

## ***Osland v R* [1998] HCA 75; 197 CLR 316 (10 December 1998) – High Court of Australia**

‘Battered woman syndrome’ – ‘Directions and warnings for/to jury’ – ‘Evidence’ – ‘Expert testimony - psychologist’ – ‘History of abuse’ – ‘Murder’ – ‘Physical violence and harm’ – ‘Provocation’ – ‘Self-defence’

Charge/s: Murder

Appeal Type: Appeal against conviction.

Facts: The appellant and her son were jointly tried in the Supreme Court of Victoria for the murder of her husband Mr Osland (the appellant’s son’s step-father). The jury convicted the appellant but was unable to reach a verdict with respect to her son. Her son was later retried and acquitted. The prosecution case was that the appellant and her son planned to murder her husband. The appellant mixed sedatives with her husband’s dinner in sufficient quantity to induce sleep within an hour. The appellant’s son later completed the plan by hitting Mr Osland on the head with an iron pipe while he was asleep. He and the appellant then buried Mr Osland in a grave they had earlier prepared. At trial, the appellant and her son relied on self-defence and provocation raised against ‘an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years’ which had allegedly been ‘escalating in the days prior to his death’ (at [4]). The prosecution accepted that Mr Osland had been violent in the past but maintained that this behaviour had ceased well before he was murdered. The appellant raised expert evidence of the ‘battered woman syndrome’ (BWS) in support of her case. A psychologist’s evidence indicated that the appellant’s relationship with her husband was ‘consistent with it being a battering relationship’ (at [50]).

The psychologist outlined the general characteristics of battered women as follows (at [51]):

1. they are ashamed, fear telling others of their predicament and keep it secret.
2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed.
3. they have an increased arousal and become acutely aware of any signal of danger from their partner.
4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family.
5. in severe cases, they may live with the belief that one day they will be killed by the other person.

Issue/s: Some of the issues concerned –

1. Provocation - Whether the trial judge erred in ‘failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of provocation’ (see at [155]).

2. Self-defence – Whether the trial judge erred in ‘failing to make clear the connection between the evidence of “battered woman syndrome”, admitted at the trial, and the law of self-defence’ (see at [155]).

Decision and Reasoning: The appeal was dismissed by majority (Gaudron and Gummow JJ dissenting). However, all members of the Court were unanimous in holding that the trial judge’s directions with respect to ‘battered woman syndrome’ (BWS) were appropriate.

Gaudron and Gummow JJ:

*“Expert evidence is admissible with respect to a relevant matter about which ordinary persons are “[not] able to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience in the area” and which is the subject “of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience””* (at [53])

*“...there may be cases in which a matter of apparently slight significance is properly to be regarded as evidence of provocation when considered in light of expert evidence as to the battered woman's heightened arousal or awareness of danger. And evidence of that may also be relevant to the gravity of the provocation, as may the history of the abusive relationship.”* (at [55])

*“So, too, expert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk. And, of course, the history of the particular relationship may bear on the reasonableness of that belief.”* (at [56])

*“...there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put.”* (at [60])

Callinan J (while agreeing that the directions with respect to BWS were appropriate) held that to adopt a new and separate defence of BWS ‘goes too far for the laws of this country’ (see at [239]). His Honour also noted that these issues could be matters for expert evidence as well as matters of common sense for a jury to decide with the assistance from the trial judge.

McHugh J did not make any comments on BWS.

Kirby J:

His Honour discussed the relevance of the BWS defence in abusive relationships. His Honour was of the opinion that the term should not be restricted to women because there may be situations where men are the victims such as similarly abusive same-sex relationships, and ‘unlike conception and childbirth, there is no inherent reason why a battering relationship should be confined to women as victims’ (at [159]).

His Honour was broadly supportive of BWS evidence but did note some controversies around it and was somewhat critical of it: “...it appears to be an “advocacy driven construct” designed to “medicalise” the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data’ (at [161]).

Further, he was critical of the term itself and stated it should not be used. He was also aware that the syndrome was ‘based largely on the experiences of Caucasian women of a particular social background’ (whose) “passive” responses may be different from those of women with different economic or ethnic backgrounds’ (at [161]).

Ultimately however, his Honour was supportive – ‘Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of “traumatic bonding” which may occur in abusive relationships’ (at [167]).