

Comments and Notes

“Kill(er) man was a Battered Wife”¹ the application of Battered Woman Syndrome to Homosexual Defendants: *The Queen v McEwen*

1. Introduction

The recent case of *The Queen v McEwen*² illustrates the first successful use of Battered Woman Syndrome (BWS) by a homosexual man in Australia. In February 1994, Robert Vaughan McEwen was charged with the murder of his lover and partner of 14 years, Thomas Hodgson. At the trial, expert evidence was led to explain the following questions: “Why would he stay in such an abusive relationship? Why did he not tell someone or seek help? Why of course in the end did this ... quiet, meek and submissive young man ... suddenly stab his partner to death in a frenzied attack?”³ The jury failed to reach an unanimous verdict. However, before the retrial, the Crown accepted a plea by McEwen of guilty to manslaughter on the basis of provocation. In March 1996, McEwen was sentenced by Walsh J in the Supreme Court of Western Australia, to imprisonment for five years.⁴ The characterisation of McEwen as a ‘battered spouse’ provided the framework for his provocation defence as well as his mitigated sentence.

This case raises a number of important issues in relation to the use of BWS as a psychological and quasi-legal construct. BWS was developed as a way of articulating a ‘defence’⁵ for women charged with the murder of their abusive partners, and has been of significant *practical* importance in combating a legal system premised on (heterosexual) male discourse and experience.⁶ At the same time, BWS has been criticised by feminist writers, from its

1 Gibson, R, “Kill Man was a Battered Wife”, *West Australian*, 8 February 1996.

2 There is no written judgment of the *McEwen* decision. This account is based on the transcripts of the trial before Murray J and the sentencing proceedings before Walsh J, in the Supreme Court of Western Australia on 18-25 April 1995 and 18 March 1996 respectively.

3 *The Queen v Robert Vaughan McEwen*, Transcript of Proceedings 20/4/95, per Mr Roberts-Smith QC, counsel for the defendant, in his opening speech to the jury at 254.

4 The sentence effectively amounted to imprisonment for one year, allowing three years credit for the time McEwen had already spent in custody, and one year credit for the emotional stress he suffered in jail of repeated sexual assaults by ‘inmates’.

5 Battered Woman Syndrome is not strictly a defence, but has been used in Australia as evidence to support defences such as duress, provocation and self-defence as well as a factor of mitigation in sentencing.

6 The first Australian decision where BWS evidence was admissible was *Runjanjic and Kontinnen* (1991) 53 A Crim R 362, where it was used to argue duress. It has since been applied throughout Australia, see for example, *R v Kontinnen* (1992) 16 Crim LJ 360 (self-defence), *R v Hickey* (1992) 16 Crim LJ 271, *R v Woolsey* (unreported, Newman J) 19/8/93 (mitigation of sentence), *Muy Ky Chhay* (1994) 72 A Crim LR (provocation). A comprehensive list of Australian cases which have accepted BWS evidence is cited in Stubbs, J (ed), *Women, Male Violence and the Law*, The Institute of Criminology Monograph Series No 6, Sydney (1994) at 199-202.

legal inception in Australia, for reinforcing negative stereotypes of women as irrational and passive and for failing to address the social, political and economic dimensions to battering relationships. Further criticism has been levelled at the emergence of BWS as a domain for experts, filtering individual experiences through a scientific/medical discourse, and placing the issue of domestic violence beyond the comprehension of lay jurors.⁷ In light of the origins and critiques of BWS, it is not surprising that the expert evidence in the case against McEwen served to 'feminise' the defendant as passive and childlike, highlighting his own psychological failings at the expense of any analysis of the cultural or political context of same-sex battering.

McEwen's case also raises questions and issues about the ability of the legal system to recognise sexual orientation and homosexual relationships. The decision has been welcomed by some gay and lesbian spokespersons as an affirmation of the existence of homosexual relationships, rights and responsibilities. Mr Brian Grieg of the *Australian Council for Lesbian and Gay Rights* said of the decision: "[c]ourts are increasingly saying that homosexual relationships exist, they carry obligations and are affected by the same issues as heterosexual relationships ...".⁸ Arguably, the flip side to this case is the limited basis upon which the courts are prepared to recognise sexual orientation, that is, to the extent that homosexual relationships are construed as replicating the gendered patterns and role playing of heterosexual relationships. In this sense, the factor of sexual orientation may well become merely a neat or bizarre twist to an increasingly well-told courtroom story.

2. *The Facts*

Robert McEwen met Thomas Hodgson in Auckland in 1980. He was 17 years old and Hodgson was nearly 33. After a week, they moved in together and began an openly homosexual relationship which lasted for 14 years, and included the sharing of finances and common property. In 1988, the two moved to Perth. Hodgson was employed as a sales executive for a publishing company and McEwen worked at the Hilton Hotel and later managed a cafe. On McEwen's courtroom account, the relationship was characterised from the beginning by a series of rules, delineating the roles and expectations of each partner: "I wasn't allowed to go out to any place other than work unless I was with Tom ... [h]e would look after the money and pay the bills and generally take care of our finances", "I had to do the ironing and the cleaning of the house, and he would do the washing."⁹

7 See generally, Stubbs, J, "Battered Woman Syndrome: An Advance for Women or Further Evidence of the Legal System's Inability to Comprehend Women's Experience" (1991) 3(2) *Current Issues in Criminal Justice* 267, Stubbs, J, "The (Un)reasonable Battered Woman?: A Response to Eastel" (1992) 3(3) *Current Issues in Criminal Justice* 359, Sheehy, E, Stubbs, J, and Tolmie, J, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16(6) *Crim LJ* 369, Budrikis, K, "Note on Hickey: The Problems with a Psychological Approach to Domestic Violence" (1993) 15(3) *Syd LR* 365, Stubbs, J, and Tolmie, J, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 *Canadian Journal of Women and Law* 122 at 142.

8 "Gays hail bashed spouse verdict" *Sydney Morning Herald* 9/2/96 at 2.

9 Trial transcript 20/4/95, examination in chief of McEwen at 260, 261.

Thomas Hodgson was charming, intelligent and stable, but also possessive and domineering. He denied Robert McEwen any contact with his family or friends, subjected him to regular 'put downs' in public, controlled his finances and restricted him from leaving the house. If McEwen questioned or challenged Hodgson, he was intimidated into apology: "I used to get scared of his anger and I learnt quite some time ago that you don't question anything that Tom says or anything that Tom does."¹⁰ In April 1991, McEwen decided to leave the relationship, but later relented after Hodgson begged him to stay and promised to change. The same night that he agreed to stay, McEwen was violently anally raped by Hodgson, setting the precedent for frequent and brutal sexual harassment and abuse: "[h]e would either force himself on me or he would do it to me when I was asleep."¹¹

On the evening of 17 February 1994, the two men argued about sex, Hodgson demanding sex and McEwen refusing to comply. McEwen's belief was that rape was inevitable, based on the preceding four nights of forced sex. Both men had smoked cannabis and taken Rohypnol tablets before retiring. McEwen followed Hodgson to bed, but got up again after being fondled sexually. Fearful and frustrated by the fact that he could not 'switch off' and fall asleep, McEwen smoked more marijuana and took several more Rohypnol tablets. The last thing he remembered was his partner yelling abuse from the bedroom: "[w]hy aren't you a fucking slut like your mother?", "[w]hy don't you just give in now because you know it's only going to happen anyway?"¹² The Prosecution claimed that between 2.00-4.00 am, McEwen formed the intention to kill his partner, and then stabbed him 42 times with two kitchen knives in the back and chest, disposing of the naked body, around 5.00 am at a nearby construction site. After returning home and cleaning up, he telephoned Hodgson's sister to inform her that the deceased had gone out the previous evening and failed to return. By mid-afternoon, the police had identified the body and questioned McEwen, who revealed the existence of a suicide pact with Hodgson, and stated that he had "panicked."¹³ Under cross-examination as to motive, McEwen said: "I don't know why I did it".¹⁴

3. *The expert evidence*

The expert evidence given at the trial and included in the remarks on sentence, served to reconstruct McEwen into the mould of a battered wife with all the necessary 'symptoms' of learned helplessness, cycle of violence, and post-traumatic stress disorder. The structure of McEwen's defence was designed to explain and excuse his unreasonable and abnormal behaviour, not through his own account of events but via the scientific authority of expert 'syndrome' evidence. As his defence counsel said to Murray J:¹⁵

10 *Id* at 276.

11 *Id* from 277-281, quote at 281.

12 *Id* at 301.

13 *Sentence transcript* 18/3/96 at 80, 83.

14 *Trial transcript* 21/4/95 at 375.

15 *Trial transcript* 20/4/95 at 340 (my emphasis).

... despite, in a sense, what the accused says about being trapped, he was in fact trapped in a relationship and the cumulative emotional and psychological effect of that on him made his responses different to the responses which might be expected from an ordinary person who had not been in that relationship, or that type of relationship, and it is to explain and to enable the jury to understand the nature of those reactions ... which could not be understood by people properly without expert evidence.

The consultant psychiatrist characterised McEwen as passive, dependent and childlike, highlighting his personal inadequacies rather than the range of social, economic and cultural factors limiting his actions in the face of constant physical and emotional violence.¹⁶ For example, he stated: “[l]ooking at his personality up to the time of the event, it struck me that there was a marked immaturity there in the fact that he in many ways behaved like a young adolescent, particularly in his relationship to Tom Hodgson, and there was gross dependency in the sense that he depended on Tom Hodgson to an unreal or aberrant way to what you would expect from somebody of his age”.¹⁷ Robert McEwen’s actions could have been characterised as a form of self preservation from the infliction of grievous bodily harm, but instead they were constructed through the expert testimony as irrational and frenzied.¹⁸ The clinical psychologist stated in her Report: ¹⁹

It seems that in particular the sexual abuse which frequently involved anal rape of Mr McEwen over the last three years of the relationship together with the pattern of domestic abuse culminated in what could be termed ‘Battered Woman Syndrome’ causing a massive psychological breakdown of coping responses and loss of control. In my view it is likely that this was consistent with symptoms of severe post-traumatic stress disorder which caused injury to his mental health at the time.

The often made criticism that learned helplessness provides an incongruous explanation for the actions of someone who has killed an abusive partner, did not escape the Crown Prosecutor, who asked the expert psychiatrist: ²⁰

Q. Does it strike you as curious, doctor, that someone who is in this cycle who has learned helplessness then does something so obviously taking control of their lives, such as killing someone?

A. It’s not easy to explain, but there are plenty of incidents once again where people do react in a very different manner from their normal way of reacting.

16 This type of critique is drawn from feminist analyses of the way in which BWS stereotypes, medicalises and individualises women defendants, whilst leaving male based legal standards of reasonableness intact; see for example, Stubbs (1991), above n7 at 270, Sheehy, Stubbs, and Tomie, above n7 at 384-87, Stubbs (1992), above n7 at 360.

17 Trial transcript 21/4/95 at 404.

18 The defence relied on BWS for the purposes of self defence as well as provocation. However, Murray J ruled against self defence being put to the jury for two reasons: (1) the Code states “ [G]rievous bodily harm ... likely to cause permanent injury to health”, which can encompass mental health, but that must be produced by the receipt of bodily injury; and (2) the evidence was insufficient to sustain the reasonableness of the belief that there was no other option but to take the course that accused did. See trial transcript 24/4/95 at 531-543.

19 Sentence transcript 18/3/96 at 93.

20 Trial transcript 21/4/95 at 430.

Throughout the trial, the important factor of McEwen's sexuality was either ignored (deemed irrelevant) or 'hetero-relationised' (renamed "Battered Spouse Syndrome")²¹. There was no social context given of the particular nature or causes of same sex battering nor any political context of the discrimination which isolates gay and lesbian victims of domestic violence. The medical experts similarly utilised a very limited conceptual framework in which to characterise the dynamics of same sex relationships, as can be seen from the following examples:

(1) I think you have made the point that this is not — although it's called or referred to as "battered woman syndrome", it's not confined to heterosexual relationships. Is that right? — That's correct. In fact some writers from America argue that at least 10 per cent and probably more of homosexual relationships go through this same sort of situation, so it's probably about as common in the homosexual as it is in the heterosexual spheres of life.²²

(2) Was there, on the basis of what he told you and the material you had, any characteristic of the relationship, as you saw it professionally, between him and Mr Hodgson? How would you describe that relationship? — It seemed to me that it was a very uneven relationship with Mr Hodgson being by far the dominant partner and it seemed, in looking at how the relationship evolved, that it could be likened to a spouse abuse type relationship.

I see. You say "a spouse abuse type relationship", is that something akin to or does it involve what has been called battered woman or battered wife syndrome? — Yes. I think that is also a name for it.²³

The legal categorisation of Robert McEwen as a battered wife was effected via the 'collusion' of medical and legal discourses. In their claim to establish the truth of McEwen's relationship with Hodgson and the events leading to its destruction, other realities, such as McEwen's resistance, the particular dynamics of a gay male relationship, the unique difficulties facing a gay victim of domestic violence, were de-legitimised.

4. *Domestic violence in same sex relationships*

The potential for BWS to elide or misrepresent key dimensions of domestic violence has been articulated in the context of race. Julie Stubbs and Julia Tolmie, for example, have analysed the way in which BWS creates a white, middle class standard which distorts the experiences of Aboriginal women who fall outside its boundaries.²⁴ Equally as distorting, is the filtering of a

21 "Hetero-relationised" is a phrase borrowed from the lesbian jurisprudence of Ruthann Robson, to explain the re-definition of gays and lesbians into prevailing models of heterosexuality: Robson, R, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal theory" (1990) 20 *Golden Gate U LR* 567 at 572, n21.

22 Trial transcript 21/4/95 per the psychiatrist at 406.

23 Trial transcript 24/4/95 per the psychologist at 460.

24 "Whilst depictions of women who have been in battering relationships as passive and helpless are typically inaccurate, distorted and simplistic, it has been argued that such images may create even greater hurdles for Black women whose gender roles may not be organised to easily fit into white stereotypes of femininity": Stubbs and Tolmie, above n7 at

gay man's experiences and responses to ongoing violence through the fulcrum of a heterosexual battered wife. As Jenni Millbank has asked in the context of family law, what meanings and rights are sacrificed in trying to fit gays and lesbians into existing, confining legal categories?²⁵

At the 16th National Lesbian and Gay Health Conference in America in June 1994, the results of an extensive survey of gay men found that the third major health problem after HIV/AIDS and substance abuse was domestic violence.²⁶ An earlier American study published in the *Journal of Sex Research*, found that 12.1% of gay men had been raped by their partners, whilst the figure for lesbians reached 30.6%.²⁷ The issue of same sex battering has been silenced to some extent in gay and lesbian communities as a way of minimising the already negative images and stereotypes levelled at homosexual relationships. Kimberle Crenshaw has likened the violence against women in lesbian communities with violence against women of colour, where secrecy shrouds issues of abuse for fear of embarrassing other members and of being ostracised.²⁸ For the victims of abuse, the alienation and stigma can be twofold, particularly in light of ineffective mainstream legal and therapeutic services.²⁹

There are very few, if any, domestic violence organisations, refuges or counselling services in Australia which specifically target gays and lesbians. Bruce Grant, the Co-ordinator of the *NSW Lesbian and Gay Anti-Violence Project* has highlighted that the lack of services for gay and lesbian victims of domestic violence effectively ensures that the problem of same sex battering remains unchecked and unnoticed.³⁰ He stated that "(m)ost services are set up to provide support to women survivors of domestic violence. In some cases when a lesbian attempts to access those services they can be slightly more responsive than they would be to a gay man. But when a gay man tries to access those services they hear a male voice on the phone and hear 'perpetrator'."³¹ Where a man is sexually assaulted or beaten by a known assailant, there is a social tendency to blame the victim or trivialise the violence as acceptable male to male aggression.³² Service providers can replicate these norms and attitudes in dealing with gay male battering, by treating the problem as one of violence between men, rather

142. See also Budrikis, above n7. Both articles provide a detailed discussion of *R v Hickey* (unreported) Supreme Court NSW, 14 April 1992.

25 Millbank, J, "Which then, would be the 'husband' and which the 'wife?': Some Introductory Thoughts on Contesting 'the Family' in Court" (1996) 3 *Murdoch U E-LJ*. <http://www.murdoch.edu.au/elaw/issues/v3n3/millbank.html>.

26 O'Sullivan, K, "The Violent Betrayal — Domestic Violence in Gay and Lesbian Relationships" (1995) 227 *Campaign Australia* 34 at 35.

27 Cited in Rand, F and Arns, B, "Lesbian Rape: The hate that dare not speak its name" *Lesbians on the Loose*, February 1994 at 8.

28 Crenshaw, K, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color" (1991) 43 *Stanford LR* 1241, note 5.

29 This has been thoroughly documented in America, where gay males and lesbians have traditionally fallen outside statutory definitions of what constitutes a domestic violence victim. See for example Mahoney, M, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 *Michigan LR* at 50, 51; Robson, R, above n21 at 578.

30 Jones, M, "Unchecked and Unnoticed" (1997) 164 *OutRage* at 164.

31 *Ibid*.

32 Gerard Webster, Director of the Sexual Abuse Counselling Service, cited in O'Sullivan, above n26 at 37.

than violence within a relationship.³³ And yet, there are problems specific to violent gay relationships. For example, clinical social workers at St Vincent's Hospital have documented a correlation between abusive male behaviour upon the discovery of a partner's HIV status including physical beatings, emotional abuse, stealing pension money, withholding medication, and withholding or forcing sex.³⁴

Gay and lesbian partners can obtain apprehended violence orders in NSW under Part XVA of the *Crimes Act* 1900 (NSW), if the court is satisfied on the balance of probabilities that the person fears harassment or violence.³⁵ The police have rights of entry where they believe that a domestic violence offence has been or may be committed.³⁶ These legal mechanisms should be contextualised generally, within the well documented unresponsiveness of police officers to treat domestic violence as a crime,³⁷ and more specifically, within the homophobic attitudes and behaviour of some police officers towards gays and lesbians, particularly in the context of anti-gay violence,³⁸ where the police have actually been cited as perpetrators.³⁹ In his communications with the police, Robert McEwen failed to divulge the reality of his relationship with Thomas Hodgson, including the sexual abuse. In a recent interview with the gay magazine *OutRage*, McEwen explained why:⁴⁰

33 Jones, above n30 at 40.

34 O'Sullivan, above n26 at 38, 39.

35 The definition of domestic violence offence encompasses gay and lesbian partners as it includes "a person who has or has had an intimate personal relationship with the person who commits the offence."

36 s357F *Crimes Act* 1900 (NSW).

37 For example, a reluctance to lay criminal charges, initiate intervention orders and unsympathetic and insensitive treatment of victims: Chappell, D, and Strang, H, "Domestic Violence Findings and Recommendations of the National Committee on Violence" (1990) 4 *Australian Journal of Family Law* 211 at 220, 221. Consultations with Aboriginal women in NSW have revealed a history of police officers failing to provide information on legal rights, dismissing domestic violence as merely a cultural problem, and engaging in racist and sexist interrogations of complainants. Thomas, C, "Report on Consultations with Aboriginal Communities" *NSW Women's Coordination Unit*, July 1991.

38 Between 1990 and 1996, there were 26 anti-gay/lesbian homicides in NSW (constituting 20% of all stranger homicides): "Review of the 'Homosexual Advance Defence', Discussion Paper, *Attorney-General's Department NSW*, Aug 1996 at 8.

39 Galbraith, L, "The Force of the Argument: Relations between the lesbian and gay communities and the police" *Burn*, July 1993 at 16-18, 56. A new anti-domestic violence campaign was launched in NSW in June 1996, designed to take "all forms of domestic violence seriously" and raise awareness of the problem of abuse and the role of the police in ethnic, Aboriginal and gay/lesbian communities. To this extent, the introduction of laws to require police to automatically seek AVOs on behalf of victims of battering and stalking is proposed: *Lesbians on the Loose*, June 1996 at 4. For a discussion of police attitudes and hostility in relation to the controlling of gay beats, see Swivel, M, "Public Convenience, Public Nuisance: Criminological Perspectives on 'The Beat'" (1991) 3(2) *Current Issues in Criminal Justice* 237. He comments on the history of police officers acting as agents to entrap beat users and highlights the encouragement of a capricious and arbitrary justice where police have acted as 'moral vigilantes'.

40 Gardiner, K, "I Love You To Death", *OutRage*, above n30 at 42. At the trial, McEwen stated in examination-in-chief: "... with no disrespect to the police, they intimidate me, being a homosexual, and ... it's not something that I would talk to the police about anyway", Trial transcript 20/4/95 at 307.

The prosecutor asked me during the trial, 'If it was so bad, why didn't you go to the police?' I didn't know how to answer, since there were police sitting either side of me, but there is a lot of homophobia within the police, and if I had gone to them, their first reaction, after they stopped laughing, would have been, 'Look, you're a man, grow some balls, and fuck off.'

The use of BWS evidence in the *McEwen* case was designed to answer the question of why the accused did not leave his abusive relationship with Thomas Hodgson. Robert McEwen gave a straightforward answer to this question: "I had nowhere to go and I didn't have any family that I could go to and ... I didn't think I had any friends that I could go to stay with", "I had no money."⁴¹ And yet in the expert opinion of the clinical psychologist, McEwen was an example of "dysfunctional coping", that is, "individuals [who] don't have adequate ways of resolving things ... they have no way of de-escalating the conflict and resolving it."⁴² This analysis not only ignores what Elizabeth Schneider has described as the "daily experiences of oppression, struggle, and resistance within ongoing (battering) relationships"⁴³ but also fails to address the difficulties specific to battered gay men including the fear of leaving or even of publicising a gay relationship in the face of a homophobic society, exclusion from women's domestic violence refuges, reluctance to hand over a partner to the police, stigma and disapproval from within gay communities, as well as the mainstream social acceptance of male to male physical aggression as a 'conflict of equals'.⁴⁴

5. *Recognising sexual orientation*

R v McEwen is nonetheless a rare and important case because of its legal recognition of same sex relationships where hitherto little acknowledgment existed. Jenni Millbank has highlighted the shift in gay and lesbian legal initiatives from decriminalisation (the right to have same-sex relationships) to civil protection (the protection from workplace and service based discrimination) to civil recognition (the right to have relationships given legal status).⁴⁵ The Lesbian and Gay Legal Rights Service has similarly stated: "[w]e have chosen to focus our law reform direction on relationship rights. The law around relationships is the linchpin of prejudice against us. The right to choose with whom to relate is a fundamental individual right."⁴⁶ State and Federal legislation exclude lesbian and gays as partners and co-parents in a multitude of areas, including worker's/victim's compensation, guardianship, inheritance, superannuation.⁴⁷ Even in the absence of statutory limitations,

41 Trial transcript 20/4/95 at 278, 279.

42 Trial transcript 24/4/95 at 461.

43 Schneider, E, "Particularity and Generality: Challenges of Feminist Legal Theory and Practice in Work on Woman Abuse" (1992) 67 *NY LR* 520 at 549.

44 For a discussion of the problems facing gay male victims of domestic violence in New Zealand, see Christie, N, "Comment: Thinking About Domestic Violence in Gay Male Relationships" (1996) 4 *Waikato LR* 180.

45 Above n25.

46 Lesbian and Gay Rights Legal Service, "The Bride Wore Pink: Legal Recognition of Our Relationships" reprinted in (1993) 3 *Australian Gay and Lesbian LJ* 67 at 69.

47 *Id* at 74-79. A notable exception exists in the ACT, where domestic relationships legislation has been introduced which includes same-sex and opposite-sex live-in couples

Australian courts have been reluctant to acknowledge gay and lesbian relationships in anyway other than as a threat or a disease.⁴⁸ A recent illustration of the heterosexual bias of the common law can be seen in the area of consenting to bodily 'harm'. In the case of *Brown*⁴⁹, the House of Lords ruled that satisfying homosexual sadomasochist desires was unlawful and constituted assault occasioning actual bodily harm, despite the 'enthusiastic' consent of the 'victims'. This decision was conveniently distinguished in the case of *Wilson*,⁵⁰ where a husband was charged with inflicting actual bodily harm on his wife, by branding his initials on her buttocks with a hot knife. The court euphemistically rationalised: "... far from wishing to cause injury to his wife, the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment ..."⁵¹

The courtroom experience of arguing for rights and defences often amounts to a domestication of gay and lesbian identity through legal analogising and categorising.⁵² Access to financial benefits arguments for the granting of custody are premised on the extent to which gay and lesbian relationships are 'just like' the model of heterosexual marriage. In the *McEwen* case, the success of the accused's defence depended on his resemblance to a battered wife stereotypically feminised as weak, dependant and irrational. The defence counsel argued that BWS was not gender specific and might better be called "Battered Spouse Syndrome", and yet the phenomenon of same sex battering could only be explained by reference to traditional heterosexual active/passive gender roles. In the recent case of *Brown v The Commissioner for Superannuation*⁵³, a gay man seeking spousal benefits under his deceased partner's superannuation plan, similarly argued that the terms 'husband' and 'wife' were no longer gender specific. The Tribunal stated that its main difficulty with allowing the plaintiff to succeed was deciding "how one would categorise the parties in a homosexual relationship ... [w]hich then, would be the "husband" and which the "wife"."⁵⁴ This question was answered by the plaintiff's expert, who argued that the 'husband' in a homosexual relationship, is "a man who takes the 'active' or 'masculine' role", whereas the 'wife', is "a man taking the ... effeminate or female-acting partner".⁵⁵ As Jenni Millbank has argued, this kind of legal reasoning not only denies the originality and

equally: see Millbank, J, "An Implied Promise to Parent: Lesbian Families, Litigation and *W v G*" (1996) 10 *Australian Journal of Family Law* 112 at 123-4.

48 Millbank cites a number of family law custody cases where even stable and lengthy lesbian relationships have been viewed as threatening to the best interests of the child and where courts have not only questioned lesbians as fit parents but placed restrictions on lesbian relationships as a condition of custody: *L and L* (1983) FLC 91-353, *Doyle* (1992) 15 Fam LR 274, *G and G* (1988) FLC 91-939, and *A and J* (1995) 19 FamLR 260, id at 123.

49 *R v Brown* [1994] 1 AC 212.

50 *R v Wilson* [1996] 3 WLR 125.

51 Id at 127.

52 Ruthann Robson has discussed this at length in relation to lesbian identity, see *Lesbian (Out)law: Survival Under the Rule of Law* (1992).

53 (1995) 21 AAR 378.

54 Id at 385, above n25.

55 Id at 385-6, above n25.

diversity of gay and lesbian relationships, but is also oppressive of gender equality within heterosexual relationships.⁵⁶

The relating of same sex desire to gender has been contextualised by Eve Sedgwick in the western cultural trope of 'gender inversion' — the lesbian as virile and the male homosexual as effeminate. According to Sedgwick, "one vital impulse of this trope is the preservation of an essential *heterosexuality* within desire itself, through a particular reading of the homosexuality of persons."⁵⁷ Heterosexuality is posited as the foundation or the original, upon which homosexuality can only mimic or copy. And yet, as Judith Butler has suggested:⁵⁸

The origin requires its derivations in order to affirm itself as an origin, for origins only make sense to the extent that they are differentiated from that which they produce as derivations. Hence, if it were not for the notion of the homosexual *as* copy, there would be no construct of heterosexuality *as* origin.

6. Conclusion

There is no definitive reading of the *McEwen* case. In many ways, the court process was sensitive to the circumstances of the defendant, and the eventual judgment, a fair determination. However, this note has argued that the BWS defence distorted more than it explained not only with respect to the particular responses of Robert McEwen to prolonged domestic violence, but more generally, in relation to the nature and context of same sex battering. In this sense, BWS can work to reinforce the rigid, hierarchical and gendered binaries (active/passive, dominant/submissive, victim/agent) which already inform legal reasoning, and which limit understandings of both heterosexual and gay and lesbian relationships. Ultimately, Robert McEwen was more than a 'battered wife'. Perhaps the indecisive verdict of the jury reflected this.

CATHARINE J. SIMONE*

Postscript: Robert McEwen recently claimed to have been asked to leave his job in a Perth hotel, after giving an interview in which he described his abusive relationship with Thomas Hodgson and the events leading to his manslaughter conviction, to *OutRage*, a national gay magazine. (Mathew Jones "Man sacked over 'battered spouse' admission", *Capital Q Weekly*, 10/1/97 at 1).

56 Id at 385-6, above n25.

57 Martin, B, "Sexual Practice and Changing Lesbian Identities" in Barret, M and Phillips, A (eds), *Destabilising Theories: Contemporary Debates*, (1992) at 100, 101.

58 Id at 104 (footnote omitted).

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