

## ORIGINAL ARTICLE

**Battered woman syndrome: updating the expert checklist**Graham Glancy<sup>1,2</sup>, Marissa Heintzman<sup>1</sup>, Adam Wheeler<sup>1</sup><sup>1</sup> University of Toronto, Division of Forensic Psychiatry, Toronto, Canada<sup>2</sup> McMaster University, Department of Psychiatry and Behavioural Neurosciences, Hamilton, Canada

*The aim of this article is to examine the current state of the battered woman syndrome (BWS) defence in Canada and propose an update to the list of factors considered by experts evaluating the applicability of the defence to individual cases. The history and current legal definition of the defence are presented, and theories relating to BWS are summarized. Factors required of expert testimony in BWS cases are presented; cases relevant to the development of the defence that highlights these assessment factors are discussed. In a subsequent section, limitations of the defence and the role of the expert are explored. The PTSD Checklist (used in clinician diagnosis) is summarized before an updated, BWS-specific expert checklist is proposed. The updated checklist proposes six elements to be considered by an expert assessing a BWS case: 1. environmental factors, 2. attempts to leave or alter the situation, 3. risk factors of the abuser, 4. risk factors of the victim, 5. triggers for violence, and 6. contrary evidence. It is hoped that using this checklist will help experts to cover all the essential elements they must consider in order to conclude that a woman satisfies the criteria for BWS. In particular, this updated checklist will help experts to prepare comprehensive testimony that addresses the five issues defined by Justice Wilson as the expert's duty to assess. In addition, this checklist will help experts present a firm foundation for a defence regarding the critical question of why the night of the offence was different from all other nights.*

**Key words**

*Battered woman syndrome, Learned helplessness, Post-Traumatic Stress Disorder, Self-defence, Expert testimony*

**Introduction**

Battered woman syndrome (BWS) has been internationally recognized as a justification for self-defence since the 1990s. However, public acceptance of the defence is only one step toward providing

women justice in a system that has traditionally favoured men. Popular understandings of the doctrine of self-defence often assume that defensive force is justified only when in response to an obvious, immediate threat. There are several reasons why this might not be the case for battered women. For many battered women, fear for their safety or their children's safety, along with trauma and victimization, drives them to use violence against their abuser outside the immediate context of a direct confrontation.

Despite being created to adapt the requirements of self-defence to include women's experiences of violence more accurately, the BWS defence is not always easily applied in practice. Many juries view the case with one question in mind: "Why did she not just leave the situation or the abusive relationship?" In some jurisdictions, there is still a legal duty to retreat: a threatened person cannot harm another in self-defence if she has a reasonable opportunity to remove herself from the situation. This stands in contrast with "stand your ground" and "castle" doctrines in some American states, whereby an individual is not required to retreat from an imminent threat but can defend himself and his property with any force necessary. Neither of these requirements supports the battered woman's position. While a man has the right to defend his family and property with lethal force, a woman must defend her reasons for not fleeing violence within the home. If she had an opportunity to flee, subsequent violence on her part might be viewed as an act of vengeance rather than an act of self-defence. Effective use of expert testimony offers juries an essential tool for navigating these challenging factual and legal dilemmas.

The following paper explores BWS in the context of Canadian law, as well as the effective use of expert testimony. In the first

section of this paper, an overview of the law of self-defence is provided to situate the historical treatment of battered women and the emergence of BWS theory. This is followed by a discussion of the key ruling that established the BWS defence in Canadian law, *R. v. Lavallee*, as well as subsequent judicial consideration of the BWS defence. The third section expands upon the limitations of the defence and the role of the expert in the assessment. An expanded expert checklist for the assessment of a woman regarding BWS is provided in the final section.

#### *Overview of Self-Defence in Canadian Law*

The common-law doctrine of self-defence was codified in Canada's first *Criminal Code* [1]. Although the *Code* historically included a number of provisions intended to guide the application of the defence according to circumstances (i.e. a sudden and unlawful attack vs. the use of force to defend against a disproportionate defence), the general structure of self-defence remains largely unchanged today. Recent amendments to the *Code* in 2013 replaced these statutory scenarios with a number of important contextual factors intended to guide judges and juries in applying the doctrine, although the structure of the defence itself was not changed. Section 34(1) of the *Code* currently provides that an accused acted in self-defence, and is, therefore, not guilty of an offence, if:

- i. he or she believes on reasonable grounds that force is being used against him or her (or another person) or that a threat of force is being made against them or another person;
- ii. the act that constitutes the offence is committed for the purpose of defending or protecting himself or herself (or the other person) from that use or threat of force; and
- iii. the act committed is reasonable in the circumstances [2].

These elements were historically considered alongside an imminence (i.e. immediacy) rule, such that a self-defence argument would only succeed where there was no alternative course of action other

than using force for protecting oneself. This criterion—intended, in part, to ensure that escape was not an option—was also adopted to narrow the scope of this full legal justification [3]. Evidence that a significant period of time had passed between the threat or use of force against the accused and their responding use of force could support the inference that there were other motivations at play (e.g. revenge).

#### *Historical Treatment of the “Battered Woman” in Court*

Self-defence has long been a part of Canadian criminal law. However, BWS was only first recognized as a legal justification for self-defence in Canada in the 1990s. Of course, the issue of violence against women had been considered elsewhere in the common-law world well before then.

A battered woman argument was first notably used in a Canadian criminal trial in 1911. Angelina Napolitano, a 28-year-old Italian immigrant, and mother of four, attempted to use the defence after killing her husband with an axe as he lay sleeping. Napolitano admitted to the murder, claiming it was the result of years of physical abuse and the only way she could see to escape from the life of prostitution her husband was forcing her toward [4].

The *Criminal Code* at the time had much the same requirements of self-defence as those listed above. An accused had to prove that he or she was in imminent danger with no alternative course of action available. For a variety of reasons, including differences in physical strength, battered women most often kill when they are *not* being assaulted, and, therefore, when they are not technically in imminent danger. This was the case for Angelina Napolitano. The prosecution emphasized the point that Napolitano had committed adultery, and the judge instructed the jury to keep this fact foremost in their mind since it disqualified Napolitano from claiming “wronged woman status” by the standards of the time. She was found guilty and sentenced to death.

Despite the death sentence, the public rallied in support of Napolitano. She had

been presented as a victim in her case: a poor immigrant woman, abused by her husband. An international clemency campaign was launched, propagating the idea that such an uneducated immigrant could not reasonably be expected to uphold the standards of others. Her sentence was ultimately commuted to life in prison; she served 11 years before being paroled.

Elsewhere in the common-law world, in the 1949 case of *R. v. Duffy*, the British Court of Criminal Appeal considered whether a defence of provocation applied to a woman who had killed her husband after a history of brutal abuse.<sup>1</sup> On the night of the offence, the deceased threatened and physically struck Ms. Duffy, preventing her from taking their child away to safety. She left the room for a while, changed her clothes, and then returned to strike her husband with a hatchet and hammer, killing him while he lay in bed. She argued that the course of abuse constituted provocation, but the defence was rejected by the jury and the Court of Criminal Appeal, resulting in her conviction for murder. In what remains a leading statement on the historical common-law defence of provocation, the Court of Appeal affirmed the following jury instruction:

Provocation is some act, or series of acts done (or words spoken) ... which would cause in any reasonable person and actually causes in the accused, **a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind** ...

A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here—the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. **What matters is whether this girl had the time to say: “Whatever I have**

**suffered, whatever I have endured, I know that Thou shalt not kill.” That is what matters.** [Emphasis added] - *R v Duffy* [1949] 1 All ER 932

The highly gendered and paternalistic nature of this jury charge aside, a strict application of this temporal requirement (i.e. how soon after abuse or provocation the woman used defensive force) remained a significant component of both self-defence and provocation throughout the common-law world (including Canada) for decades. It was only as a result of evolving clinical insight into the dynamics of gendered violence that criminal courts in Canada began to rethink its approach to the issue of when abused women use defensive force.

### Theories of Battered Woman Syndrome

The term “battered woman syndrome” was first used by Lenore Walker in 1979 to describe the pattern of violence that exists in abusive relationships and the impact it has on the woman [5]. Walker described a three-step cycle of violence that defined the syndrome: tension building, acute battering, and reconciliation. It was proposed that the presence of at least two cycles of violence leads to the syndrome. Walker’s theory proposed that the woman’s behaviour and inability to leave the situation is due to “learned helplessness.” In other words, the woman has developed such a firm belief in her partner’s dominance over her that she does not believe in her own ability to escape or change her situation. This theoretical understanding has not easily mapped onto the legal doctrine, as will be discussed shortly.

In 1987, Dr. Charles Ewing made another early attempt to understand the situation and mindset of battered women who kill. In his book [6], Ewing, a psychologist and lawyer, analyzed over 100 cases. He sought to identify the kinds of abuse each defendant experienced and the characteristics of the battering relationship.

<sup>1</sup> Note - Provocation, unlike self-defence, only provides a partial excuse to murder. Where the defence is accepted, it reduces murder to manslaughter in recognition of the diminished moral blameworthiness of someone provoked into what is

clearly an extreme use of force. Self-defence is available for a wider range of offences but is subject to the general constraint that the use of force must be reasonable and not excessive in the circumstances.

Ewing identified seven factors of battered women who kill their husbands. A situational understanding of each case, identified by experts during trial using such factors, is the basis for a successful BWS defence today.

According to Ewing, in a violent incident ending in death, it is likely that: 1/The woman has experienced serious injuries at the hands of her spouse; 2/The frequency of battering incidents increased prior to the incident in question; 3/Life-threatening acts have occurred, often accompanied by death threats; 4/Weapons, particularly guns, are present in the household; 5/The man has abused the children. 6/ A threat to the custody, care, or lives of the children has triggered the event; and 7/The man has made a threat of retaliation if the woman were to leave, including descriptions of stalking, finding, and killing her and others.

#### *BWS Theory Considered in R. v. Lavallee*

In 1990, the Supreme Court of Canada recognized that BWS could support a self-defence argument in the landmark case of *R v. Lavallee* [7]. Ms. Lavallee was a 22-year-old woman who had been living with the victim, Kevin Rust, for several years. One evening, the couple was throwing a party and began arguing. Ms. Lavallee ran upstairs and hid in a closet but was dragged out by her hair by Mr. Rust. He allegedly handed Ms. Lavallee a gun, saying “either you kill me, or I’ll kill you.” He turned around; the gun went off. Although she claimed to be aiming above his head, Ms. Lavallee killed Mr. Rust with a single gunshot to the back of the head. At trial, Ms. Lavallee argued that she acted in self-defence. Her claim was supported by expert psychiatric evidence about the effects of ongoing physical, mental, and emotional abuse inflicted upon the accused by the deceased, all of which led to the opinion that she sincerely believed she would be killed that night. The Court accepted this argument as evidence that BWS requires a relaxation of the imminence rule in cases of domestic violence.

Specifically, the Court held that expert evidence is admissible for four main purposes: (1) to dispel stereotypes about

battered women, (2) to address the ability of an accused to perceive danger from her partner (regarding the issue of whether she “reasonably apprehended” death or grievous bodily harm), (3) to explain why battered women may remain in abusive relationships, and (4) to explain why an accused may not flee and the consequent reasonableness of her belief that use of force was the only way to save her life [7]. The imminence rule has since been clarified as merely one factor to be taken into consideration where self-defence is a live issue [8]. This ruling set a precedent for future cases of its kind; women no longer had to “wait for the ‘uplifted knife’ to act in self-defence.” [9]

#### **Selected Canadian Cases Since *Lavallee***

Canadian courts have attempted to define the parameters of a BWS defence more clearly since *Lavallee* but have struggled to apply its legal and clinical criteria. In particular, courts have considered the imminence criterion, the reasonableness of the threat perceived by the accused, and the availability of the defence in cases where the relationship between parties is not that of a battered woman and spouse.

#### *Imminence*

The case of *R. v. Irwin* [10] was decided shortly after *Lavallee*. In this case, the British Columbia Court of Appeal held that *Lavallee* would apply where there was a reasonable apprehension of death in the immediate future. However, it would not apply in a case where the accused fired the third fatal shot because he feared that the victim would recover from the first two shots and would come back in a few months to kill him. The accused’s subjective fear of retaliation in a few months was not objectively reasonable because this delay did not constitute imminent danger. The imminence criterion was more recently applied in *R. v. Z.K.* [11], where the accused had an abusive relationship with the victim, his father. In that case, the Court held that this abuse did not give rise to a reasonable apprehension of bodily harm or death on the day of the offence and rejected the self-defence claim.

### *Reasonableness of the Threat*

In *R. v. Eyapaise* [12], the Court of Queen's Bench of Alberta rejected a BWS defence as unreasonable in a case where the accused was a battered wife, but the victim was not her husband. The accused stabbed the victim, a stranger after he touched her breasts several times while drinking with her. She freed herself without a struggle, then obtained a knife, and stabbed him in the neck. The Court heard that she had been the victim of abuse by men throughout her life and had once been sexually assaulted by a group of assailants. However, the Court held that her actions were not a reasonable form of self-defence, even if she feared harm to herself and felt trapped based on previous relationships because she had other options available to protect herself.

Interestingly, in *R. v. Knott* [13], the Court of Queen's Bench of Manitoba accepted a BWS defence in a case where a third party was present and trying to protect the accused at the time of the incident. Ms. Knott had been regularly abused by her husband and was hospitalized twice due to her injuries. She had attempted to leave the relationship twice before, but her husband always found her again. Ms. Knott was living on her own at the time of the incident when her husband and his brother showed up at her apartment. Knott's husband physically and verbally abused her throughout the day before all they went out to drink at a bar that evening. Ms. Knott did not want to let her husband back into her apartment after the bar but knew he would scream and bang on the door, disturbing the neighbours. She let him in, and the violence continued to escalate inside the apartment. The victim's brother attempted to restrain the victim, who kept trying to attack the accused. The accused first tried to fend off his attacks with a mop before eventually grabbing a steak knife and stabbing him. Ms. Knott was acquitted on evidence that she suffered from post-traumatic stress disorder (PTSD) and was fearful of escalating violence.

### *Relationship Between Parties*

In *R. v. Malott* [14], the accused and the victim had been living in a common-law

relationship for 19 years and had two children together. The accused had previously gone to the police due to physical, sexual, psychological, and emotional abuse at the hands of her husband. The police had informed the husband of her accusations because he was a police informant; this resulted in an escalation of the violence. The couple had separated a few months before the incident, the husband taking the couple's son and moving in with a new girlfriend.

On the morning of the criminal act, the victim picked up the accused and took her to a medical centre so she could acquire prescription drugs for his illegal drug trade. The accused took a gun with her and shot him to death after they arrived at the medical centre. She then took a taxi to his home and shot and stabbed his girlfriend. As in *Lavallee*, expert evidence of BWS was introduced in the trial. The Ontario Court of Appeal conceded that the accused had been subject to terrible abuse by her husband. However, the Court rejected an argument that the girlfriend of the deceased could have been viewed by the accused as an extension of her abusive spouse and as part of the source of the abuse she had suffered throughout her marriage. She was found guilty of second-degree murder; the jury recommended that she receive the lightest sentence in light of the severity of BWS.

The Supreme Court subsequently confirmed, in *R. v. Charlebois* [15], that the *Lavallee* defence was uniquely available to battered women. They refused to apply the defence to Charlebois, a male accused of shooting an acquaintance—with whom he had a history of violence—in the back while he lay sleeping. The accused claimed the victim had shown up at his house with a knife and had seen a gun the accused had previously refused to sell him. The accused was overcome with fear of retaliation by the victim, leading to the criminal incident. Following *Charlebois*, in *R. v. Bird* [16], the Saskatchewan Provincial Court held that BWS did not apply where there was no history of abuse between the parties, notwithstanding any history that the accused had been victimized by others in the past.

The Ontario Court of Appeal applied *Charlebois* to reject a *Lavallee* defence in *R. v. Currie* [17]. The Court concluded that, despite the accused's subjective fear that the victim might attack him in the future, there was no objective evidence of a threat to his safety. As a result, there was no connection between a threat to Currie's safety and his actions on the day that he shot the deceased. There was no evidentiary foundation to support the defence.

#### *Amendments to the Criminal Code*

In 2013, the *Criminal Code* was amended by the *Citizen's Arrest and Self-Defence Act* [18] to codify the *Lavallee* factors, including a history of abuse between the parties, into a statutory list of considerations relevant to a claim of self-defence by any person. As a result, s. 34(2) of the *Code* now requires courts to consider the following factors:

- a) *the nature of the force or threat;*
- b) *the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;*
- c) *the person's role in the incident;*
- d) *whether any party to the incident used or threatened to use a weapon;*
- e) *the size, age, gender and physical capabilities of the parties to the incident;*
- f) *the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat; any history of interaction or communication between the parties to the incident;*
- g) *the nature and proportionality of the person's response to the use or threat of force; and*
- h) *whether the act committed was in response to a use or threat of force that the person knew was lawful* [18].

#### **Limitations of the Defence and the Importance of the Expert**

Writing for the Supreme Court in *Lavallee*, Justice Wilson outlined some of the reasons why expert testimony is crucial to a BWS defence. She noted that the expert

has the duty to address (1) the existence of complex PTSD, (2) the existence of BWS, (3) the uniqueness of the events leading to the violent act, (4) the woman's psychological state and apprehension of death or harm, and (5) reasons why the woman remained in the relationship [19]. This evidence can provide the jury with a framework to assess whether a woman's response in killing her abuser was reasonable, according to Section 34.

However, in subsequent years, there has been some disagreement as to how expert testimony should be presented. Soon after *Lavallee*, Sheehy [20] proposed that the term "battered woman syndrome" be dropped from testimony. As Schneider [21] pointed out, the term suggests "an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting 'normally.'" Others have supported this notion, arguing that expert testimony should focus on the social reality of the woman's situation—such as the batterer's control, her lack of support and alternatives, and risks of leaving—rather than her psychological reactions [22-24]. Reasons for this were supported in a study by Kasian and colleagues [25], which assessed acquittal rates by mock jurors in cases involving battered women who killed their husbands. Kasian and others found that expert evidence impacted the jurors' beliefs of guilt but only when automatism was raised by the defendant; if a plea of self-defence was entered, jurors were more likely to find a defendant guilty.

Critics of BWS point to such studies as proof of the shortcomings of the BWS defence. They argue that the legal trend to use the BWS defence disadvantages women as a group, forcing them to be portrayed in court as ultra-feminine and helpless. Acquittals are achieved by embracing victimhood [20,21]. Society imposes notions of what the "correct" behaviour is and assumes the guilt of those who do not present as such, further perpetuating the gender inequity that BWS was supposed to help solve in the court system.

### *The Expert Assessment*

Despite this criticism, a forensic expert is sometimes retained to assess individuals charged within the existing legal system. There are several proposed ways of dealing with this reality, many of which hinge on the role of the expert. The following section expands upon Justice Wilson's suggested purpose of expert testimony in BWS cases. It provides an understanding of exactly what an expert looks for in the details of a case, including the situational factors and symptoms exhibited by the defendant, and how a clear comprehension of these details helps to understand the reasons for a violent act.

### *The Cycle of Violence*

The first criterion is the presence of an abusive relationship. This is established by a list of the types and frequency of abuse. It is helpful to obtain collateral confirmation, including statements by others, such as friends, relatives, neighbours, colleagues and others, police records, and medical records from the general practitioner, psychiatrist, or counsellors and emergency rooms to verify this information. Without collateral information, the expert should have a high degree of suspicion about the nature of the abuse. This can be complicated by the forced isolation of the woman, such that she kept the abuse hidden. The starting point is the presence of at least two cycles of violence, as described on page two. In most legitimate cases, there are multiple instances and cycles and, in our experience, a diminishing reconciliation phase.

### *The PTSD Checklist*

Battered woman syndrome, while not a medical diagnosis within the DSM-V, describes a pattern of behaviour and symptoms closely resembling, or at least inclusive of, post-traumatic stress disorder (PTSD). It was previously considered a form of complex PTSD [26], but this descriptor has more recently been considered merely a variant of PTSD proper.

There are a number of commonly used self-report scales [27] available as an adjunct to the clinical interview. To diagnose PTSD,

clinicians may use a standardized reporting scale corresponding to the DSM-5 criteria for PTSD: the PTSD Checklist [28] (Ruggeiro et al.). In evaluating a BWS case, experts can use the PTSD Checklist criteria to determine if a woman satisfies the DSM criteria for the disorder, supporting her claim of BWS. In addition to PTSD symptoms, there may also be comorbid depressive and anxiety disorders, which should be noted and included in the formulation.

### **The Updated Expert Checklist**

The following section will expand upon the considerations outlined above to provide an updated expert checklist for use in BWS cases. This checklist will address several factors to provide a comprehensive assessment of the woman's situation and actions, beyond the role of victim perpetuated by Walker's concept of learned helplessness. This updated checklist will explore 1/Environmental factors; 2/Attempts to leave or alter the situation; 3/Risk factors of the abuser; 4/Risk factors of the victim; 5/Triggers for violence; and 6/Contrary evidence.

### *Environmental Factors*

An expert has a duty to help the jury answer its biggest question: why did she stay? This can be partially explained using Walker's learned helplessness theory, but a stronger tactic is to evaluate the environmental factors. These may include an examination of the support systems available to the woman.

**Table 1.** The PTSD Checklist

Factor or Symptom	Details
The experience of the traumatic event, including fear for bodily safety or of death	<ul style="list-style-type: none"> <li>▪ After-effects lasting longer than four weeks</li> </ul>
Sequelae of trauma affecting aspects of life	<ul style="list-style-type: none"> <li>▪ Job performance affected</li> <li>▪ School performance affected</li> <li>▪ Social relationships affected</li> </ul>
Re-experiencing of the traumatic event	<ul style="list-style-type: none"> <li>▪ Intrusive memories</li> <li>▪ Nightmares</li> <li>▪ Night terrors</li> <li>▪ Daydreams</li> <li>▪ Flashbacks</li> <li>▪ Physiological responses with or without stimuli</li> </ul>
Hyper-arousal responses	<ul style="list-style-type: none"> <li>▪ Anxiety reactions</li> <li>▪ Crying</li> <li>▪ Sleeping problems</li> <li>▪ Eating problems</li> <li>▪ Hypervigilance to further harm</li> <li>▪ Exaggerated startle response</li> <li>▪ Exaggerated fearful response</li> </ul>
Numbing of emotions	<ul style="list-style-type: none"> <li>▪ Avoidance of making things worse, whenever possible</li> <li>▪ Avoidance in the form of depression, dissociation, and denial</li> <li>▪ Minimization of fear or harm</li> <li>▪ Decreased participation in activities</li> <li>▪ Isolation from other people</li> <li>▪ Other indications life is being controlled</li> </ul>
Negative mood and cognition alteration	<ul style="list-style-type: none"> <li>▪ Inability to remember some aspects of the traumatic event</li> <li>▪ Negative self-esteem</li> <li>▪ Negative expectations from others and the world</li> <li>▪ A pervasive negative state of mind</li> <li>▪ Difficulty experiencing positive emotions</li> <li>▪ Distortion of self-blame</li> <li>▪ Decreased interest in activities</li> <li>▪ Detachment from others</li> </ul>

**Table 2.** The Updated Expert Checklist: Environmental Factors

Environmental Factor	Reason
Financial difficulty of leaving	<ul style="list-style-type: none"> <li>▪ The victim has a job, but the abuser controls the finances.</li> <li>▪ The victim has control over finances but is afraid of repercussions if she is caught taking money.</li> <li>▪ The victim does not have a job or is afraid to leave her job due to her image of herself as being talentless and unskilled that has been enforced by verbal abuse.</li> </ul>
Presence of children in the home	<ul style="list-style-type: none"> <li>▪ Victim fears</li> <li>▪ The abuser will prevent children from leaving.</li> <li>▪ The abuser will harm children if she leaves them behind.</li> <li>▪ The abuser will take and hide children if he knows she is leaving.</li> <li>▪ The abuser will win custody in court.</li> <li>▪ Victim feels</li> <li>▪ Social pressure to keep the family together.</li> </ul>
Inability to access support systems	<ul style="list-style-type: none"> <li>▪ Victim has</li> <li>▪ Become isolated from family and friends, often at abuser's will.</li> <li>▪ Limited community or government resources available to her.</li> <li>▪ Lack of access to finances required to leave.</li> <li>▪ Had previous difficulty reaching out for help.</li> </ul>
No guarantee of an end to the violence	<ul style="list-style-type: none"> <li>▪ Victim fears retaliation because</li> <li>▪ The abuser had retaliated in the past for similar actions.</li> <li>▪ The abuser has expressed threats or violence.</li> <li>▪ The abuser has a proven ability and resources to locate and harm the victim or family members.</li> </ul>

### *Attempts to Alter the Situation*

Although the woman may not ultimately have left the situation, the expert can highlight other attempts she did make to alter her situation. An explanation of the results of these attempts can help to explain the woman's fear of further attempts or her feeling of hopelessness and resultant capitulation to the situation. It is important for the evaluator to canvas with the woman what attempts she made to

change and eventually to leave the relationship. At the very least, what attempts to leave the relationship did she consider, and if she rejected them, why did she reject them. If she did make attempts to leave the relationship, it would be helpful if there is collateral information confirming this, for instance, from her family, friends, or counsellors.

**Table 3.** The Updated Expert Checklist: Attempts to Alter the Situation

<b>Attempt</b>	<b>Result</b>
Proposal of separation	Negative reaction/violence from the abuser.
Report to police	Abuser finds out, escalates violence.
Proposal victim takes a job to relieve financial stresses	Abuser reacts negatively, feeling threatened professionally.
Proposal of counselling	Negative reaction from abuser, persistent distrust resulting in increased isolation.

### *Risk Factors of the Abuser*

The expert's assessment and testimony extend beyond understanding the woman's experience; the background and actions of the abuser are equally important to understanding the level of risk he presented, which adds to the woman's perception of acute danger. These factors may be found in the collateral information, which likely includes witness statements, medical records, and police records.

### *Risk Factors for the Victim*

There are also several factors the woman may present that typically indicate the escalation of a situation, with resultant changes to her attitude and mental state, possibly helping to understand the precipitation of a violent incident. Understanding the woman's personal experience of the relationship and situation, beyond what might be visible to an outside observer, is another key purpose of expert testimony.

### *Triggers for Violence*

Once the expert has explained the situation and the woman's enhanced ability to predict and quantify violence from her abuser, the jury can better understand why a particular incident resulted in death. Table

6 presents triggers that could precipitate violent events.

A critical factor in understanding the accused's actions in the final denouement is noted by Regehr and Glancy [19]: if the woman had been abused numerous times, why did she kill or harm her abuser on this specific occasion? In other words, why is this night different than any other night? Not all women who are battered, even repeatedly, end up killing their abusers. It is important to understand why, after repeated episodes of abuse, the woman became violent toward her abuser on this particular occasion. There may be signs of impending tragedy, resulting in an increase in the frequency and severity of the abuse (see Table 7). Even more acutely, there may be a crucial change in the quality of the abuse, such as threats of sexual assault of the children, the recent acquisition or presence of a lethal weapon, or an increase in sexual assaults.

In reviewing the literature on women who kill, some triggers emerge. It is the presence of threats related to the children that are perhaps the most critical. Understanding why a particular woman acted in this particular way at this time is

one of the most important facets of these assessments. This differentiates this woman and this occasion from the all too common patterns of abuse that do not result in the woman harming her abuser.

**Table 4.** The Updated Expert Checklist: Risks Factors of the Abuser

Risk Factor	Evidence
Demonstrates a lack of concern for the victim	May disrespect or ignore what is necessary for her wellbeing.
Controls aspects of the victim's life	Does not allow the victim <ul style="list-style-type: none"> <li>▪ To travel.</li> <li>▪ To visit family.</li> <li>▪ To attend social activities.</li> <li>▪ To pursue further education.</li> </ul>
	May physically or verbally sabotage victim's attempts <ul style="list-style-type: none"> <li>▪ To better self.</li> <li>▪ To have a life outside of home life.</li> </ul>
Needs to be the centre of attention	Abuser feels resentment toward <ul style="list-style-type: none"> <li>▪ Activities that occupy the victim's time.</li> <li>▪ Own children and other family members for occupying victim's time.</li> </ul>
	Abuser upstages other family members and close friends to maintain attention on himself.
Personality traits	Abuser may <ul style="list-style-type: none"> <li>▪ Be charming, manipulative, or seductive to get what he wants.</li> <li>▪ Become hostile and mean when he fails.</li> <li>▪ Have difficulty interpreting negative emotions, with multiple triggers translating into anger.</li> <li>▪ Exhibit jealousy to an extreme, including jealousy of children, friends, and family.</li> </ul>
Expresses an interest in violent topics	Items pertaining to violent behaviour are present, including <ul style="list-style-type: none"> <li>▪ Books.</li> <li>▪ Internet searches.</li> <li>▪ Weapons.</li> </ul>
Personal history of violence	History of <ul style="list-style-type: none"> <li>▪ Experiencing or witnessing violence in childhood.</li> <li>▪ Childhood temper tantrums.</li> <li>▪ Military service, likely for long stints.</li> <li>▪ Insecurity.</li> <li>▪ Expressions of aggression toward women.</li> <li>▪ Violence against animals.</li> <li>▪ Violence against inanimate objects.</li> </ul>
Relationship to parents	Abuser likely experienced <ul style="list-style-type: none"> <li>▪ A punitive, strict father.</li> <li>▪ An inconsistent mother.</li> <li>▪ Coddling or protective behaviour from mother during violent childhood episodes.</li> </ul>
	Relationship with parents may have resulted in <ul style="list-style-type: none"> <li>▪ An inability to self-soothe.</li> <li>▪ A belief in traditional gender roles; enforcing these roles as a way to maintain power in the relationship.</li> </ul>

**Table 5.** The Updated Expert Checklist: Risks Factors for the Victim

Risk Factor	Evidence
Change in motivation	Victim stops <ul style="list-style-type: none"> <li>▪ Attending social events.</li> <li>▪ Answering phone and emails.</li> </ul>
Change in appearance	Victim quits her job. Victim exhibits <ul style="list-style-type: none"> <li>▪ A lack of care in appearance.</li> <li>▪ A change in grooming habits (such as failing to wash her hair).</li> </ul>
Social isolation	Victim may <ul style="list-style-type: none"> <li>▪ Be forced by the abuser to isolate self.</li> <li>▪ Withdraw from activities to mitigate the risk of violent repercussions.</li> <li>▪ Withdraw to spend more time with the abuser as he cannot handle being alone.</li> </ul>
Learned hypervigilance	Victim may <ul style="list-style-type: none"> <li>▪ Try to watch abuser's moods.</li> <li>▪ Learn to read his expressions and behaviour.</li> <li>▪ Feel a heightened perception of danger.</li> <li>▪ Register that this particular incident is worse than the others.</li> </ul>
Marked passivity	Victim exhibits <ul style="list-style-type: none"> <li>▪ Difficulties in problem-solving.</li> <li>▪ Depression and anxiety, leading to paralysis.</li> </ul>
Preoccupied with relationship with abuser	Victim may unrealistically attribute total power to the abuser.
Alterations in self-perception	Victim exhibits <ul style="list-style-type: none"> <li>▪ A growing sense of shame and guilt.</li> <li>▪ Self-blame.</li> <li>▪ A lack of appetite.</li> <li>▪ Weight loss.</li> <li>▪ Persistent dysphoria.</li> <li>▪ Lowered self-esteem as a result of repeated humiliation.</li> <li>▪ A reduced ability to confide in others.</li> </ul>
Altered memory	Victim experiences <ul style="list-style-type: none"> <li>▪ Amnesia or Hypermnesia (blocking out or minimizing) of traumatic events.</li> <li>▪ Blocking out or minimizing traumatic events,</li> <li>▪ Transient dissociative episodes.</li> <li>▪ Depersonalization.</li> <li>▪ Derealization.</li> <li>▪ Reliving traumatic experiences.</li> </ul>
Depressive symptoms	Victim exhibits <ul style="list-style-type: none"> <li>▪ Uncontrollable crying.</li> <li>▪ Feelings of being utterly alone.</li> <li>▪ Chronic suicidal preoccupation.</li> <li>▪ Self-injury.</li> </ul>
Personality changes	Victim exhibits <ul style="list-style-type: none"> <li>▪ Explosive or inhibited anger.</li> <li>▪ Compulsivity or impulsivity.</li> <li>▪ Extremely inhibited sexuality.</li> </ul>
Financial situation	Victim is subject to tight economic controls, perpetuating her dependence on the abuser and reluctance to leave.

**Table 6.** The Updated Expert Checklist: Triggers for Violence

Trigger	Reason
Loss of income	<p>Abuser may have lost job, resulting in</p> <ul style="list-style-type: none"> <li>▪ Increased financial stress.</li> <li>▪ A feeling of shame and failure.</li> </ul>
Decrease in intercourse	<p>Abuser resents</p> <ul style="list-style-type: none"> <li>▪ Activities and relationships that occupy the victim's time.</li> <li>▪ His own children, particularly a new baby, occupying victim's time.</li> </ul>
Disparity in status	<p>Resentment may grow due to the difference between abuser and victim's</p> <ul style="list-style-type: none"> <li>▪ Education levels.</li> <li>▪ Socio-economic backgrounds.</li> <li>▪ Views of gender roles.</li> </ul>

**Table 7.** The Updated Expert Checklist: Contrary Evidence

Contrary Evidence	Reason
Presence of social group or activities	<p>Victim may try to maintain façade of functional lifestyle to</p> <ul style="list-style-type: none"> <li>▪ Mitigate violence against her.</li> <li>▪ Dissociate from her situation.</li> <li>▪ Assert some element of control over her life.</li> </ul>
Presence of control in aspects of family life	<p>Victim may be allowed control of some aspects because</p> <ul style="list-style-type: none"> <li>▪ The abuser likes traditional gender roles.</li> <li>▪ The abuser wants to be taken care of.</li> <li>▪ The abuser may check over her work anyways.</li> </ul> <p>Victim may conduct tasks seemingly willingly because</p> <ul style="list-style-type: none"> <li>▪ The abuser may punish her for work he believes is done poorly.</li> </ul>
Did not confide or report abuse	<p>Victim may</p> <ul style="list-style-type: none"> <li>▪ Be fearful abuser will find out she has told someone.</li> <li>▪ Have previously experienced abuser finding out.</li> </ul>
Learned Helplessness	<p>Victim may</p> <ul style="list-style-type: none"> <li>▪ Not be confident in the outcome of an action.</li> <li>▪ Choose to develop coping mechanisms instead of pursuing escape.</li> <li>▪ Be socially isolated.</li> </ul>

### *Contrary Evidence*

The forensic expert should approach each case with neutrality or even forensic skepticism as may a jury. In order to overcome jury skepticism, an expert must be able to explain how details of a woman's life might seem contrary to the popular concept of a battered woman. The woman may, for instance, maintain a functional lifestyle, participating in social groups or activities without anyone knowing something is wrong. She may also demonstrate control of aspects of family life. This, rather than being a sign of a confident and self-possessed woman, may be enforced by an abuser who prefers traditional gender roles, dictating particular tasks to her. The woman herself may not demonstrate any desire to escape as she has chosen to resort to coping mechanisms instead, likely afraid of the consequences of confiding in anyone or reporting the abuse.

The evaluator in such cases should perform a full psychiatric assessment. Psychological testing may be helpful. This testing typically shows a profile consistent with complex trauma. This testing may also help rule out malingering in that certain tests have validity scales, which, taken in the context of the total picture, may be of value in the assessment. It can be a complex formulation, which takes the personality of the battered woman into account, placing it in the context of the history of the abuse (if any) and the final act of violence against the violent abuser. To this end, it is important to look at possible contrary arguments before coming to any conclusions. The following table illustrates evidence a jury might see as contradictory and the possible justifications for each contradictory factor.

### **Conclusion**

The BWS defense is an attempt to rectify the standards by which women who kill are judged in our courts. It is not as a concept,

however, without criticism. The public notion of battered women and the very name of the defence itself carry a heavy stigma that can drastically affect legal outcomes. It is one of the roles of the expert to alleviate this stigma, providing testimony that contributes to a fair and balanced trial.

As shown by the legal history of BWS, the defence has the potential for change; so too must the role of the expert evolve to provide a clearer understanding of the woman's situation, actions, and mindset. Expert testimony must go beyond the declaration of an unwell victim who has learned helplessness. The above-proposed checklist provides a detailed look at the many factors that influence violent incidents involving battered women. It is hoped that these checklists will serve as a guide for expert assessment and testimony in BWS cases.

We have developed this checklist as an adjunct to assessment where the issue of a BWS defence arises. There are no definite lines between those that qualify for the defence and those that do not. However, it is important that the expert consider all the evidence available in coming to a conclusion. We have found that using this checklist helps to cover all the essential elements an expert must consider in order to conclude that a woman satisfies the criteria for BWS. In particular, this updated checklist can help experts to cover all issues comprehensively in preparation for giving testimony regarding the five issues that Justice Wilson defined as the expert's duty to assess. In addition, the final question of why the particular night was different from all other nights renders the defence not only understandable but provides a firm foundation for an affirmative defence.

Conflict of Interest: none

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