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Framework Evidence vs. Syndrome Evidence

Audrey Stone*

Thank you. I'm really glad that the Dean was talking about education because actually what I think about with all of these forms of evidence is not so much what is battered women syndrome or what is extreme emotional disturbance, but how can we educate everyone, the general public, juries, attorneys, and courts on what is domestic violence. Because to me, when I actually think about the practice of law, I don't think so much about how I am going to present a case to a jury; I think about how am I going to handle every day-to-day issue that comes up within my cases. In other words how does everything that we are discussing today inform my strategy and approach to an individual case? For example, this morning when I checked my messages, I had a call from a client. She left a distraught message that her husband, from whom she is separated, was insisting that he come to her home tonight to drop off some belongings. Now, this is a custody case where there is a history of domestic violence and she is living with a family member who is having a party tonight. No one in my client's family wanted him arriving and disrupting things, and so I'm sitting here and I'm thinking, well, ok, I've got one minute to try and advise and counsel this person. In the background I'm thinking about what we discussed this morning, parental alienation syndrome and how failing to cooperate with a spouse can be negatively perceived. If I advised this client to tell her husband that he can't come over to the house, that she should take a firm stand, which might very well be warranted, that won't reflect well in her custody battle because then it would look as if she is alienating her children from her husband and preventing access. On the other hand, I'm thinking how do I empower this victim of

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domestic violence who should be able to set those kinds of guidelines? Then I am thinking that this incident will most likely be conveyed to the children's law guardian, and what can I say to the law guardian about what just occurred that will reflect best on my client, and that will convey that she is trying to handle the situation appropriately? This illustration demonstrates how understanding the dynamics of domestic violence and balancing knowledge of domestic violence with the practical considerations of litigation comes to the foreground throughout our practice, and not simply as a trial tactic. The reason that I told this story is because I think expert testimony helps us through our entire approach to the practice of law. How we go about practicing law, whether it be in criminal law, civil law, or family law, and how, when we counsel our clients, we need to bring to the table an understanding of how trauma and violence has impacted on their past conduct and will impact on their litigation goals.

So, I'm actually going to take an approach somewhat contrary to what has been expressed here by Wanda Lucibello.¹ I think it's extremely relevant to try to use theories around expert evidence in domestic violence and in all areas of practice. And I say that because I think we need to really make an effort to educate everyone on understanding the entire framework of domestic violence. This thought leads me to what I've been asked to address, which is: what is battered women syndrome and what is what we've come to call battering and its effects or social framework testimony, or what I think Wanda might have called "battered person's experience testimony." Way back in the Seventies we started to see what Lenore Walker described as the phenomena of learned helplessness and battered women's syndrome.² The testimony and evidence that started to evolve at that time very much focused on battered women, as individuals who suffered from post-traumatic stress disorder. What defense attorneys tended to do was to take this theory, which was really a theory involving someone who would have a psychological problem or issue and fit it into Lenore Walker's

1. I like to do this because way back when I was a public defender in Brooklyn I often found myself disagreeing with Wanda who was my favorite, and continues to be my favorite, prosecutor from Kings County in Brooklyn.

2. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

theory, and then see if it would facilitate a defense of justification or self-defense. What we've learned over the years is that this really didn't work very well, because domestic violence is much bigger. It's what we've all been talking about all day, power and control within intimate relationships that manifests itself in myriad forms of abuse. It's something that doesn't involve sickness and disease or a mental defect of the victim. What it involves is a relationship where one person is being controlled by another. And the response of the less powerful victim relates to our social views of acceptable behavior. When the victim remains in an abusive relationship it evolves out of knowledge that friends, family, police, prosecutors, clergy, etc., may justify their abuser's conduct or the victim may feel that it would be immoral for her to abandon her marriage or to remove her children from their father. Therefore, when the battered woman takes her abuser's life it is not the result of her own mental illness or infirmity. Rather, the victim's conduct is a reaction to the social framework of her life, for example, knowledge that a call to the police may lead to ineffective intervention that escalates the violence rather than defusing it, or that the victim has been to the DA's office in the past and maybe didn't get an order of protection, or they didn't get relief in court, or they went to the hospital and nobody noticed that the injuries that they said they got from falling down the stairs were really an incident arising out of domestic violence.

This leads to the question of what is the difference between battered women's syndrome and so-called social framework testimony, or battering and its affects? The difference becomes a shift in focus from viewing domestic violence victims as suffering from post traumatic stress disorder, to treating them as smart learners who have adapted and reacted to their individual circumstances in a manner that is consistent with the social stigma attached to domestic violence and the approaches we as a society have adopted for coping with domestic violence as an issue.

Another thing that differentiates use of experts who do not focus on a syndrome, is that these are experts in a much more generalized way. These experts can describe anyone who is a victim of domestic violence, not simply a victim who meets the preconceived notions of one. When we look at domestic violence

victims from this approach the victim could be a very strong person, the type of person likely to fight back. Whereas when you're talking about battered women syndrome, what you're talking about is someone who is, as we said before, part of this learned helplessness theory, someone who is mentally impaired or sick. Lenore Walker's description of the battered woman is a person whose reaction to a situation results from her post-traumatic stress disorder and "learned helplessness."³ So, if we look at expert testimony expansively as being about the nature of domestic violence, we can use it in any kind of case because it can apply to any domestic violence victim.

The other issue becomes who can testify as a domestic violence expert. We talked a lot today about psychologists and what role they play in criminal cases or custody cases, and a lot of what we discussed is how critical mental health professionals can be. What I hear people saying today, however, is that in a domestic violence case, it's not necessarily a mental health professional who is going to be useful in supporting a particular theory or in providing insight into a particular victim's conduct. What would be useful is a domestic violence advocate who understands the nature and dynamics of domestic violence. It's a much broader realm of individuals, which does not necessarily include people who could make a medical or psychiatric diagnosis. So, we have a different range of experts when we start expanding the use and the idea of battered women expert testimony.

We also can use the testimony itself more expansively. We can use it, and this gets back to my first point about how it is relevant to me in expanding my practice to all types of law and not just criminal defense. This testimony becomes relevant to the prosecutor who wants, for instance, to explain and understand why a victim fails to cooperate or turn to the government for assistance or why the victim is recanting. This type of evidence was used in *People v. Ellis*,⁴ a New York City case, where a victim recanted and the judge allowed expert testimony to explain that victim's recantation.⁵ That case was really quite a novel, interesting use of expert testimony because the prosecu-

3. See *id.* at 49-50, 63-64.

4. 650 N.Y.S.2d 503 (Sup. Ct. 1996).

5. *Id.* at 504-09.

tor used the expert to testify on the issue of credibility, an issue that is usually the province of the jury alone. So *Ellis* represented a very expansive use of this testimony. We can also use this testimony in custody cases, to explain why, perhaps, someone might be fearful and upset about allowing the father, who is the batterer, regular unsupervised access to his children. This evidence would explain the huge overlap in child abuse and domestic violence, as we saw this morning in some of the statistics. And I think that the cases go on, and on, and on. So, I guess what I'm really here to say is that I know we will continue in some respect to call this battered women syndrome evidence, it's out there already and it's a term that we've all sort of agreed upon but, with a wink to the judges, what I am saying today is that what we need to show fact finders and juries isn't really battered women syndrome. We want to talk about domestic violence. We want jurors to understand what we all, who work in this field, already understand, the nature and dynamics of domestic violence and how does that explain this particular victim's actions in this case. Thank you.