

THE ADMISSIBILITY OF CRIMINAL EVIDENCE OF BATTERED WOMAN SYNDROME IN MALAYSIA UNDER THE PENAL CODE AND EVIDENCE ACT 1950

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ABSTRACT

Battered woman syndrome (BWS) is a syndrome that presents after long-term abuse of domestic violence's case. The evidence is presented in court to explain why some women remain in abusive relationships. In Malaysia, the evidence on BWS is not a defence by itself, but rather given to support any relevant defence such as provocation under Exception 1 to s. 300 of the Penal Code (Act 574) and private defence under ss. 96 to 106 of the Penal Code. The case of *Peh Boon Kheang v. Peh Boon Wang* [2007] 2 MLJ 785 shows that evidence related to BWS can be submitted through expert witness under s. 45 of the Evidence Act 1950 (Act 56). The principle of it was affirmed in *Nisalma binti Saat v. Public Prosecutor* [2018] MLJU 880 where the High Court accepted expert evidence proffered by a psychiatrist which resembled BWS in support of private defence. This research employed doctrinal research consisting of legal analysis of the Penal Code, the Evidence Act 1950, case law, and other scholarly writings in this area. The research found

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[Received: 1 August 2024, Accepted: 1 November 2024, Published: 31 November 2024]



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that although BWS evidence has been accepted in court, it is not free from criticism thus the admissibility of it may be challenged. The research therefore aims to analyse the relevancy of BWS and its evidential weight to be admitted by the criminal court.

Keywords: Battered Woman Syndrome, Domestic Violence, Provocation, Private Defence, Expert Evidence.

PENERIMAAN KETERANGAN JENAYAH SINDROM WANITA TERANIAYA MENURUT KANUN KESEKSAAN DAN AKTA KETERANGAN 1950

ABSTRAK

Sindrom wanita teraniaya (BWS) adalah sindrom yang timbul selepas penderaan jangka panjang dalam kes keganasan rumahtangga. Bukti keterangan ini dikemukakan di mahkamah untuk menjelaskan mengapa sesetengah wanita kekal dalam hubungan yang bersifat ganas. Di Malaysia, keterangan mengenai BWS bukanlah satu pembelaan secara sendirian, tetapi dikemukakan untuk menyokong sebarang pembelaan yang relevan seperti bangkitan marah di bawah Pengecualian 1 kepada s. 300 Kanun Keseksaan (Akta 574) dan pembelaan diri di bawah ss. 96 hingga 106 Kanun Keseksaan. Kes *Pheh Boon Kheang v. Peh Boon Wang* [2007] 2 MLJ 785 menunjukkan bahawa keterangan berkaitan BWS boleh dikemukakan melalui saksi pakar di bawah s. 45 Akta Keterangan 1950. Prinsip ini telah disahkan dalam kes *Nisalma binti Saat v. Pendakwa Raya* [2018] MLJU 880 di mana Mahkamah Tinggi menerima pakai keterangan pakar yang dikemukakan oleh psikiatri yang menyerupai BWS sebagai sokongan kepada pembelaan diri. Penyelidikan ini menggunakan penyelidikan doktrinal yang terdiri daripada kajian peruntukan undang-undang Kanun Keseksaan, Akta Keterangan 1950 (Akta 56), kes undang-undang, dan tulisan ilmiah lain dalam bidang ini. Penyelidikan mendapati bahawa walaupun bukti BWS diterima pakai di mahkamah, ia tidak bebas daripada kritikan umum sehingga kebolehterimaannya boleh dicabar di mahkamah. Oleh itu, penyelidikan ini bertujuan untuk mengkaji kedudukan undang-undang BWS dan sejauh manakah ia boleh diterima pakai di mahkamah.

Kata Kunci: Sindrom Wanita Teraniaya, Keganasan Rumah Tangga, Provokasi, Pembelaan Diri, Keterangan Pakar.

INTRODUCTION

The prevalence of domestic violence is a serious phenomenon as it happens all over the world, irrespective of race, religion and place including in Malaysia.¹ To address the issue, in Malaysia, the Government has enacted the Domestic Violence Act 1994 (Act 521) (DVA 1994) to provide legal protection for victims of domestic violence.² Under s.2 of the DVA 1994, victims of domestic violence may comprise a spouse, his or her former spouse, a child, an incapacitated adult, or any other member of the family who suffers harms which include physical, psychological, emotional, sexual, financial abuse and abuse of victim's dignity.³ The effects of domestic violence on the victims are not only physical but also emotional, which can be detrimental to the victims.⁴ In addition, there are also women who are victims of domestic violence suffering from battered woman syndrome (BWS). BWS is a syndrome that relates to domestic violence. It is a psychological problem that can develop in a battered woman as a result of prolonged abuse in an intimate relationship. The topic of BWS was first studied in the United States in the 1970s, which examined the psychological impact of domestic violence.⁵ The study on BWS was later popularised by Walker in 1979 in her book entitled

¹Sohayla M Attalla and Abby Amira Rome, "Effects of Domestic Violence on Academic Achievement among University Students in Selangor, Malaysia," *Malaysian Journal of Medicine & Health Sciences* vol. 16 (2020): 8.

²The DVA 1994 was passed by the Parliament on 24th June 1994 and came into force on 1st June 1996.

³Mohd Safri Mohammed Na'aim, Ramalinggam Rajamanickam and Rohaida Nordin. "Intimate Partner Violence Within the Framework of Malaysian Laws," *UUM Journal of Legal Studies* vol. 13, no. 1 (2022): 136. DOI: <https://doi.org/10.32890/uumjls2022.13.1.6>.

⁴Liu Bo and Peng Yating, "Long-Term Impact of Domestic Violence on Individuals—An Empirical Study Based on Education, Health and Life Satisfaction," *Behavioral Sciences* vol.13, no. 2 (2023): 137. DOI: 10.3390/bs13020137.

⁵Samantha Stephey, "Reasonable for Whom? A Consideration of the Appropriate Reasonableness Standard Where Battered Woman Syndrome Evidence is Relevant to a Duress Defense," *University of Baltimore Law Review* vol. 52, no. 3 (2023): 510.

“The Battered Woman”.⁶ BWS’s theory is not just about the effects of domestic violence on women, the theory of the cycle of violence and learned helplessness, but later, it began to evolve and it started to be relied on in cases where the battered woman killed their abuser.

It means that there are cases where women who are victims of domestic violence react to the extent of killing their partner to protect themselves or because they lose control due to provocation. In this situation, women who were originally victims of domestic violence turned into an accused. At the international level, there have been cases where women killed their abusive partners.⁷ *R v. Ahluwalia*⁸ and *R v. Thornton*⁹ are examples of English cases where the intimate partner’s violence victims have reacted by killing their abusive partners. The same situation also happened in Malaysia as can be seen in the case of *Nisalma binti Saat v. Public Prosecutor*.¹⁰ This shows that the effect of domestic violence is very serious and could push women to respond by killing their abusive partners. Although accused, she is not yet guilty and therefore has the right to raise appropriate defences, such as provocation and private defence; however, much depends on the facts of the case.¹¹ BWS evidence is introduced in court to explain why the victims remain in violent relationships, why they do not seek help, and how the violence has affected them.¹²

Since the term “BWS” is not mentioned in the Penal Code (Act 574), reference to case law is important to comprehend the court’s approach to BWS evidence. The case in point is *Peh Boon Kheang v. Peh Boon Wang*,¹³ where the Court held that evidence related to BWS

⁶Lenore E. Walker, *The Battered Woman* (New York: Harper & Row, 1979).

⁷H. Pelvin, “The “Normal” woman who kills: representations of women’s intimate partner homicide” *Feminist Criminology* vol.14, no.3 (2019): 349. DOI: <https://doi.org/10.1177/15570851177448>.

⁸[1992] 4 All ER 889.

⁹[1992] 1 All ER 306.

¹⁰[2018] MLJU 880.

¹¹Mohd Safri Mohammed Na’aim, Ramalinggam Rajamanickam and Rohaida Nordin, “The Right of an Accused to Defence Under the Criminal Justice System in Malaysia,” *Journal of Nusantara Studies (JONUS)* vol.7, no. 1 (2022): 48. DOI: <https://doi.org/10.24200/jonus.vol7iss1pp43-58>.

¹²Regina A. Schuller and Neil Vidmar, “Battered Woman Syndrome Evidence in the Courtroom,” *Law and Human Behavior* vol. 16, no. 3 (1992): 282.

¹³[2007] 2 MLJ 785.

can be submitted through an expert witness under s. 45 of the Evidence Act 1950(Act 56). This legal principle was affirmed in *Nisalma binti Saat v. Public Prosecutor*.¹⁴ where the High Court accepted the expert evidence proffered by a psychiatrist which resembled BWS in support of private defence. That said, the research found that although BWS evidence has been accepted in court, BWS evidence is not free from criticism, thus the admissibility of it may be challenged.

Prior research on BWS has examined the use of BWS in courts,¹⁵ the connection between BWS and domestic violence,¹⁶ and how BWS supports the defences of provocation and self-defence.¹⁷ In Malaysia, previous studies related to BWS are on a legal comparison of provocation laws and BWS, and BWS as a defence of murder in Malaysia,¹⁸ but these studies were conducted in 2014 and 2007, respectively. Given that the research was conducted 10 years ago and did not address recent case law, particularly the High Court's approach in *Nisalma binti Saat v. Public Prosecutor* [2018] MLJU 880 where evidence resembled BWS was used to support the private defence in Malaysia, there is a gap in the research that underscores the need to analyse how far BWS evidence is admissible in Malaysia with

¹⁴[2018] MLJU 880.

¹⁵Jessica R. Holliday et al., "The Use of Battered Woman Syndrome in US Criminal Courts," *The Journal of the American Academy of Psychiatry and the Law* vol. 50, no. 3 (2022): 373. DOI: 10.29158/JAAPL.210105-21; Maryam Farahi, "The Battered Woman Syndrome and Self-defense: A Legal and Empirical Dissent," *Fares Law Research* vol. 7, no. 19 (2024): 279. DOI: 10.22034/lc.2024.441411.1446.

¹⁶Arfan Latif, et al., "Battered Women Syndrome as a Theoretical Explanation of Domestic Violence," *Journal of Asian Development Studies* vol. 12, no. 4 (2023): 703. DOI: <https://doi.org/10.62345/jads.2023.12.4.55>.

¹⁷Mahboubeh Amini and Mansoureh Ghanbarian Banooee, "Potential Criminal Defenses in Domestic Homicide Committed by Female Victims of Intimate Partner Violence (Case Study of Fars Province)," *Criminal law and Criminology Studies* vol.52, no. 2 (2023): 250. DOI: <https://doi.org/10.22059/JQCLCS.2023.356869.1830>.

¹⁸Nur Rahidzab Rul Iman, Jasmine Ho Abdullah and Jainah Jaafar Sidek. "The Legal Comparison between the Existing Laws of Provocation in Malaysia and The Battered Woman Syndrome." (Student Project, UiTM, 2014); Izazi Muhammedin and Nadiatul Syima Ismail. "Domestic Violence: the Battered Women Syndrome as a Defence of Murder in Malaysia as compared to the United Kingdom." (Student Project, UiTM, 2007).

reference to the United States, England and Wales. The United States is referred to because BWS began to be discussed and popularised by scholars in the United States, while England and Wales are also referred to because discussions related to BWS have been debated and accepted in court to support defences, namely cumulative provocation and diminished responsibility.

RESEARCH METHODOLOGY

This research adopts doctrinal legal research, involving a detailed analysis of the legal provisions such as the Penal Code, the Evidence Act 1950, and case law as the primary sources. In addition to that, this research refers to secondary sources such as textbooks, journal articles and scholarly writings related to this area. Qualitative data analysis, involving doctrinal and content analysis, was conducted on both primary and secondary legal sources. The data collected were examined analytically and critically to assess the admissibility of BWS evidence in Malaysia, with reference to the United States and England and Wales.

DEFINITION AND THEORIES OF BWS

BWS is a psychological theory that explains why battered women continue to stay in abusive relationships.¹⁹ BWS was propounded by Lenore E. Walker in 1979. She defined battered woman as follows:

“A woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include any wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an

¹⁹Keerthana Medarametla, “Battered Women: The Gendered Notion of Defences Available,” *Socio-Legal Rev.* vol. 13 (2017): 108. DOI: <https://doi.org/10.55496/JEKG1269>; Jacqueline Fink, “Imminence Should Not Be a Controlling Factor in the Duress Defense in The Context of Battered Women,” *Touro Law Review* vol. 39, no. 2 (2024): 743.

abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.”²⁰

This definition infers that a battered woman is subjected to repeated forceful physical or psychological behavior by a man to coerce her without regard for her rights. To be classified as a battered woman, she must go through the battering cycle at least twice within any form of intimate relationship with a man, including romantic, affectionate, or sexual relationships. Walker’s study in 1979 provided the basis for her next groundbreaking book entitled “The Battered Woman Syndrome”. Based on her findings, she developed two theories that are fundamental to the BWS: the cycle of violence and learned helplessness.²¹

a) Cycle of Violence

Walker described that the cycle of violence consists of three distinct stages. The three stages initially involve a (i) tension building process which later erupts into a (ii) acute battering incident followed by (iii) love contrition.²² During the first phase, minor incidents of abuse take place, where the abused victim tries to appease the abuser so as to avoid repetition. When these efforts fail, there is increased tension and intensified abuse, leading to the acute battering incident.²³ All of the anger and tension that have been built explodes into vicious abuse, which leads to injury and sometimes death. Appel stated that the battered woman’s goal during phase two is survival rather than escape.²⁴ In the final phase, the abuser will generally express remorse and apologise profusely, with promises never to abuse the woman in future. Walker posits further that battered women do not attempt to escape the battering situation, even when outsiders observing the

²⁰Walker, *The Battered Woman*, xv.

²¹Lenore E. Walker, *The Battered Woman Syndrome*, (New York: Springer, 1984), 55-70; Stephey, “Reasonable for Whom? A Consideration of the Appropriate Reasonableness Standard Where Battered Woman Syndrome Evidence is Relevant to a Duress Defense,”: 511.

²²Walker, *The Battered Woman Syndrome*, 55-70.

²³Joshua Dressler, “Battered Women and Sleeping Abusers: Some Reflections,” *Ohio St. J. Crim. L.* vol. 3 (2005): 462.

²⁴Susan D. Appel, “Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses,” *U. Ill. L. Rev.* (1994): 960.

situation may think that it is possible to escape.²⁵ This means that prolonged and continuous abuse generally leads women to feel learned helplessness and to believe that little can be done to stop the violence.

b) Learned Helplessness

The cycle of violence or abuse generally led women to feel learned helplessness. Walker elaborated that this theory explains why women who suffer from BWS cannot leave an abusive relationship. The theory of “learned helplessness” was first formulated in 1975 by Seligman to understand the causes of depression, which Walker adapted to explain the difficulty for women to leave an abusive relationship, or in other words, the battered women’s inability to either remove themselves from the violent relationship or end the violence.²⁶ These women learn to endure the abuse as they see the abusive events as occurring outside of their control. Seligman conducted research on dogs in a laboratory setting, where they were placed in cages and subjected to random electric shocks. Initially, the dogs had no means of escaping the shocks. Over time, they learned to be helpless and eventually did not attempt to escape, even when the cage doors were left open. Walker explained that women who experienced violence that they were unable to control would, over time, develop a condition of learned helplessness, preventing them from acting on opportunities to escape from the violence which would prevent them from perceiving or acting on opportunities to escape from the violence.²⁷ This was echoed by Stephey stating that women with BWS often have lower self-esteem, and develop “learned helplessness” because they cannot predict or control the violence in their relationship.²⁸ As a result of her failure to

²⁵Lenore E. Walker, *Terrifying love: Why Battered Women Kill and How Society Responds*, (New York: Harper & Row Publishers, 1989), 50-51.

²⁶Martin EP Seligman, *Helplessness: On Depression, Development, and Death*. (San Francisco: Freeman, 1975) 1.

²⁷Lenore E. Walker, *The Battered Woman Syndrome*, 2nd ed. (New York: Springer, 2000) 116.

²⁸Stephey, “Reasonable for Whom? A Consideration of the Appropriate Reasonableness Standard Where Battered Woman Syndrome Evidence is Relevant to a Duress Defense,” 512.

leave the abusive relationship, she suffers more abuse and remains trapped in the cycle of violence.²⁹

The phenomena observed by Walker has been further explored by other scholars. According to Williams, women kill their abusers out of fear of severe psychological harm (ontological insecurity) rather than fear of severe physical harm.³⁰ The focus of this approach is on the brutal psychological torment suffered by many battered women at their abusers' hands. It is also recognised by this theory that many women cannot leave or seek help from outside because of issues such as social isolation, insufficient community resources, and lack of money that keep women tied to their abusers. Dupps observed that there are several other factors which prevent a battered woman from leaving the relationship or seeking help in addition to this learned helplessness.³¹ There are also battered women who reported the violence, but the abusers's behaviour remained unchanged. Eventually, these women felt exhausted from resisting them but stayed to avoid the shame of others knowing about the abuse.³² Trapped in the relationship, these women attempt to preserve their psychological selves by denying or rationalising their situations. As the battering relationship continues, the women eventually reach a turning point when their psychological defences collapse. In this situation, the women are forced to take immediate steps to end the abuse. Williams stated that forced into a choice between staying with their abusers and suffering devastating psychological consequences, or preserving their psychological selves by killing their abusers, some women opt for the latter.³³ Ewing found that battered women who kill have invariably

²⁹Huining Liu, "Impact of Domestic Violence on Women's Mental Health and Coping Strategies: A Survey Study in Mexico." *Journal of Research in Social Science and Humanities* vol.3, no. 2 (2024): 22. DOI: doi:10.56397/JRSSH.2024.02.0.

³⁰Kent M. Williams, "Using Battered Woman Syndrome Evidence with a Self-Defense Strategy in Minnesota," *Law & Ineq.* vol. 10 (1991): 120.

³¹David S. Dupps, "Battered Lesbians: Are They Entitled to a Battered Woman Defense," *J. Fam. L.* vol. 29 (1990): 883.

³²Sarah E. Ullman, Veronica Shepp and Erin O'Callaghan, "Survivors' experiences of sexual assault by intimate partners: A qualitative study of survivors and their informal supports." *Journal of Family Violence* vol. 39, no. 5 (2024): 883. DOI: <https://doi.org/10.1007/s10896-023-00535-5>.

³³Kent M. Williams, "Using Battered Woman Syndrome Evidence with a Self-Defense Strategy in Minnesota," 107.

been both physically and psychologically abused by the men they killed. Battered women who kill their batterers seem to have been more frequently beaten, threatened with weapons, and subjected to threats of death especially threats of retaliation for leaving.³⁴

CRITICISMS AGAINST THE BATTERED WOMAN SYNDROME

The theory of BWS is not free from criticism. The main criticism focuses on the quality of the evidence supporting the application of learned helplessness and cycle of violence theories. Faigman and Wright emphasised that the evidence reviewed by Walker did not show conclusively that most battered women encountered three phases of the abuse process.³⁵ Schuller and Vidmar shared the same view stating that the cycle of violence is not experienced by all couples nor is there a standardised time frame for the cycle.³⁶ Other researchers have also determined that there may be other patterns of violence within abusive relationships. Dutton and Painter for instance proposed not a battering cycle per se, but intermittency of abuse, which is a major determinant of the BWS and post-separation distress.³⁷ Angel also posited that adhering to the three-part cycle of abusive relationships would end in inflexibility.³⁸ Angel further claimed that many abused women stay with their abusers through numerous incidents of severe battering, which may not be preceded by minor battering or followed by remorse. Although the women had not gone through any one or two of the phases, still such incident should not be tolerated.

³⁴Charles Patrick Ewing, "Psychological Self-Defense: A proposed Justification for Battered Women Who Kill," *Law and Human Behavior* vol. 14 (1990): 583. DOI: <https://doi.org/10.1007/BF01044883>.

³⁵David L. Faigman and Amy J. Wright, "The Battered Woman Syndrome in the Age of Science," *Ariz. L. Rev.* vol. 39 (1997): 68.

³⁶Regina A. Schuller and Neil Vidmar, "Battered Woman Syndrome Evidence in the Courtroom," 280.

³⁷Donald G. Dutton and Susan Painter, "The battered woman syndrome: effects of severity and intermittency of abuse." *American Journal of Orthopsychiatry*. vol. 63 no. 4 (1993): 614.

³⁸Marina Angel, "The Myth of Battered Woman Syndrome," *Temp. Pol. & Civ. Rts. L. Rev.* vol. 24 (2014): 302.

Criticism has also been directed at the application of the theory of learned helplessness to battered women. According to Faigman and Wright, likening dogs to battered women was very belittling to women in general under this theory.³⁹ Angel supported this by stating that women are not dogs, and no scientific evidence exists to prove that they behave like dogs. In fact, research has demonstrated that women who are abused increase, not decrease their attempts to leave.⁴⁰ On the other hand, Gondolf's survivor hypothesis proposes that women respond to abuse with unmet help-seeking efforts. What the women need the most are the social support and resources that would give them independence and enable them to leave their abusers. Gondolf argued that severe abuse did not produce a sense of helplessness in a battered woman but instead made a wide array of coping strategies available to her, ultimately making her a survivor.⁴¹ Several studies have revealed that women adopt strategies to deal with a violent partner that is not helpless at all; for example, women often negotiate situations with a set of 'survival skills' that include ways of avoiding harm to themselves and their children, and planning escapes.⁴² Besides, Commack and Brickery stated that to regard a woman's behaviour as part of a syndrome, women are viewed as psychologically flawed and suffering from mental illness.⁴³ The application of learned helplessness to battered women has also been criticised because it ignores the very real social and economic constraints that keep women in their relationships. Despite criticism, battered woman syndrome is still being used in criminal courts by defence lawyers to support other defences.⁴⁴

³⁹Faigman and Wright, "The Battered Woman Syndrome in the Age of Science," 78.

⁴⁰Angel, "The myth of battered woman syndrome," 301.

⁴¹Edward W. Gondolf, *Battered Women as Survivors: An Alternative to Learned Helplessness*. (Lexington, MA: Lexington Books, 1988) 1.

⁴²Mary Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome," *Hofstra Law Review* vol. 21, no. 4 (1993): 1227-1228.

⁴³Elizabeth Comack and Salena Brickey, "Constituting the Violence of Criminalized Women," *Canadian Journal of Criminology and Criminal Justice* vol. 49, no. 1 (2007): 7. DOI: <https://doi.org/10.3138/5523-4873-1386-5453>.

⁴⁴Julia Tolmie, Rachel Smith and Denise Wilson, "Understanding intimate partner violence: Why coercive control requires a social and systemic

IS BATTERED WOMAN SYNDROME REGARDED AS A LEGAL DEFENCE?

Coughlin advocated that BWS is a separate defence.⁴⁵ Hence, once accepted it could shield the accused against the offence. However, this stance was not shared by some scholars, who disagreed that it should be treated as a separate defence.⁴⁶ This was stressed by Buel that “*BWS is not a defence, but rather a pattern of symptoms used to describe the effects of abuse on the victim.*”⁴⁷ Echoing Buel, Cornia stated that BWS is not on its own an affirmative defence.⁴⁸ In other words, the evidence on BWS is given in court not as a defence on its own, but rather given to support relevant defences such as self-defence or provocation, to explain the defendant’s actions.⁴⁹ It means the evidence on BWS is given in court not as a defence on its own, but rather given to support any relevant defence namely in the context of the defence of provocation to explain the defendant’s actions.⁵⁰ The question may arise as to why the evidence on BWS is so important? This is to clarify the common question raised by the court in murder cases involving the battered woman, which is why the battered woman did not escape or seek protection from the police.⁵¹ This aims to dispel the misconception that battered women can easily leave the relationship. Besides, BWS is

entrapment framework,” *Violence against women* vol. 30, no. 1 (2024): 57. DOI: <https://doi.org/10.1177/1077801223120>.

⁴⁵Anne M. Coughlin, “Excusing women,” *Cal L. Rev.* vol. 82 (1994): 7.

⁴⁶Christa Bunce, “Psychologically Bound: Why Expert Evidence Regarding Battered Woman Syndrome Should Be Admissible,” *SMU L. Rev.* vol.75 (2022): 864.

⁴⁷Sarah M. Buel, “Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct,” *Harv. Women's LJ* vol. 26 (2003): 296.

⁴⁸Rebecca D. Cornia, “Current use of battered woman syndrome: Institutionalization of negative stereotypes about women,” *UCLA Women's Law Journal* vol. 8 (1997): 101.

⁴⁹Tolmie, Smith and Wilson, “Understanding intimate partner violence: Why coercive control requires a social and systemic entrapment framework,”: 57.

⁵⁰Cornia, “Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes about Women,”: 101.

⁵¹Regina A. Schuller and Neil Vidmar, “Battered Woman Syndrome Evidence in the Courtroom,” 277.

also relevant to explain the impact of prolonged abuse on a woman that led to the commission of the offence.⁵² Walker observed that many battered women suppress their anger and avoid confrontation until they are so angry that they cannot manage it.⁵³ BWS evidence is thus important in explaining the experiences of women who have been victimised by their abusive partners or to explain how they respond to this violence.

a) Evidence on the BWS in the United States

Case law indicates that expert testimony on BWS is often accepted in courts throughout the United States.⁵⁴ The courts allow experts to explain BWS and help the court understand it better in the context of domestic violence.⁵⁵ In 1984, the case of *State v. Kelly*⁵⁶ marked the first case in which the Court ruled that expert testimony on Battered Woman Syndrome (BWS) met the standards for admissibility as an expert opinion.⁵⁷ Since this case, BWS testimony has been used in trials of battered women who kill intimate partners in the United States. In *People v. Romero*,⁵⁸ the California Court of Appeal offered clarification:

⁵²Andrea Dalimonte, “Confronting Battered Woman Syndrome in Iowa: Admissibility of Expert Testimony in the Compulsion Defense,” *J. Gender Race & Just* vol. 26 (2023): 463-464

⁵³Lenore E. Walker, “Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome,” *Psychotherapy: Theory, Research, Practice, Training* vol. 28, no. 1 (1991): 26. DOI: <https://doi.org/10.1037/0033-3204.28.1.21>.

⁵⁴Holliday R. Jessica et al., “The Use of Battered Woman Syndrome in US Criminal Courts,” *The Journal of the American Academy of Psychiatry and the Law* 50, no. 3 (2022): 373. DOI: 10.29158/JAAPL.210105-21.

⁵⁵Dalimonte, “Confronting Battered Woman Syndrome in Iowa: Admissibility of Expert Testimony in the Compulsion Defense,”: 463.

⁵⁶7 N.J. 178; 478 A.2d 364 (1984).

⁵⁷Gena Rachel Hatcher, “The Gendered Nature of The Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality,” *NYU Ann. Surv. Am. L.* vol. 59 (2003): 25.

⁵⁸13 Cal. Rptr. 2d 332, 333-35 (Ct. App. 1992).

“There nevertheless still exists a misconception by some lawyers and judges that there is a defence called ‘battered woman syndrome’ giving women who are battered some unique right simply because they are battered. That is not the law in California.”

It was further stressed in *Chapman v State*⁵⁹ that “*Although evidence of the syndrome is admissible ... it is not a separate defense.*” The same principle was applied in *State v. Koss*,⁶⁰ expert testimony regarding the BWS does not establish a new defence or justification,” but assists the trier of fact in evaluating the defendant’s honest belief in imminent danger of death or great bodily harm and that deadly force was “her only means of escape.”

b) Evidence on the BWS in England and Wales

Later in the 1990s, as a consequence of the BWS theory introduced in the United States, more evidence of BWS was presented before the court in support of the prolonged effects of domestic violence on women.⁶¹ The first case is *R v. Ahluwalia*.⁶² The defendant and her abusive husband (deceased) had been married for years. The defendant had been repeatedly beaten and abused and had suffered multiple injuries. The deceased had provoked the defendant on the night of the killing about having an affair, threatening to beat the defendant and use a hot iron on her. This led the defendant to set her husband on fire while he was asleep. He died from severe burn injuries a week later. During the trial, it was argued by the defendant that she just wanted to cause her husband some pain, and that she did not intend to kill him. The defendant was convicted and given a life sentence. The lawyer argued that a woman who has been subjected to years of verbal and physical abuse may kill her abuser because of a slow-burn reaction to the continuous ill-treatment. In response to such submission, Lord Taylor CJ held that:

⁵⁹386 S.E.2d 129, 131 (GA 1989).

⁶⁰551 N.E.2d 970, 974 (Ohio 1990).

⁶¹Keith Rix, “‘Battered Woman Syndrome’ and the Defence of Provocation: Two Women with Something More in Common,” *Journal of Forensic Psychiatry* vol. 12, no. 1 (2001): 131. DOI: <https://doi.org/10.1080/09585180010027860>.

⁶²[1992] 4 All ER 889.

“We accept that the subjective element in the defence of provocation would not, as a matter of law, be negated simply because of the delayed reaction in such cases, provided that there was at the time of the killing a ‘sudden and temporary loss of self-control’ caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negate provocation.”⁶³

The case acknowledged that in cases of domestic abuse, the defendant may experience a slow-burn reaction to prolonged years of provocation. Nevertheless, provocation under s. 3 of the Homicide Act 1957 still required the defendant to meet a sudden loss of self-control.⁶⁴ On appeal, the Court of Appeal accepted new medical evidence which was proffered by the defence to show that the defendant suffered from BWS as a result of prolonged years of abuse. A retrial was ordered and she was convicted of manslaughter on the grounds of diminished responsibility. This case has been hailed as a landmark since for the first time, a court in the United Kingdom had accepted evidence on BWS. The landmark ruling paved the way for women like *Ahluwalia* to introduce evidence of BWS through expert testimony while raising the defence of provocation.⁶⁵

Similarly in the case of *R v. Thornton No.2*,⁶⁶ medical evidence was presented on appeal to show that the defendant suffered from BWS which affected her personality as a result of her husband’s repeated violence.⁶⁷ The Court of Appeal allowed her appeal and quashed the conviction of murder and ordered for a retrial. The defendant then pleaded guilty to manslaughter due to reasons of diminished responsibility.

In the cases of *Ahluwalia* dan *Thornton*, BWS evidence was presented to show the impact of prolonged years of abuse on the mental states of the defendants. With the evidence, the courts considered a

⁶³[1992] 4 All ER 889, 896.

⁶⁴Ellison Lynn, “Coercive and Controlling Men and the Women Who Kill Them,” *Wolverhampton Law Journal* vol. 3 (2019): 24.

⁶⁵Aileen McColgan, “In Defence of Battered Women Who Kill,” *Oxford Journal of Legal Studies* vol. 13, no. 4 (1993): 513. DOI: <https://doi.org/10.1093/ojls/13.4.508>.

⁶⁶[1996] 2 All ER 1023.

⁶⁷Lynn, “Coercive and Controlling Men and the Women Who Kill Them,” 25.

history of past abuse in determining the defence raised by them. Nevertheless, the defence of provocation failed because of the strict requirement of suddenness. The defence then relied on BWS evidence to prove that they suffered from a mental abnormality in establishing the defence of diminished responsibility.

c) Admissibility of BWS evidence in Malaysia

In Malaysia, the BWS is not considered a defence on its own, because there is no specific defence dealing with it. None of the Exceptions 1 to s. 300 (provocation) nor in ss. 96 to 106 (private defence) of the Penal Code state that BWS could be used as legal defence for a battered woman who kills her abuser. This raises the legal position of BWS in Malaysia. Thus, reference to case law is important to comprehend the court's approach to BWS evidence. This can be traced in the case of *Peh Boon Kheang v. Peh Boon Wang*.⁶⁸ In this case, the court explained that there are many subjects where experts can be called to testify, namely "road accident investigation, ballistics and battered women's syndrome."⁶⁹ This case shows that evidence related to BWS can be submitted through expert witness testimony under s. 45 of the Evidence Act 1950. Expert testimony may be introduced to help the court understand the experiences and context within which some battered women resort to lethal force. The testimony of an expert witness can be considered as a witness who gives evidence based on opinion. In general, evidence of opinion is inadmissible, but there is an exception when an expert is a person giving his opinion. They are experts in their subject matter that ordinary people may not know. Thus, expert evidence is important to assist the court to make the right decision.⁷⁰ Realising the importance of experts, s. 45 of the Evidence Act 1950 permits the experts to give evidence in court based on their opinions over the specific subject matter. However, in light of the section, it is important to note that the court can only obtain the

⁶⁸[2007] 2 MLJ 785.

⁶⁹[2007] 2 MLJ 785, 796.

⁷⁰Ramalinggam Rajamanickam et al., "The Assessment of Expert Evidence on DNA in Malaysia," *Academic Journal of Interdisciplinary Studies* vol. 8, no. 2 (2019): 51. DOI: 10.2478/ajis-2019-0016.

assistance of experts in the fields described in the section. The fields are foreign law; science or art; handwriting; and finger impression.⁷¹

The question may arise as to whether evidence on BWS is part of the fields provided for in s. 45 of the Evidence Act 1950? To answer this question, a reference to the court's approach to deoxyribonucleic acid (DNA) evidence is necessary. This is because similar to BWS, DNA is not explicitly specified in the section. The provision, however, refers to "science" as one of the categories. Hence, the question is whether the expression "science" in the section is wide enough to cover DNA. In determining the answer, reference can be made to the case of *Chandrasekaran & Ors v. Public Prosecutor*,⁷² where the Court held that the expression "science or art" is elastic enough to be given a liberal interpretation and the fact that the section does not specify particular fields of knowledge does not mean that they are not included.⁷³ Similarly, in the context of DNA evidence, the word "DNA" is not plainly stated in the section. However, the Federal Court's case of *Pathmanabhan Nalliannen v. Public Prosecutor & Other Appeals*⁷⁴ held that "*With respect, such argument ignores the point that DNA evidence is admissible under s.45, s.46 and s.51 of the Evidence Act 1950. It is opinion evidence of an expert.*"⁷⁵ This decision indicates that the Federal Court held that DNA evidence falls under s. 45 of the Evidence Act 1950 and is therefore admissible in court.⁷⁶ Hence, in light of this principle, although the term "BWS" is not listed in s. 45, evidence of it can still be presented to the court by expert witness such as psychiatrist as was decided in *Nisalma binti Saat v. Public Prosecutor*.⁷⁷

⁷¹S. 45(1) of the Evidence Act 1950.

⁷²[1971] 1 MLJ 153.

⁷³[1971] 1 MLJ 153, 159.

⁷⁴[2017] 4 CLJ 137.

⁷⁵[2017] 4 CLJ 137, 178.

⁷⁶Rajamanickam et al., "The Assessment of Expert Evidence on DNA in Malaysia," 53.

⁷⁷[2018] MLJU 880.

d) Can BWS evidence be admitted in light of s. 8 of the Evidence Act 1950

The issue may arise as to whether BWS can be admitted as evidence under s. 8 of the Evidence Act 1950. The section states:

- (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
- (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

In accordance with s. 8 of the same Act, the conduct of the accused, whether previous or subsequent, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact. The section applies in two situations. Firstly, is related to the conduct of the accused himself (*The conduct of any party ... to any suit or proceeding*). This can be seen in illustration (c) of s. 8 of the Evidence Act 1950:

- (c) *A is tried for the murder of B by poison. The fact that before the death of B, A procured poison similar to that which was administered to B is relevant.*

This conduct is not only a positive act but also includes any reaction of the accused such as when being apprehended, like being stunned, nervous, scared or frightened. This legal principle was discussed in the case of *Parlan Dadeh v. Public Prosecutor*,⁷⁸ where the Federal Court held that the appellant's reaction of appearing surprised when approached by the police was admissible under s. 8 of the Evidence Act 1950 because it was directly related to the case as the drugs were found in the front of his pants he was wearing.

⁷⁸[2009] 1 CLJ 717.

Secondly, the conduct of the victim of the offence (... *the conduct of any person an offence against whom is the subject of any proceeding*). This can be seen in illustration (k) of s. 8 of the Act:

(k) *The question is whether A was robbed.*

The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

However, the section is silent as to whether the conduct of abusive partners who mistreated the accused (the history of past abuse) could be admitted under this section to show how the accused's actions were influenced by the prior abusive relationship. Moreover, the term "previous conduct" is not clearly explained under s. 8 of the Act. That is to say, even if the section is considered applicable to this situation, the section does not specify whether the conduct must have occurred immediately before the offence, within the same day, or if it could extend to months or years before the commission of the offence. This could lead to different interpretations by the courts on this matter.

e) An Analysis: The Case of *Nisalma Binti Saat V. Public Prosecutor* [2018] MLJU 880

It is worth discussing this case because the court accepted evidence on the history of past domestic violence with the assistance of expert evidence that resembled BWS. The facts of the case were that the accused and the victim were married in 2010. The accused gave evidence in court that the marriage was not on good terms, and they were always fighting. On the night of the killing, the accused was looking for her money, which was placed in a bowl in the kitchen. The accused asked her husband. The husband, who was under the influence of drugs, reacted aggressively and attacked the accused by throwing a spoon and other things at her face. While cursing at her, her husband threw a chair at her. Then, he pushed the table towards her. The deceased was shocked. At that time, the accused was at the sink and there was a knife on the sink. Then, when the accused saw the husband rushing towards her, the accused picked up the knife and begged her

husband not to come closer and beat her. The husband, however, disregarded the plea and continued with his assault. Afterward, the accused stabbed the husband to protect herself from the attack. The accused was charged under s. 304(a) of the Penal Code for causing death to her husband. The accused raised the defence of private defence. At the end of the trial, she was found not guilty as charged but with reduced charges under s. 304(b) of the Penal Code. She was sentenced to 2 years imprisonment. Dissatisfied with the decision, the accused then appealed. At the High Court, the Court accepted the defence and set aside the conviction. In this case, the accused raised the defence of private defence. The court held that the Public Prosecutor had failed to prove its case beyond reasonable doubt, and the accused succeeded in raising the defence of private defence.

In reaching the decision, the High Court regarded a few considerations. Firstly, the High Court regarded the history of past violence endured by the accused in determining whether or not the accused had a reasonable apprehension of danger at the time of the killing. That is to say, the High Court disagreed with the trial court that ignored the history of past violence between the accused and deceased. This can be seen from the findings of the High Court, which stressed the need to consider the whole facts of the case cumulatively, including the past violence until the day of the murder in question, to better understand whether the elements of the defence were successfully met or otherwise. The High Court also emphasised that the facts of the case should not be limited to only the day in question.⁷⁹

Secondly, the High Court also accepted the evidence given by a psychiatrist, defence witness 3 (DW 3) from the government hospital. The evidence adduced from him was to explain that the deceased was violent, hot-tempered, alcoholic, and a gambler. The report explained the symptoms suffered by the accused as a result of continuous domestic violence committed by her abusive husband. This was mentioned in the report (D33) as follows:

“Merujuk kepada laporan psikologi oleh Pegawai Psikologi Klinik Hospital Permai, Johor Bahru, penama telah menjalani beberapa penilaian psikologi. Hasil dari penilaian psikologi menunjukkan penama mempunyai fungsi kognitif yang normal. Fungsi intelektual di bawah purata dan struktur personaliti yang

⁷⁹[2018] MLJU 880, para 54.

adaptif. Penama mengalami satu fasa ketegangan bermula dari tahun kedua perkahwinan dengan mangsa. Penama mengalami keganasan yang berulang dan berikutan dari keganasan ini penama dijanjikan dengan penjelasan berbentuk penginsafan dan penyesalan oleh mangsa. Keganasan ini berhenti dalam tempoh yang singkat dan berulang semula. Tingkah laku dan pola pemikiran penama boleh dijelaskan melalui “Model Tingkah laku-Kognitif” di mana penama hilang upaya (“loss of will”) yang diiringi oleh halangan secara berulang untuk melepaskan diri dari situasi keganasan yang berulang.”⁸⁰

(Referring to a psychological report by the Clinical Psychology Officer of Hospital Permai, Johor Bahru, the nominee has undergone several psychological assessments. The psychological assessment results showed the nominee had a normal cognitive function. Below average intellectual functions and adaptive personality structures. The nominee experienced a strained and stressful phase starting from the second year of marriage to the victim. The nominee suffered repeated violence and following the violence the nominee was promised an explanatory explanation and remorse by the victim. This violence ceases for a short period and repeats itself. The nominee’s behaviour and mindset can be explained through the “Cognitive-Behavioural Model” in which nominees with loss of will are accompanied by repeated obstacles to escape recurring violent situations).

Although not expressly mentioned, the findings of the report on the observation of the accused resembled the features of BWS. The conclusion made by DW3 was that the accused suffered emotional distress as a result of domestic violence. This case shows that the court may consider past events between the accused and the victim in deciding a defense related to domestic violence. Evidence on the history of past domestic violence and abuse is important and relevant to enable the court to better understand the overall context of the case and how the cruelty of domestic violence can have an impact on the victim. The court’s acceptance of cumulative of past abuse was supported by the evidence from an expert witness, DW3, who described the symptoms experienced by the victim as a result of domestic violence.

⁸⁰[2018] MLJU 880, para 43.

f) Is It Necessary to Present BWS Evidence To Prove Past Abuse?

The question may surface as to whether the BWS evidence must be submitted to enable the court to consider past domestic violence incidents which led to the offence namely killing in Malaysia? Generally, no provision expressly requires the production of such evidence. However, in the context of the provocation defence, one of the issues raised is whether cumulative provocation is considered as defence? In general, the term “cumulative provocation” is not mentioned in the Penal Code. Despite that, there have been cases where the accused raised cumulative provocation as a defence against the offence of murder. The question arises is whether cumulative provocation falls within the ambit of Exception 1? Before addressing this issue, it would be better to comprehend the definition of cumulative provocation. Mousourakis defined cumulative provocation as “... cases involving a prolonged period of maltreatment of a person at the hands of another, which culminates in the killing of the abuser by her victim.”⁸¹ This definition refers to past events between the accused and the victim that occurred continuously and repeatedly over a period of time resulting in the accused committing murder.

The legal position of cumulative provocation under Exception 1 has been inconsistently interpreted and applied by the courts over the years.⁸² Only after the Federal Court’s case of *Public Prosecutor v. Surbir Gole*,⁸³ has the court’s interpretation of cumulative provocation become consistent, rejecting the plea of cumulative provocation and deciding that it falls outside the scope of Exception 1. While they did not directly involve domestic violence against women, the case which was discussed was based on its relevance in determining the position of cumulative provocation in Malaysia. In *Surbir Gole*, the accused, who was the employee of the deceased, asserted that he had endured prolonged mental abuse from the deceased. The sequence of events

⁸¹George Mousourakis, “Cumulative provocation and partial defences in English criminal law,” *Obiter* vol. 28 no.2 (2007): 291.

⁸²Mohd Safri Mohammed Na’aim et al., “Cumulative Provocation in Domestic Violence Against Women: A Comparative Analysis Between Malaysia and England and Wales,” *Journal of Nusantara Studies (JONUS)* vol. 9, no. 2 (2024): 318. DOI: <https://doi.org/10.24200/jonus.vol9iss2pp318-339>.

⁸³[2017] 2 CLJ 621.

unfolded as follows: The accused experienced ill-treatment and mental torture over a substantial period. This mistreatment included being denied leave and compelled to work from 7 am to 9 pm. Besides, the deceased had been verbally abused him, calling him ‘mad’, ‘crazy’, ‘stupid’, ‘cow’, and ‘bastards’. On the day of the incident, the deceased once again subjected the accused to verbal abuse, uttering the words, “ibu yang mana satukah melahirkan anak seperti kamu?” (which mother gave birth to a child like you?). These words deeply affected the accused, especially since, at that time, his mother was unwell. Prior to the incident, the accused tried to visit his ailing mother but had been rejected by the deceased. According to the accused, the verbal abuse on the day of the incident by the deceased had really enraged him. He finally snapped, lost his self-control and killed the deceased. Based on the evidence, the Court of Appeal was, of the unanimous view that the evidence pointed to cumulative provocation and affirmed the sentence imposed upon the accused by the High Court. (Criminal Appeal No: J-05-49-03/2014, para 48). The Court of Appeal in this case later described the term “cumulative provocation” as follows:

“Cumulative provocation is a series of acts or words over a period of time which culminates in the sudden and temporary loss of self-control. This provocation is not confined to the last acts before killing the accused; there may have been previous acts or words which when added, caused the accused to lose his self-control although the last act may not be sufficient to cause provocation.”⁸⁴

The Court of Appeal had interpreted Exception 1 to include cumulative provocation provided that it causes sudden and temporary loss of self-control. In this case, the Court considered the past events that took place between the accused and the victim in knowing the true context of how it caused the accused to lose control and kill the victim. However, this decision was short-lived. Upon appeal to the Federal Court, the decision of the Court of Appeal in *Surbir Gole* on the issue of cumulative provocation was consequently reversed by the former. However, the defence of provocation under Exception 1 was allowed by the Federal Court, albeit based on grave and sudden provocation, and not cumulative provocation. The Federal Court confirmed this in *Surbir Gole* in paragraph 34 (below), which clarifies the legal status of cumulative provocation:

⁸⁴Criminal Appeal No: J-05-49-03/2014, para 31.

“We ought to be reminded that the defence of “cumulative provocation” does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s. 300 of the Penal Code. Only the defence of grave and sudden provocation is specifically provided for in Exception 1 to s. 300 in the Penal Code.”⁸⁵

This line of interpretation was latter followed by the cases such as *Wong Ban Chong v. Public Prosecutor* [2018] 1 LNS 12 and *Jeffrey Bin Tahil v. Public Prosecutor* [2020] 1 LNS 56, where the Court of Appeal referred to both *Surbir Gole* in rejecting the defence of cumulative provocation raised by the accused because it did not fall within the meaning of Exception 1.

With these decisions, it requires the court to only look at the events that took place immediately prior to the killing as a single act. This line of interpretation does not align with the uniqueness of domestic violence faced by them which is continuous and repetitive, and this can have an impact and opportunity for them to raise the defence of provocation. This is because domestic violence cannot be seen as a single or one-off act, in reality, it occurs continuously and repeatedly. Therefore, what happened in the past should not be set aside by the court in making decisions related to the defence of provocation involving murder cases in the context of domestic violence given the fact that domestic violence is hard to be understood nor evaluated without reference to previous dealings between the parties or without knowing their full history. BWS evidence is thus important in explaining how domestic violence can result in accumulated fear until the last provocation, which results in the woman losing her self-control. In this situation, if the accused suffers from BWS and wants the court to consider what happened between the accused and the victims to explain to the court how the violence has impacted her that led to the offence. Then, the expert might be called by the accused to adduce BWS evidence as was decided in *Nisalma bin Saat*.

It is worth noting that there are criticisms that have been levelled against BWS evidence. Although BWS evidence can be adduced in court, it may reinforce the stereotype of battered women as weak, helpless victims. Commack and Brickery stated that regarding a woman’s behaviour as part of a syndrome, views women as

⁸⁵[2017] 2 CLJ 621, 631.

psychologically flawed and suffering from mental illness.⁸⁶ By emphasising the cognitive limitations stemming from learned helplessness, BWS depicts a person who is not capable of reasonable action and, thus, is not capable of exercising private defence.⁸⁷ Hence, BWS could potentially undermine a woman's claim to private defence. Further, some caution that learned helplessness is incompatible with homicide because women are not passive when they kill their partners. Instead, they have taken the ultimate step (typically after exhausting other resources) in ending the violence perpetrated upon them.⁸⁸ Therefore, Angel further argued that there is no need for experts to testify on BWS and learned helplessness. Alternatively, what is needed is for the law to expand its scope to allow evidence of a history of abuse. Such evidence would allow the court to understand the reason for the accused's reaction to such a threat or provocation rather than viewing women as weak.

CONCLUSION AND RECOMMENDATION

All in all, although the term BWS is not mentioned in the Penal Code but based on the case of *Nisalma bin Saat*, it can be adduced by an expert as an evidence for a private defence. The purpose of evidence of BWS is to clarify the common question raised by the court in a murder case involving the battered woman, which is why the battered woman did not escape or seek protection from the police. Likewise in the United States, England and Wales the BWS evidence has been adduced and accepted in support of other defences such as provocation and diminished responsibility. In the context of provocation, given the trend in the Federal Court interpretations of cumulative provocation, if the accused suffers from BWS, she may want BWS evidence to be

⁸⁶Commack and Brickey, "Constituting the violence of criminalized women,"7.

⁸⁷Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after R. v. Lavallee," *The University of Toronto Law Journal* vol. 47, no. 1 (1997): 1. DOI: <https://doi.org/10.2307/826013>.

⁸⁸Kit Kinports, "So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense," *Louis U. Pub. L. Rev.* vol. 23 (2004): 169.

adduced in court to explain how the violence impacted her and led to the offence. However, BWS is not free from criticism and its admissibility might be challenged as discussed in section IV. Hence, it is proposed to include one provision in the Penal Code to the effect that in deciding the defence relating to domestic violence such as provocation and private defence, the court shall consider the relevant circumstances of the accused which may include any relevant history of earlier events between the parties to the incident which lead to the killing. In light of this, the accused may or may not adduce BWS evidence to prove past history because the courts can regard any relevant history of earlier events between the parties (particularly the conduct of abusive partners who mistreated the accused [the history of past abuse]) in deciding the defence of provocation or private defence. Such evidence would help the court to understand the reasons behind the accused's reaction to the threat or provocation, rather than perceiving women as weak. This proposed amendment will also address concerns on the possibility of the admissibility of BWS evidence being challenged in court due to some criticisms against it.

It is pertinent to note that, even if the court accepts BWS evidence, it does not mean that the court automatically accepts the defence of provocation or private defence. The court is still required to consider other conditions in deciding to accept the respective defences. That said, by acknowledging the effect of domestic violence on the accused, the court would better understand the case in totality, particularly cases involving domestic violence. Thus, expert testimony can be useful to aid the court in determining the defence, as well as to clear common misconceptions surrounding battered woman.⁸⁹ More importantly, it helps the court to gain a proper understanding of the whole picture of the event.

⁸⁹Brenda L. Russell and Linda S. Melillo, "Attitudes toward Battered Women Who Kill: Defendant Typicality and Judgments of Culpability" *Criminal Justice and Behavior* vol. 33, no. 2 (2006): 220. DOI: <https://doi.org/10.1177/009385480528441>.

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