The fact that a non-medical expert's evidence was admitted is a precedent in this area and may go some way to allaying the anxieties of those feminists concerned with the medicalising of women's experiences.[5] Instead of the defendant's individual psychology, Dr Easteal stressed the societal variables and the on-going violence that can contribute to the situational response of battered woman syndrome.

A clinical psychologist's evidence was also heard. This related specifically to the defendant whom he testified 'exhibited the indicia of battered woman syndrome': the subjective element of the test for duress.

The magistrate's decision and his in-court education

In the decision the magistrate stated that up to the close of the defendant's personal testimony he was sceptical about her evidence and the likelihood that an ordinary person would have failed to take opportunities available for escape. However, the expert testimony made him rethink his scepticism: 'Many of my reasons for scepticism appear to be explicable by the symptoms of battered woman syndrome'. The significance of this statement is that it implies that the expert evidence assisted him to understand the defendant's behaviour both in relation to the offences and to her credibility as a witness.

Given that newly acquired knowledge, he concluded that:

- expert evidence was relevant, and

  in light of that evidence, he could not be satisfied beyond reasonable doubt that the defendant's mind was not overborne by the threats or that a person of like age and sex in similar circumstances would not have done the acts or would have availed themselves of opportunities of retreat.

The information was therefore dismissed and the defendant was discharged. Of particular significance in this decision is that a magistrate learned that reasonable behaviour for a battered woman may not be the same as it is for others: a lesson for the judiciary in understanding that what they, as white middle class males see as reasonable, is limited by their own narrowly defined perceptions. Another breakthrough was the acceptance of non-medical expert evidence about battered woman syndrome. All in all, this was a notable case which hopefully will act as a precedent or as a model in other similar situations. Certainly an essential first step for non-gender based 'justice' is to enable the judiciary to understand the battered woman's experience.

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1. Easteal, P., 'Battered Woman Syndrome: What is Reasonable?' (1992) 17(5) *Alt.LJ*, 220-3.
2. *R v Lawrence* [1980] 1 NSWLR 122 at 143.
3. See *R v Lawrence* [1980] 1 NSWLR 122 at 143 for further explanation.
4. The only research aside from P. Easteal's referred to in the evidence was work by Dr Lenore Walker, *The Battered Woman*, Harper and Row, 1979, and *Terrifying Love*, Harper and Row, 1990.
5. See the debate between Easteal and Stubbs in (1992) 3(3) *Current Issues in Criminal Justice*, pp.356-9.

Necessity and prison escape

BILL WALSH discusses a New South Wales case where the judge allowed a prison escapee's defence of necessity to go to the jury.

Graham Gene Potter was convicted of murder in New South Wales in 1982 and was sentenced to life imprisonment. Since his conviction, Potter has consistently maintained his innocence and has been seeking a judicial inquiry into his conviction under s.475 of the *Crimes Act* 1900 (NSW). On 30 June 1990 Potter escaped from Bathurst Goal in New South Wales in a non-violent manner with another inmate. The two escapees travelled by taxi from Bathurst to another country town, Lithgow, where they were arrested on the following day.

In October 1992 Potter stood trial before Judge Peter Dent QC and a jury in the District Court of New South Wales for the offence of Escape from Lawful Custody. Potter's trial was significant in that the defence of necessity was raised by the accused and the trial judge allowed this defence to be put before the jury. This is believed to be the first occasion in Australia that the defence of necessity has been allowed to be considered by a jury in relation to a prison escape.

Since his initial conviction in 1982 Potter worked continuously on material in an endeavour to secure a judicial inquiry into his conviction so as to prove his innocence. In 1987 his family purchased a computer to assist him in preparing material to prove his innocence. Evidence was given by Potter and prison staff that Potter worked 'exhaustively' on his case and that he was 'obsessed' with proving his innocence. Potter said in evidence at the trial that, for three years from 1987 to 1990, he worked 10-14 hours a day, seven days a week on his case. One senior prison officer at the trial said Potter used his computer 'incessantly'. Prison staff, in their evidence at the trial, described Potter as a model and trusted prisoner.

In April 1990 a directive was issued by the then Minister for Corrective Services, Michael Yabsley, to the effect that only computers for 'approved educational purposes' were to be used by prisoners in gaols in New South Wales. The directive did not allow the use of a computer for legal research or research to help prove one's innocence. Potter applied for an exemption but was refused. To make matters worse, an inmate in the cell opposite Potter's own, continued to use a computer for educational purposes. The prison chaplain, Reverend Howard Knowles, in his evidence, described it as a 'terrible blow' for Potter to have his computer removed from him and to be denied an exemption to the policy, particularly when there was a prisoner in an opposite cell being allowed to use a computer. Reverend Knowles said that this was a 'gross injustice' and described the exceptions to the policy as 'unfair'.

Other evidence, unchallenged by the Crown, was presented in relation to a number of other frustrations or stress factors, which were operating on Potter in the period prior to his escape. These included the loss of some of his research mater-

ial by gaol authorities, the loss of his prison file (containing important material about his conduct and re-classification within the prison system), inaccurate and adverse media publicity about his case, confusion as to his exact classification in the prison system, and news that his young wife may have to undergo a hysterectomy. In addition, an official of the Serious Offenders Review Board had told Potter that he would not leave prison until 'his toes were pointing to heaven'. For a 'life' prisoner, this meant death.

Potter told police, in his record of interview following his arrest, that he escaped so that he could continue with the research to prove his innocence. He said, in the record of interview, 'I decided there was no other way to research my case to prove my innocence unless I took measures to get access to a computer on the outside and pursue my case legal studies on the outside . . .' Potter, who gave sworn evidence in the trial, told the jury that the prison authorities had treated him like 'a dirty rag' when he had sought an exemption to the Minister's directive as to the use of computers in the gaol. Potter stated that, as a result of all the stresses on him, he was no longer able to cope.

A prison psychologist called by the Crown in reply made some interesting observations. He said that, from his conversations with Potter and reading of Potter's case research material prior to his escape, he never considered that Potter had been suffering from any type of delusion. The prison psychologist said, in evidence, that he was not aware of any other person in the gaol system who had maintained his or her innocence after conviction for 'as long as' or 'as vehemently' as Potter.

Eminent psychologist, Dr Wendy-Louise Walker, formerly Associate Professor of Behavioural Sciences at Sydney University, gave expert evidence for the defence in the trial. Dr Walker said that his computer work had become the 'lynchpin' of Potter's everyday life and 'almost a reason for existing'. Dr Walker read a number of letters written by Potter to his wife in the week preceding his escape and expressed the view that they had been written by someone 'highly troubled'. Dr Walker expressed the expert opinion that, at the time of his escape, Potter was 'probably' in a suicidal state.

Evidence emerged in the trial that Potter could easily have escaped from gaol on previous occasions as he had worked in the low security visitors' section of the gaol for a number of years. There was some evidence that Potter had discussed the escape with his co-offender in the days before the trial and that Potter had 'stored' some items used in the escape.

Significantly, and for the first time in recorded Australian legal history, the trial judge allowed the defence of necessity, in the sense of duress of circumstances, to be put to the jury. Traditionally, the legal elements of the defence of necessity in English and Australian law have been:

(a) The crime must have been committed only in order to avoid certain consequences which would have inflicted irreparable harm upon the accused or upon persons he was bound to protect;

(b) The accused must have honestly believed on reasonable grounds that he was placed in a situation of imminent peril;

(c) The acts done to avoid the peril must not be out of proportion to the peril to be avoided.[1]

In the trial of Graham Potter, Judge Dent QC, in allowing the defence of necessity to be considered by the jury, referred to a 1989 English decision, *R v Martin* [1989] 1 All ER 652, in which the Court of Appeal stated:

> . . . most commonly the defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'. [at 653]

The concept of 'duress of circumstances' appears to have emerged in an English decision in 1988, *R v Conway* [1988] 3 All ER 1025. In his book, *Compulsion in the Criminal Law*, Stanley Yeo, in referring to duress of circumstances and to the English decision of *R v Conway*, says:

> This is a welcome development under the English common law as the courts appear to have been strongly resistant to recognising any general form of defence of necessity.[2]

Judge Dent QC ruled that suicide was 'an irreparable harm' for the purposes of the defence of necessity.

In 1982, David Weisbrot wrote:

> It is now also necessary for courts to recognise the intolerable conditions in the prisons by permitting the defence of necessity (or duress) to exculpate a prisoner charged with escaping when that escape was a product of, and a reasonable reaction to, these conditions.[3]

Australian courts, as shown by the Victorian decisions of *R v Dawson* [1978] VR 536 and *R v Loughman* [1981] VR 443 have been reluctant to allow consideration of the defence of necessity to prison escapees, the trial judge in both cases ruling that there was no evidence fit to be left to the jury on the defence. In each case this ruling was upheld on appeal.

The jury returned a verdict of guilty in relation to the Escape from Prison by Graham Potter. In passing sentence, however, Judge Dent QC took into account the evidence adduced in the course of the trial and sentenced Potter to only three months imprisonment, saying:

> This accused had been, in my view, subjected to the mindless thoughtlessness and brutality of a penal system that demands that his liberty be restricted for the term of his natural life and civilising influences in his life in the Bathurst Prison were removed from him and all sorts of things were going wrong which should not have gone wrong. When I was first at the Bar, it was the duty of Chairman of Quarter Sessions to visit the gaols. It is important that judges should know the sort of things that go wrong in the administration of the prison system and quite frankly I think the evidence establishes . . . that what the accused did on this occasion was a cry, a cry for recognition of the injustice that he thought he was suffering and undoubtedly the others who gave evidence on his behalf thought he was suffering.

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3. Weisbrot, David, 'Prison Escape – A Matter of Necessity', (1982) 7 *Legal Service Bulletin* 269.