(401) *Washburn Law Journal* 422–7; E. Imwinkelried, 'The Next Step After *Daubert*: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Non-scientific Expert Testimony' (1994) 15(2271) *Cardozo Law Review* 2291; D. Bernstein, '"Non-scientific Experts": What Degree of Judicial Scrutiny Should They Face?' (1998) *George Mason University School of Law*, available at *http://members.aol.com/deliotb/kumho.html*, accessed 5 August 2008.

168 T. Brannigan and C. Dyer, 'Clarke rules out tougher law on tackling intruders', *Guardian*, 13 January 2005, available from *http://politics.guardian.co.uk/homeaffairs/story/0,11026,1389240,00.html*, accessed 5 August 2008.

the knowledge that they will be fully supported by the criminal justice system'.[169]

'Tony Blair and David Blunkett, the former Home Secretary, had indicated that they would consider amending legislation if consultations suggested it was necessary.'[170] Such a recommendation, however, still seems nowhere in sight. The Law Commission released its Final Report on *Partial Defences to Murder* in 2004.[171] Among a range of issues, the Report considered the option raised in Law Commission Consultation Paper No. 173 (31 October 2003) to form a *partial defence of excessive force in self-defence*. The 2004 Report explains that two typical types of scenarios exemplify the use of excessive force in self-defence.[172] First is the scenario where the defendant, based on her subjective belief, has a legal right to use force, but she uses a disproportionate and therefore unreasonable amount of force. An example is the case of a homeowner who has a legal right to protect himself from the danger posed by an intruder, but uses excessive force, as was the case in *R* v *Martin*. In the second scenario, exemplified by the domestic violence cases discussed in this article, a battered person uses force pre-emptively because she fears that otherwise it will not be possible to survive the anticipated attack.

The Law Commission rejected the proposal for a new *partial defence of excessive force in self-defence*. It explained its decision as follows: 'In our view, our proposed reformulation [of the defence of provocation] will be the simplest and most effective way of ameliorating the deficiencies of the present law'.[173] The Law Commission later stated that following widespread and detailed consultation of its recommendation in *Partial Defences to Murder*, it saw 'no compelling reason to depart from them in substance . . .'.[174] According to the recommendations of the Law Commission, where a jury rejects the self-defence plea, they might still return a manslaughter verdict on the application of a new reformulated defence of provocation. The reformulated defence of provocation, which was set out in Part 3 of Law Com. No. 290,[175] was restated in Part 5 of Law Com. No. 304[176] as follows:

(1) Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:
  (a) The defendant acted in response to:
    (i) Gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or

169 Above n. 168.
170 Ibid.
171 Law Commission, *Partial Defences to Murder*, Law Com. No. 290 (2004), available at *http://www.lawcom.gov.uk/lc_reports.htm#2004*, accessed 5 August 2008.
172 Ibid. at paras 4.1 and 4.18.
173 Ibid. at para 4.30.
174 Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. No. 304 (2006) para. 5.11, available at *http://www.lawcom.gov.uk/lc_reports.htm#2006*, accessed 5 August 2008.
175 Law Commission, above n. 171 at para 3.168.
176 Law Commission, above n. 174 at para. 5.11.

(ii) Fear of serious violence towards the defendant or another; or

(iii) A combination of both (i) and (ii); and

(b) A person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.

(2) In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

The Law Commission's proposal is commendable for its reformulation of the law of provocation. Its proposal makes the defence broader by making it available where D over-reacted by killed in response to fear of serious violence. This is important because, as the Commission explained, 'D should not be prejudiced because he or she over-reacted in fear or panic . . . The frequently close relationship between anger and fear in someone's reaction makes us confident that it is right to link these elements together in a single partial defence of provocation'.[177] The reform would also have the advantage of giving defendants more flexibility in how they choose to run their defence.

> If they are prepared to accept nothing less than total vindication of what they did, then they can plead nothing other than self-defence. In such a case, the outcome sought is complete acquittal, to which the alternative is conviction for first degree murder. If D is not so confident that the jury will find his or her actions to have been fully justified, he or she can plead provocation—in the form of a fear of serious violence—instead of or alongside a plea of self-defence. Having the latter option reduces the chance that D will be harshly adjudged to have committed first degree murder because the jury finds that he or she overreacted. The jury can opt for the middle course: guilty of second degree murder on the grounds of provocation, leaving the judge with discretion over sentence.[178]

Despite these benefits, it is regrettable that the Law Commission failed to embrace the opportunity to rethink more extensively the objective standard of reasonableness in the law of self-defence. While under current law physical characteristics of D would be considered, the objective standard in the law of self-defence needs to be reformed in two ways. First, the fact-finder should be allowed to take into consideration whether differences in physical size and strength between the defendant ('D') and her aggressor ('X') have affected D's apprehension of danger. Secondly, the purely objective standard should be modified into a 'contextual objective standard', in order for the fact-finder to consider how contextual factors may have influenced D's apprehension of danger. Unless such reform is undertaken, the English law of self-defence would

177 Above n. 176 at paras 5.54–5.55.
178 Ibid. at paras 5.56–5.5.

remain unduly constrained. The Law Commission appears to have used provocation as a halfway defence for defendants such as battered women, at the expense of the more appropriate full defence of self-defence. Battered women, among others who act in self-defence, should not be found guilty of manslaughter merely because of inadequacies in the law.

Perhaps the shortcomings of the objective standard in the law of self-defence could be mitigated, to a degree, by the Crown Prosecution Service guidance entitled *Self-Defence and the Prevention of Crime*.[179] This guidance emphasises the importance of ensuring that when people act 'reasonably and in good faith to defend themselves, their family, their property or in the prevention of crime or the apprehension of offenders', they should not be prosecuted for such action.[180] Hence, the guidance requires that 'when reviewing cases involving assertions of self-defence or action in the prevention of crime/preservation of property, prosecutors should be aware of the balance to be struck' between, on the one hand, 'the public interest in promoting a responsible contribution on the part of citizens in preserving law and order' and, on the other hand, 'in discouraging vigilantism and the use of violence generally'.[181] The guidelines provide that it may not be in the public interest to prosecute when it is alleged that the degree of force used is excessive 'if the degree of force used is not very far beyond the threshold of what is reasonable'.[182] Determining what is 'not very far beyond the threshold' is not certain, but at least it introduces some flexibility that may help a defendant. However, the guideline adds that when such force 'results in death or serious injury, it will be only in very rare circumstances indeed that a prosecution will not be needed in the public interest'.[183]

179 Crown Prosecution Service, *Self-Defence and the Prevention of Crime* (2005), available at *http://www.cps.gov.uk/legal/section13/chapter_t.html*, accessed 5 August 2008.
180 Ibid.
181 Ibid.
182 Ibid.
183 Ibid.