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Battered Woman Syndrome, Diminished Responsibility & Women Who Kill: Insights from Scottish Case Law

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Abstract

*Using Scotland as a case study, this article maps the development of Battered Woman Syndrome in law. It looks to the potential space for development that has been created by the recent case of *Graham v HM Advocate*, concluding that such a move would be an important step and one with significant implications for domestic abuse policy and the treatment of female accused more widely.*

Introduction

Using the recent case of *Wendy Graham v HM Advocate* as a facilitator, this article will contribute to literature which has examined Battered Woman Syndrome and female perpetrated homicides arising from domestic abuse. It will provide an original comparative analysis of how Battered Woman Syndrome is currently utilised by Scottish Criminal Law and the scope which now exists for further development of the law in this area. It will also provide discussion of previously unexamined empirical data which speaks to how the syndrome is used in practice. What will be concluded is: that within Scotland, *Graham* offers an opportunity for a move away from the problematic Battered Woman Syndrome, but also that such a move would generate international attention. Limiting the role of Battered Woman Syndrome in law has particular significance in the context of partial defences to murder, but more importantly, the conclusions that will be offered here have crucial implications for how law and society responds to female perpetrated fatal domestic abuse. Domestic abuse is an international problems, and so too are female perpetrated homicides which arise from it. Resultantly, the insights which can be gleaned from *Graham* and the Scottish landscape can contribute to existing international research and policy making surrounding domestic abuse and women and justice more generally.

This article will begin by providing an overview of the recent developments of diminished responsibility in Scots Law, particularly following *Galbraith*. It will then explore the recent decision in *Graham* in more detail. From this, the history of 'Battered Woman Syndrome' will be outlined, followed by an examination of where this syndrome sits under current psychological and psychiatric diagnostic frameworks. *Graham* also raises interesting questions about the qualifications of experts required in cases which involve the interaction of drink and drugs with an existing psychological condition. As such, the role and qualification of the expert will be considered in closer detail. Lastly, it will be interrogated whether diminished responsibility is in fact the 'domestic abuse defence'. Following from the decision in *Galbraith*, it has been commented in Scotland that diminished responsibility is likely to be the most relevant choice of defence for women who kill their abusive partners. This claim will be explored in detail for the first time, using Scotland as a case study. In particular, it will be interrogated in light of empirical work which has found that

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approximately a quarter of all female perpetrated homicides in Scotland each year occur within the context of women killing their abusive partners¹, which in itself points to the significance of this category of accused.

Galbraith (No.2) and the Development of Diminished Responsibility in Scots Law

When discussing diminished responsibility, Chalmers has previously commented that it “has, in Scotland, long been a doctrine in search of a definition.”² Historically considered a distinctively Scottish plea, diminished responsibility first appeared in the 19th century.³ Under common law, the modern law of diminished responsibility was provided for by *Galbraith*, thereafter being placed in statutory form. The Criminal Justice and Licensing (Scotland) Act 2010 inserted into the Criminal Procedure (Scotland) Act 1995, section 51B which states:

A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on the grounds of diminished responsibility if the person’s ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of mind.

This definition essentially restated the law as it was set out in *Galbraith*⁴, but one significant clarification existed in relation to the role of drugs and alcohol. *Galbraith* had not directly commented on this issues and did not refer to unreported case law which had.⁵ Section 51B(3) now clarifies that, although voluntary drug and/or alcohol intoxication cannot form the basis of the defence itself, the influence of drugs and alcohol will not rule out diminished responsibility *per se*. This clarification of the common law understanding of the plea was seen as significant enough to offer justification for putting the plea into legislative form following *Galbraith*.⁶

Prior to *Galbraith*, in order to be successful with diminished responsibility, a mental disease or a state of mind virtually bordering on insanity had to be shown.⁷ *Galbraith*’s appeal against a conviction of murder rested on the basis of misdirection, with the appellant arguing that, although the directions of the trial judge regarding diminished responsibility accurately stated the law as set out in binding authorities, these authorities themselves

¹ R. McPherson, *Access to Justice: Women who kill, self-defence and pre-trial decision-making* (PhD Thesis: Glasgow Caledonian University, 2013) 15-16.

² J. Chalmers, ‘Abnormality and Anglicisation: first thoughts on *Galbraith* (No,2)’ (2002) 6(1) *Edinburgh Law Review* 108.

³ Although the plea began to take form in the 17th century, see T.B. Smith, *Studies Critical and Comparative*, 241-251 (Edinburgh: W.Green, 1962). It was not always referred to as diminished responsibility, described in the case of *Dingwall* as “murder with extenuating circumstances”, J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial*, at 219 para 11-01 (Edinburgh: W.Green, 2006). It was not adopted in England until 1957, Homicide Act 1957, s.2 as amended by Coroners and Justice Act 2009, s.52. For a discussion of the English position see R.D. MacKay, ‘The new diminished responsibility plea: More than mere modernisation’, chapter in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, edited by A. Reed and M. Bohlander (Surrey: Ashgate, 2011).

⁴ *Galbraith v HM Advocate* (No.2) 2002 JC 1.

⁵ *HM Advocate v McLeod*, unreported, discussed by Chalmers and Leverick, above n. 3 231 at para 11-13.

⁶ Scottish Law Commission, *Insanity and Diminished Responsibility*, Report 195 (2004) section 3.5.

⁷ *HM Advocate v Savage* 1923 JC 49.

“contained erroneous and unduly narrow statements of the law on this point”⁸- in particular, the requirement that the accused be suffering from a ‘mental disease’ and was required to satisfy the four criteria set out in *Savage*⁹. Accordingly, the trial judge's directions in *Galbraith* were argued to be unduly narrow.¹⁰ Upon appeal, this was agreed and the new test for diminished responsibility was clarified: that there must be an abnormality of mind and that this abnormality substantially impaired the accused’s ability to control their conduct. A mental disease was not required to satisfy the plea. In *Galbraith*’s context, where her claim was that she had suffered long term abuse at the hands of her husband, the appropriate direction to the jury was that if they accepted evidence of the abuse and the psychologist’s account of the effects of abuse, then a verdict of culpable homicide could be returned. Second, the criteria in *Savage* did not need to be adhered to absolutely, instead only being an indication of the *types of things* an accused would need to prove. The appeal was successful and a re-trial was ordered for Kim Galbraith, whereupon the Crown accepted a guilty plea to a reduced charge of culpable homicide on the basis of diminished responsibility.¹¹

Commenting on *Galbraith*, Chalmers notes that the case was a disappointing decision from the point of view that it failed to address the theoretical doctrine of diminished responsibility and did not address how diminished responsibility interacts with other defences, specifically whether the abnormality of mind could be attributed to the ordinary person for the purposes of provocation, self-defence or coercion.¹²

In *Graham* the court represents what is likely to be a commonly held view of *Galbraith*: that it “was, and is, a very well known, if not somewhat controversial, authority”.¹³

Wendy Graham v HM Advocate

In 2008 Wendy Graham was charged with the murder of her partner, Mark Thomson. A defence was advanced on the basis of diminished responsibility, which was later withdrawn from the jury’s consideration. Graham was unanimously found guilty of murder and sentenced to life imprisonment with a punishment part of 11 years.

In 2013 an application was lodged for an extension of time in which to lodge a notice of intention to appeal against Graham’s conviction.¹⁴ The basis of this application was defective representation at trial, and in particular the fact that Graham’s original advisors had not made use of a further report available to them from a State Hospital psychiatrist which would have assisted with a claim of Battered Person Syndrome, to be used as evidence of

⁸ *Galbraith v HM Advocate (No.2)* 2002 JC 1.

⁹ *HM Advocate v Savage*, 1923 JC 49.

¹⁰ In particular *Connelly v HM Advocate* 1990 JC 349 had wrongly interpreted the *ratio decidendi* of the earlier case of *HM Advocate v Savage* 1923 JC 49 and in doing so have unduly narrowed the scope of the plea. This misinterpretation related to the four criteria which had been discussed in *Savage*: (i) aberration or weakness of mind (ii) mental unsoundness (iii) a state of mind bordering on though not amounting to insanity (iv) a mind so affected that responsibility is diminished from full responsibility to partial responsibility. It was wrong to understand this as meaning that an accused could not avail themselves of the plea unless they satisfied each of those conditions discussed by the court in *Savage*.

¹¹ McPherson, above n. 1.

¹² Chalmers, above n. 2.

¹³ [2018] HCJAC 57 at para 92.

¹⁴ [2013] HCJAC 140.

the mental abnormality required for diminished responsibility. The application was refused, with the Court holding that inadequate explanation had been provided for the significant delay of five years which had elapsed since her conviction.

Following from this, the case became the subject of a review by the Scottish Criminal Cases Review Commission (SCCRC). They referred the case to the High Court on the basis of new evidence pertaining to Graham's psychological state at the time of the killing, specifically evidence from chartered psychologist, Dawn Harris.¹⁵ In the most recent consideration of Graham's case, the Appeal Court rejected the grounds for appeal advanced by the SCCRC.

The resulting discussion in *Graham v HM Advocate* is a significant one. It considers the qualifications required of experts in diminished responsibility cases (and murder cases more generally) and, for the first time, 'Battered Person Syndrome' and the role that this syndrome may have in establishing the mental abnormality required for diminished responsibility.

Battered Woman Syndrome

Undoubtedly part of that controversy arose from Kim Galbraith's claims of domestic abuse and the unusual facts which it must be said do not typically correspond with other cases where women have killed their abusers, in particular: her use of a firearm, killing her husband when he was sleeping, the premeditated nature of the killing and originally offering an untrue version of events to the police.¹⁶ As the above comments from *Graham* suggest, the case received a great deal of press attention- to the point that an order was sought to postpone the publication of the report of proceedings due to hostile press coverage which was anticipated to be experienced during any retrial.¹⁷

During the original trial, evidence had been led by the Defence from a psychologist who noted that the accused had been suffering from post-traumatic stress disorder and learned helplessness- essentially that Kim Galbraith had been suffering from 'Battered Woman Syndrome' (BWS). Although the language of BWS had been used in cases before *Galbraith*¹⁸, it was undoubtedly this case which catapulted BWS into high profile status in Scotland, both in terms of popular understanding, and within the Appeal Court which rarely presides over cases of this nature (since most female perpetrated partner homicides are resolved by way

¹⁵ [2018] HCJAC 57.

¹⁶ Those who note that such killings are rarely pre-meditated are: C.P. Ewing, *Battered Women Who Kill: Psychological Self-Defense As Legal Justification*, at 87 (Massachusetts: Lexington Books D.C Health & Co, 1987); A. Browne, *When Battered Women Kill*, at 135 esp. (New York: Free Press, 1987); R.S Ogle and S. Jacobs, *Self-defense and Battered Women who Kill: A New Framework*, p.44 (Westport: Praeger Publishers, 2002). Ewing also notes that women usually admit to carrying out such killings (at 45) as does W. Chan, *Women, Murder and Justice*, at.49 (New York: Palgrave, 2001) and E.S.L. Peterson, 'Murder as self-help: Women and intimate partner homicide', (1999) 3(1) *Homicide Studies* 30 at 30. Guns are used more in an American context and Browne notes that they were used in 81 per cent of cases in her study (at 140) but this runs contrary to other studies which have found that women are more likely to use cutting instruments in homicides- a fact which has been linked to their domestic role, M.E. Wolfgang, *Patterns of Criminal Homicide*, at 87 (Philadelphia: University of Pennsylvania Press, 1958). In Scotland, the most common method of all homicides is use of a knife, see Scottish Government, *Homicide in Scotland 2017-2018* (2018) at 12 table 7.

¹⁷ *Galbraith v HM Advocate* 2001 SLT 465.

¹⁸ See for example *HM Advocate v Margaret Murray* 2000, unreported as discussed in *The Herald*, 29 Sep 2001, *Disabled Woman Jailed for Killing Husband*, available at: https://www.heraldsotland.com/news/12142715.Disabled_woman_jailed_for_killing_husband/

of a guilty plea being tendered to a reduced charge of culpable homicide¹⁹).

The syndrome itself was developed by Lenore Walker in 1979²⁰ to help the fact-finder apply legal requirements to a domestic abuse situation. The syndrome consists of a cycle theory and a theory of learned helplessness.²¹ The cycle theory postulates that male violence against women typically follows a repeated three phase pattern: a period of heightened tension, a sudden eruption of violence from the man following some small trigger and a loving contrite phase during which the male pleads for forgiveness, is affectionate and swears off violence. Learned helplessness is a theory which suggests that the randomness and apparent unavoidability of a woman's beatings lead her to accept her fate and to develop a number of common characteristics, such as low self-esteem, self-blame for the violence, anxiety, depression, fear, general suspiciousness and the belief that only she can change her predicament.²²

This development arose during a larger movement in the 1970s which occurred in relation to legal recognition of violence against women. By the 1980s legal acceptance of BWS had begun, corresponding to the time of Walker's research.²³ Initially, the syndrome was helpful in the sense that it allowed expert testimony to be provided (often by Walker herself) which allowed juries to be directed on myths and misconceptions regarding domestic abuse, for example 'why doesn't she leave?' - much like the rationale for the recent developments in Scotland which provide that judicial direction should be given on delayed reporting or a lack of physical resistance offered by the complainer in rape cases.²⁴ However, like much of the "knowledge explosion"²⁵ which has occurred in Scotland in relation to domestic abuse, the focus remains on the victim as the complainer in the proceedings, rather than the accused. BWS remains one of the only developments introduced with the aim of allowing an accused's actions to potentially be viewed as reasonable, in some jurisdictions, even potentially securing an acquittal²⁶. The benefits to women, therefore, were obvious when it was first introduced.

¹⁹ McPherson, above n. 1.

²⁰ L.E. Walker, *The Battered Woman* (New York: Harper & Row, 1979).

²¹ See M.E.P Seligman, *Helplessness: On Depression, Development and Death* (San Francisco: Freeman, 1975).

²² L.E. Walker, 'Battered Women and Learned Helplessness' (1977-78) 2 (Numbers 3-4) *Victimology: An International Journal* 525.

²³ B.L. Russell, *Battered Woman Syndrome as a Legal Defense: History, Effectiveness and Implications*, 131-133 (North Carolina: McFarland, 2010).

²⁴ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s. 6.

²⁵ C Connelly and K. Cavanagh, 'Domestic abuse, civil protection orders and the 'new criminologies': is there any value in engaging with the law?' (2007) 15(3) *Feminist Legal Studies* 259.

²⁶ This is because in some jurisdictions, notably American states, BWS has increasingly been incorporated into self-defence to deal with issues such as imminence and reasonableness whilst also being used to combat the stereotypes known to exist amongst jurors, as identified by the National Judicial Education Program 2008, Russell, above n. 23 at 57, 5 and 117. Ogle and Jacobs note that Louisiana is the only American state where BWS is used as part of a diminished capacity defence, above n. 16 at 137.

However, for some, using the syndrome in the context of self-defence has been problematic. Gillespie, for example, comments that BWS has not been used in a way that examines reasonableness, but instead has become an excuse for a form of female irrationality, therefore falling back on the same problems in the context of a different defence, C. Gillespie, *Justifiable Homicide: Battered Women, Self Defense and the Law*, at 180 (Columbia: Ohio State University, 1989). Likewise, for Ewing, an expert can say why a woman remained in an abusive relationship, but for him, an expert cannot explain the reasonableness of her homicide, Ewing, above n. 16 at 55.

However, despite the laudable aims of BWS, serious criticism has been levelled at both the concept and Walker's research methodologies.²⁷ At a theoretical level, criticisms have been levelled at the stereotypical nature of BWS. Because there is an attempt to mould all experiences of abuse into the straightjacket of a syndrome, the issue for experts and the courts arguably becomes an essentialist approach of consulting a check list. Where the fact-finder fails to find evidence of BWS, the relevance of the accused's history and experiences may be ignored altogether, leaving her worse off than if the background circumstances are simply relayed to the court. For some, BWS also fails to explain how a woman goes from being a victim to a killer.²⁸

More generally, using expert testimony and syndromes to 'explain' a woman's actions is an issue which has divided feminists. Whilst it is recognised that juries in particular require explanations as to why a woman has killed, others question why an expert is needed to accommodate a woman's experiences into law.²⁹ Nicolson has previously commented that politically, the use of BWS (or indeed any syndrome) diverts attention away from the important moral and political issues at play in the trial of female accused, by focusing on their personality and psychology and by privileging expert evidence; encouraging pathologisation of the accused.³⁰ Even where there is no trial, the syndrome pathologises women, placing them at the centre of the failings which have taken place in the relationship. Recognising such problems, Raitt and Zeedyk note that BWS was not meant to be a mental health excuse, yet now is used in this way (whilst noting the original potential for success it had).³¹ For them, in practice, the potential for success has been prevented by what they call the 'implicit relation' of law and psychology: supposed objectivity, adherence to male standards and individualism - all of which make women's experiences seem abnormal.³² Although BWS may have achieved short-term, worthy, contributions to individual cases, for Raitt and Zeedyk the long term effect of BWS on women as a group is negative, preserving male assumptions and biases "nourished in a guise of scientific objectivity".³³

A further concern about BWS is the language itself. Elizabeth Schneider, for example, considers that the term 'battered woman' is reductive and invokes negative connotations, suggesting that the woman is the problem, not her experiences.³⁴ More than being reductive and essentialist in nature (pathologising women and expecting victims to look a certain way), it suggests of a lack of agency. The significance of this more broadly is that institutions and

²⁷ For an in-depth account of the failings in Walker's methodology see D,L Faigman, 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72 *Virginia Law Review* 619 and D.L Faigman and A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Arizona Law Review* 67. See also Russell, above n. 21 at 95.

²⁸ Ogle and Jacobs, above n. 16 at 54.

²⁹ K. O'Donovan, 'Law's knowledge: The Judge, the Expert, the Battered Woman, and her Syndrome' (1993) *Journal of Law and Society* 427 at 430; Raitt, F.E. and Zeedyk, M. *The implicit relation of psychology and law: Women and syndrome evidence*, ch. 2 esp (London: Routledge, 2000).

³⁰ D. Nicolson, 'What the Law Giveth, It also Taketh Away: Female Specific Defences to Criminal Liability', chapter in *Feminist Perspectives on Criminal Law*, edited by D. Nicolson and Bibbings, L. (London: Cavendish, 2000); Raitt. and Zeedyk, above n. 29 at ch. 2 esp.

³¹ Raitt and Zeedyk, above n. 29 at ch.4.

³² *Ibid.*

³³ *Ibid.* all at 86. See also J. Loveless, R v GAC: battered woman syndromization (2014) 9 *Criminal Law Review* 655 which examines BWS in the context of duress, but points also to the outdated nature of the syndrome and problems which it entails.

³⁴ E.M. Schneider, *Battered Women and Feminist Lawmaking*, 61 (London: Yale University Press, 2000). Although Schneider nevertheless opts to use the term as she feels it is the most common term associated with women in this predicament.

discourses can influence how socially acceptable something is³⁵: the way the law deals with women who have killed their abusers impacts on how the issue is considered and framed within society and even how women themselves come to understand their experiences of violence in the home. Social terms, such as 'battered woman' and 'battered woman's syndrome', can then interpellate³⁶ women in a way which reinforces and perpetuates gender scripts.³⁷ Despite such concerns, the terminology can be difficult to avoid, even amongst feminist commentators.³⁸

In *Graham*, there is no reference to BWS, with the Court instead adopting the terminology of 'Battered Person's Syndrome' (BPS). On one reading, the adoption of gender-neutral language could be seen as an appropriate development. However, if viewed through the lens of concerns regarding the language of 'battered' itself, then such terminology arguably remains problematic for the accused in question, regardless of the gender-neutral adaptation. Interestingly, however, the close discussion paid to BPS in *Graham* in terms of how such a syndrome is officially diagnosed arguably renders these concerns less pressing.

Current Diagnostic Framework of BPS

Two manuals are currently used when considering what psychological and psychiatric conditions can fall within the remit of capacity defences. The first is the *Diagnostic and statistical manual of mental disorders* (DSM), published by the American Psychiatric Association. This offers standard criteria for the classification of mental disorders. The fourth edition of this publication defined BWS as an off-shoot of post-traumatic stress disorder³⁹ and it was this understanding that was adopted in *Galbraith*. The second manual is the *International Classification of Diseases and Related Health Problems* (ICD) which is prepared by the World Health Organisation and covers a wider variety of health issues.

The Court in *Graham* gave closer consideration to the diagnosis of BPS- the same syndrome as BWS, only described in these gender-neutral terms. In particular, the opinion of the clinical psychologist appointed by the SCCRC, Dawn Harris, noted: that BPS is "too vague and not a diagnostic term". For Harris, the appellant's behaviour was 'better understood from the viewpoint of a traumatised individual.'⁴⁰ In his evidence for the Crown, psychiatrist Professor Thomson refers to the Scottish Government requirement that all diagnosis should be made using ICD-10⁴¹, rather than the American Psychiatric Association's DSM-V, usually

³⁵ C. Weedon, *Feminist Practice and Poststructuralist Theory*, 2nd edn, 76 (Oxford: Blackwell Publishers, 1997).

³⁶ The term 'interpellate' is used by Butler to describe the naming method which provides subjectivity and social identity to an individual. The term itself, however, was developed by Althusser.

³⁷ A. Carline, *Women who kill their abusive partners: An analysis of Queer Theory, Social Justice and Criminal Law*, ch.2 esp. (PhD thesis, University of Hull, 2002); A. Carline, 'Resignifications and Subversive Transformations: Judith Butler's Queer Theory and Women Who Kill' (2006) 27(3) *Liverpool Law Review* 303. Indeed this could be termed as what Butler describes as 'hate speech'- speech acts which ultimately injures the recipient, J. Butler, *Excitable Speech: Contemporary Scenes of Politics*, 5. (New York: Routledge, 1996).

³⁸ For example, Carline who relies on queer theory and Butler's notion of gender as performative in her analysis of cases where women have killed their abusers avoids the terminology of 'battered women' in the title of her thesis but perhaps arguably in contradiction to the theoretical framework she adopts, the term is used throughout her work, Carline, above n. 37.

³⁹ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders DSM-IV-TR*, 4th edn (text revision) (Washington DC: American Psychiatric Association, 2000).

⁴⁰ [2018] HCJAC 57at para 47.

⁴¹ World Health Organisation, *International Statistical Classification of Diseases and Related Health Problems*, 5th edn (2015).

relied upon for psychological diagnosis.⁴² BPS is not contained within ICD-10 (or indeed a term used in the current DMS-IV). In her evidence, Professor Thomson was of the view that, despite the fact that BPS is not explicitly referred to or defined within ICD-10, it could, nevertheless, be considered a psychological condition relevant to diminished responsibility as defined in *Galbraith*. Assumedly, this is because BPS could be considered under the more general umbrella term ‘post-traumatic stress disorder’ (PTSD) which is defined in ICD-10.

The ICD-10 defines PTSD as being present when there is “a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone”.⁴³ It further stipulates that in a small proportion of cases, this may lead to an enduring personality change, described later as a response lastly for at least two years to a “catastrophic stress” such as torture, prolonged captivity with an imminent threat of being killed or prolonged exposure to life threatening situations.⁴⁴

It would appear that moving forward two situations could arise in the Scottish Courts: first, that the language of BWS/BPS will be replaced with the more general terminology of post-traumatic stress disorder. Given the problematic history of BWS, this is a potentially positive development and one which should be encouraged. The second situation more likely to arise as a result of *Graham* is that moving forward, evidence about post-traumatic stress disorder arising from domestic abuse is likely to have to be provided by a psychiatrist, rather than psychologist.

Qualifications of the Expert in Diminished Responsibility Pleas

Historically, diminished responsibility as a plea originally faced judicial scepticism, with it being feared that it could potentially require the admission of expert evidence as a matter of common practice.⁴⁵ However, attitudes towards expert evidence have since evolved, with expert testimony now being admitted across a wide range of cases, not just those which involve a plea of diminished responsibility.⁴⁶ Although it is not a statutory requirement that psychological or psychiatric evidence is provided by the Defence in support of diminished responsibility, given the fact that section 51B(4) provides that the burden of proving the relevant condition lies with the accused (to be satisfied on the balance of probabilities), in practice, it would be very difficult to be successful with such a plea without reference to expert testimony. The relevance of the expert within the context of diminished responsibility, is, therefore, clear.

Graham considered the role of the expert itself; both in terms of providing evidence about mental abnormality in the context of a diminished responsibility plea and the qualifications required to give evidence in murder trials more generally. On this second point, the court invited the Scottish Law Commission to give further consideration to the qualifications which should be demanded by the court in murder trials as part of their current review of homicide.⁴⁷

⁴² [2018] HCJAC 57 at para 61.

⁴³ World Health Organisation, above n. 40 at F43.1.

⁴⁴ *Ibid* at F62.0

⁴⁵ *Carraher v HM Advocate* 1946 JC 108.

⁴⁶ For a discussion of the development of psychological evidence into law see Raitt and Zeedyk, above n. 29 at ch. 2 esp.

⁴⁷ [2018] HCJAC 57 at para 124.

As referred to in *Graham*, the current test for the admission of expert testimony comes from the case of *Kennedy v Cordia (Services) LLP*⁴⁸. Although a civil matter relating to personal injury, the test set out by the Supreme Court for the admission of expert testimony has since been adopted by the Appeal Court in Scottish criminal matters. This four-part test holds that skilled witnesses can give evidence of their opinions to assist the court as long as (i) such evidence is necessary to assist the court in its task (ii) they have the necessary knowledge and experience (iii) the presentation and assessment of their evidence is impartial and (iv) there exists a reliable body of knowledge or experience underpinning the discipline to which the expert is affiliated.

A key question raised in *Graham* is whether a psychologist does meet the Kennedy criteria when they are being asked to consider how drugs and alcohol may have interacted with the mental disorder in question. In *Graham*, this was a particularly pertinent point given the long standing drug and alcohol problems which had been experienced by the appellant.

Some uncertainty existed about the exact levels of intoxication that Wendy Graham experienced before the fatality (which indeed seems entirely understandable given the severity of the situation and levels of intoxication alluded to), with the Court pointing to the inconsistency of Graham's account.⁴⁹ It would appear that in the hours leading up to Mr Thomson's death, Graham had consumed up to six cans of lager and a small amount of Bacardi in addition to both prescribed and illegal diazepam (5mg and 10mg), methadone, the anti-depressant mirtazapine, and amphetamine. Regrettably, this level of consumption was not anomalous for Graham, instead representing her long term drug and alcohol addiction. This is perhaps best evidenced by police officers' conclusion that she was not obviously intoxicated at the time of her arrest, was fully orientated and resultantly, fit for interview.⁵⁰

The relationship between Graham's mental health and substance abuse was clearly a complex one. She had a history of depression which coincided consistently with heroin and alcohol addiction. It would appear that as her personal circumstances became worse (paternal alcoholism, maternal psychiatric care, violence in her first marriage entered into at a young age and then her relationship with Thomson) her reliance on drugs and alcohol increased and as her drug and alcohol addiction worsened, her mental health deteriorated. Unfortunately, a common cycle for many.

Crown expert, specialist registrar Dr Morris, who had examined the appellant was of the view that Graham's intoxication would "outweigh any possible evidence of a mental disorder" and that symptoms which could have been attributed to a mental disorder such as Emotionally Unstable Personality Disorder (which Graham had previously been diagnosed with), could also have been explained by the drug and alcohol problems experienced by the appellant.⁵¹ The second Crown expert, psychiatrist Dr Lenihan, was similarly of the view that despite the EUPD diagnosis, the most prominent issue being suffered by Graham was her dependence on drugs and alcohol.

⁴⁸ [2016] UKSC 6.

⁴⁹ [2018] HCJAC 57 at para 13.

⁵⁰ *Ibid.*

⁵¹ *Ibid* at para 25.

Nicola Wake discusses the role of intoxication in the context of diminished responsibility, including Scottish Law in her comparative analysis.⁵² She discusses the four scenarios which were posed by the Scottish Law Commission in their discussion of diminished responsibility before the introduction of the Criminal Justice and Licensing (Scotland) Act 2010: where there is dependence but the accused is not necessarily intoxicated at the time of the fatality whether there exists mental abnormality and intoxication, where there is dependence and intoxication at the time of the fatality and where there is intoxication but no abnormality of mind. The view of the SLC view was that dependence syndrome could be taken into account, but that as per *Brennan*⁵³, where no abnormality of mind existed and the issue was one of voluntary intoxication, the accused could not avail themselves of diminished responsibility.

Other jurisdictions, faced with similar problems and have suggested that diminished responsibility probably can include drug and/or alcohol dependency. In *Stewart* the court considered the factors that could be considered: the seriousness and extent of the alcohol dependence, the ability of the defendant to control their alcohol intake, whether the defendant is capable of abstinence and whether there existed reason for drinking more than usual.⁵⁴ Elsewhere, the Privy Council (hearing a case from the Court of Appeal of Trinidad and Tobago) have assumed that this position would apply to drugs as well but again only if the appellant was substance dependant.⁵⁵ In *Daniel*, the defendant had suffered from alcohol and drug induced psychosis. The Court held that any abnormality of mind arising from transient intoxication was irrelevant, but held that an exception may arise where the intake was the involuntary result of “irresistible craving or compulsion.”

As Wake comments, the issue of the relationship between defences and intoxication is a complex one. She refers to the (English) Law Commission which has considered that resolution could be achieved through judicial development.⁵⁶ Perhaps *Graham* was such an opportunity for the Appeal Court in Scotland to consider this aspect of diminished responsibility more closely. Clearly many accused who will be suffering from an abnormality of mind, will be likely to have problems with alcohol and/or drugs. It would appear unlikely that Wendy Graham will be the last accused to go before the court where the issues are complex and not easily extricable from one another, but yet, the answer as to how to interpret this complexity in the context of diminished responsibility appears no closer following *Graham*.

The Domestic Abuse Defence?

The view of the SCCRC, who advocated that there did exist psychological evidence in support of *Graham*, was that “the impact of complex trauma, dissociation and PTSD would appear particularly relevant in a case in which a woman is charged with murdering an apparently abusive partner”⁵⁷. This is an understandable conclusion and one which echoes previous academic commentary on the matter. For example, Connelly has previously commented that

⁵² N. Wake, ‘Recognising acute intoxication as a diminished responsibility? A comparative analysis’ (2012) 76(1) *Journal of Criminal Law* 71.

⁵³ 1977 JC 38.

⁵⁴ R v Stewart [2009] EWCA 593.

⁵⁵ Daniel v The Queen [2012] UKPC 15.

⁵⁶ Wake, above n. 52.

⁵⁷ [2018] HCJAC 57 at para 54.

post *Galbraith*, diminished responsibility had become the vehicle for women who kill their abusers to avoid murder convictions in Scotland.⁵⁸

Elsewhere, Chalmers, has commented that existing definitions of both diminished responsibility and provocation in Scots Law are such that they ostensibly have limited application in the context of cases where women kill their abusive partners⁵⁹ (although he also recognises that despite this, there appear to be no murder convictions amongst such cases⁶⁰). At his time of writing, Chalmers further remarked that a lack of empirical research in Scotland post-*Galbraith* makes it difficult to gauge how the new definition is operating.

The starting point for such an empirical examination is, of course, to find out how many men are killed by their partner or ex-partner every year. The Scottish Government's annual statistical release on homicide provides such information.⁶¹ It presents information on the location of a homicide, the main method of killing, the age and gender of the accused person, and the relationship of the accused person to the victim.⁶² Within the 'relationship' category, the sub-categories of relationships are: Son/daughter; Parent; Partner/ex-partner; Other relative; Acquaintance⁶³; Stranger⁶⁴; Unknown. What must be recognised is that prior to 2000-01, the category of 'partner' did not necessarily include ex-partners as these were occasionally recorded as 'acquaintances'⁶⁵, meaning that information published after this time captures domestic abuse fatalities more accurately (since the point after a relationship has ended has been recognised as a particularly dangerous time for women in terms of when they are most likely to be killed⁶⁶).⁶⁷ However, although partner/ex-partner is now

⁵⁸C. Connelly, *Women Who Kill Violent Men*, paper delivered at Sir Gerald Gordon Seminar on Criminal Law (University of Glasgow, 2011). Although Casey took provocation as the most relevant plea as her starting point in her doctoral research on the issue she also commented that (pre *Galbraith*) diminished responsibility was a favoured defence strategy in Scotland, J. Casey, *Legal Defences for Battered Women Who Kill: The Battered Women Syndrome, Expert Testimony and Law Reform* (PhD Thesis, University of Edinburgh, 1999).

Although in the context of *Graham*, doubt was cast on Wendy Graham's account of abuse as intimate terrorism at the hands of Mr Thomson with it being characterised as a relationship involving "violence on both sides" (at para 4). Previous evidence from Lothian and Borders Police which indicated that on numerous occasions the police were called to domestic abuse incidents, *Wendy Graham v HM Advocate* [2013] HCJAC 140 at para 4, and evidence was led that Mr Thomson also was prone to aggression when under the influence of alcohol.

⁵⁹J. Chalmers, 'Partial Defences to Murder in Scotland', at 171, chapter in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, edited by A. Reed, and M. Bohlander (Surry: Ashgate, 2011).

⁶⁰*Ibid.* 172. McPherson, above n. 1 identifies 61 relevant cases where woman had killed abusive partners in Scotland, of which, six were convicted of murder (five of which went to trial) showing that whilst such cases may not have been 'high profile' or reported in legal journals, they have occurred.

⁶¹Categorised as homicides from a police perspective (in the sense of crimes charged by the police as homicides), as opposed to being categorised in terms of the ultimate conviction.

⁶²See Scottish Government, *Crime and Justice*, 'Violent Crime-Homicide'(2012) available at: <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendHom>

⁶³'Acquaintance' is broken down into four further categories: friend or social acquaintance, business or criminal associate, rival gang member and other known person.

⁶⁴'Stranger' is broken down into three sub-categories: victim known to accused, victim unknown to accused and unknown.

⁶⁵Scottish Government, *A National Statistics Publication for Scotland Homicide in Scotland 2010-11*, Annex 1.7 (Edinburgh: Scottish Government Statistician Group, 2011).

⁶⁶Browne, above n. 16 109; R.E. Dobash and R.P Dobash, 'Lethal and Nonlethal Violence Against an Intimate Female Partner: Comparing Male Murderers to Nonlethal Abusers' (2007) 13(4) *Violence Against Women* 329.

recorded as a single category, this does not assist in terms of identifying the homicide as one which has followed domestic abuse.⁶⁸ Given that the Scottish Government, like many central bodies, do not draw connections between their two datasets of homicide and domestic abuse, what can be taken from the Scottish Government statistics is the total number of homicides for each year where the male was the victim and the accused was either a partner or ex-partner. Whilst this cannot indicate whether the case involved a history of domestic abuse, what can be said is that these annual figures represent the likely maximum potential number of cases in which a woman kills her abuser⁶⁹ each year in Scotland (or indeed any jurisdiction which publishes homicide statistics and records the relationship between the victim and the person charged with the offence).

Given that most cases of this nature are resolved by way of a guilty plea to culpable homicide, very few cases become the subject of legal reporting. Newspaper reports can, therefore, be used in an attempt to build up a picture of the landscape of cases which exist and indeed there exists precedent for using newspaper reports as a research method in this area of work. In noting the problems associated with accessing cases where woman kill men in the USA, Gillespie comments that the cases reported in legal journals are only the “tip of the iceberg”, and as such she discusses her reliance on press and “other sources” in her study on women’s use of self-defence.⁷⁰ Although the information selected for presentation by newspaper reporters is not consistent, it can provide context and background which can go on to supplement a more detailed investigation and analysis, and importantly provide information which is otherwise unavailable.⁷¹

Against this backdrop, previous Scottish research carried out by the author empirically examined this issue in more detail.⁷² This work identified cases where a woman killed her partner or ex-partner in the period of December 1988⁷³ to April 2013. Of the 71 cases identified using the methods described above, in ten, the context of the fatality appeared not to be domestic abuse, leaving 61 ‘relevant’ cases (51 cases where domestic abuse was reported and ten where the context was unclear).⁷⁴ Diminished responsibility was pled in

⁶⁷ Partner/ex-partner could, of course, relate to a same sex relationships. In the period examined in McPherson’s 2013, five homicides involved male victims being killed by their male (ex) partner, the (ex) partner, above n. 1 at 63.

⁶⁸ Similarly, the motives do not help since as fatal domestic abuse could be categorised under a number of motives depending on the criteria used to categorise cases (which is unknown). Motives included within the Scottish Government’s statistics are: rage/fury, fight/quarrel, jealousy, sexual, financial (theft or gain), feud/faction/rivalry, insanity, contract killing, suicide pact/mercy killing, other, unknown.

⁶⁹ It could also be the case that a woman kills an abusive man with whom she was not in a relationship with, for example an Uncle or family friend.

⁷⁰ Gillespie, above n. 26 at x. Gillespie also notes that only three American appeal cases exist which deal with self-defence for a female defendant since the beginning of the 20th century (at 48-49).

⁷¹ In 1994, British journalists Hilary Kingsley and Geoff Tibballs edited *No Way Out: Battered Women Who Kill* (London: Headline Books Publishing, 1994) which gave more detailed account of cases where woman had killed their partners following domestic abuse. However, the cases looked at were generally high profile (Francine Hughes ‘The Burning Bed’, Sara Thornton, Kiranjit Ahluwalia) and were pre-1994, when the book was published.

⁷² McPherson, above n. 1.

⁷³ This 1988 case was not reported until 1989. 1989 was provided as a natural cut off for the search period since the ‘Herald’ online database, which was a main source of information during the research, did not go further back than this date.

⁷⁴ Given the commentary which suggests that both male and female partner homicides are preceded by male perpetrated domestic abuse (R. Bradfield, ‘Women Who Kill: Lack of Intent and Diminished Responsibility as the ‘Other’ Defences to Spousal Homicide’ (2001) 13(2) *Current Issues in Criminal*

five cases (accepted in four). Provocation was pled in 18 of the cases (accepted in 16). In a further six of the cases it would appear that the plea was a 'mix' of both pleas, with one containing additional claims of self-defence (all six resulted in a guilty plea for culpable homicide being accepted without trial). In two further cases, again where a guilty plea to culpable homicide was accepted without trial, the provocation plea also appeared to contain elements of a self-defence claim.⁷⁵ This research, therefore, confirmed that whilst diminished responsibility plays a role in this context, it has not become a vehicle for women to avoid murder convictions in the way Connelly suggested. Indeed, provocation remains the most significant plea in this context. But interestingly, BWS also appears to form part of the discussion amongst provocation pleas, albeit in a less formal capacity.⁷⁶ In pleas of provocation, even where BWS is not explicitly mentioned, it can be seen that the evidence has been submitted of depressive illness and mental incapacity. For example, in the appeal against sentence of Barbara Cassidy it was noted:

More broadly as far as the background is concerned we were told that the appellant was on anti-depressants and reports from Cornton Vale indicate that she was perhaps suffering from what could be described as depressive illness... The sequel [of the fatality] is one in which she has continued to suffer from considerable anxiety and depression.⁷⁷

In other cases, more than simply citing depressive illnesses, the defence requested 'psychological help' in respect of such illness as part of a mitigated disposal.⁷⁸ BWS, therefore, has significance beyond diminished responsibility. In England and Wales, the introduction of the loss of control partial defence under the Coroners and Justice Act 2009⁷⁹ invited consideration of the role of BWS in defences other than diminished responsibility. In theory, it was considered that BWS would not be able to be used under the new loss of control defence. Norrie discusses the development of the law in light of the 2009 Act, commenting that historically, as BWS became increasingly medicalised, the more it was considered unworthy of the provocation defence and more fitting to diminished responsibility. For him, a benefit of the new approach adopted by the 2009 Act encourages "defendants and their lawyers will be encouraged to portray themselves as ordinary people grievously harmed and acting out of a legitimate sense of anger at what has been done to them."⁸⁰ Discussing Norrie's comments, Weare concludes that whilst evidence of BWS will not be able to be used when utilising the loss of control defence, evidence of abuse can still

Law 143 143; J. Herring, *Criminal Law: Texts, Cases and Materials*, at 319 (Oxford: Oxford University Press, 2006); C. Wells, 'Provocation: The Case for Abolition', at 93, chapter in *Rethinking English Homicide Law*, edited by Ashworth, A. and Mitchell, B. (Oxford University Press, Oxford, 2000)), it was considered appropriate to include the 10 'unclear' cases in those considered.

⁷⁵ McPherson, above n. 1 at 218, table 1 esp.

⁷⁶ See for example McDonald v HM Advocate 1997 unreported. See The Herald, *Abuse Led to Stabbing*, 5 November 1997, available at: <http://www.heraldscotland.com/sport/spl/aberdeen/abuse-led-to-stabbing-1.371349>

⁷⁷ Cassidy v HM Advocate 1999 C645/98, unreported. Previously available on the Scottish Courts website at: <http://www.scotcourts.gov.uk/opinions/c64598.html>

⁷⁸The Herald, *Disabled Women Killed for Killing husband*, 29 September 2001, referring to the case of *HM Advocate v Murray*, 2001 unreported. Gillespie also notes a judicial comment where it was stated that it is in women's interests to be found guilty of killing an abuser so they could get the counselling required, Gillespie, above n. 26 at 27.

⁷⁹ S. 54.

⁸⁰ A. Norrie, The Coroners and Justice Act 2009-a partial defence to murder (1) Loss of control (2010) 4 *Criminal Law Review* 275 at 286.

be put before the court meaning that “battered women who plead loss of control will be labelled as victims”.⁸¹ More recently in England and Wales, Sally Challen has won leave to appeal against her murder conviction on the basis on expert evidence which suggests that she suffered from coercive control through her marriage. The forthcoming appeal will argue that understanding a woman’s actions through the framework of controlling and coercive behaviour is more appropriate than previous models which are based on the medicalisation of women- certainly an important moment for female defendants and one which could potentially take the law in a much needed new direction.

Conclusion

In terms of Scots law, moving forward, it seems likely, due to the complex and expected nature of mental abnormality and addiction, that psychiatric/medical qualification will be required of expert witnesses. Although *Graham* did not comment further on the role of syndrome dependency within diminished responsibility, it is hoped that forthcoming cases will offer further clarity on this important aspect of the plea.

However, as suggested, the Court in *Graham* has raised some interesting points with implications beyond diminished responsibility and Scottish criminal procedure. Although diminished responsibility is not necessarily the ‘go to’ position for women who kill their abusive partners, the legacy of BWS and the high profile nature of *Galbraith* are such that the associations are difficult to extinguish in a small jurisdiction. However, against the backdrop of the diagnostic developments in the ICD-10 (and DSM-IV) and resulting discussion in *Graham*, there is now an important opportunity to move away from a syndrome which has long been viewed as unhelpful and indeed damaging to women. This does not mean removing their experiences and potential psychological states from the perimeters of diminished responsibility, but instead means recognising them under the more general umbrella of PTSD. Limiting the role of BWS in diminished responsibility may also impact upon its application in provocation, which, in practice, has a more significant role to play in the context of domestic abuse fatalities in Scotland. The problems of BWS as a syndrome have been recognised internationally. As such, any jurisdiction’s gradual move away from the problematic syndrome would be something which ignites interest from further afield. The ‘knowledge explosion’ in Scotland in relation to domestic abuse has been recognised by academic commentators and policy makers alike, but as said, up until now this has been limited to the role of the complainer in criminal proceedings. There now exists an important opportunity to recognise that, at times, the victim of domestic abuse may later find themselves to be the accused in proceedings and an opportunity to move the discourse beyond outdated syndromes and pathologisation of female accused.

⁸¹ S. Weare, “The Mad” “The Bad” “The Victim”: Gendered constructions of women who kill within the criminal justice system (2013) 2(3) *Laws* 337.