The Use of Alcohol and/or Drugs in Intimate Partner Homicide: Themes in Judges' Sentencing Remarks

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This article presents the results of a major theme arising out of a grounded theory analysis of judges' sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. Specifically, this article focuses on judges' commentary regarding the use of alcohol and/or drugs as a contributing factor to the offending. The qualitative data indicate that despite the seriousness of the offence, sentencing judges often fail to attribute with clarity a sufficient degree of responsibility to male offenders for their voluntary consumption of alcohol and drugs and their subsequent violent behaviour. Additionally, judges attributed more blameworthiness to non-Aboriginal female offenders, who they believed were unable to take control of their dysfunctional lives whilst in an alcohol or drug-induced state.

Key words: Aboriginal; alcohol; drugs; intimate partner homicide; qualitative research; sentencing; violence.

Introduction

This article presents the results of one of several key themes arising out of a grounded theory analysis of judges' sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. Sentencing remarks were collated from six Australian jurisdictions, namely New South Wales (NSW), Northern Territory (NT), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). There were no relevant sentencing remarks available to the researchers for either the Australian Capital Territory (ACT) or Queensland (Qld) during the study period.

The primary aim of the study was to ascertain how judges are presently dealing with intimate partner homicide. As a result of

this study, a number of key themes emerged from the data. Specifically, this article examines one of those key themes, that is, judges' commentary on the use of alcohol and/or drugs as a contributory factor in the offending. In doing so, this article draws on all cases in the study ($n = 52$). This study broadens Hall, Whittle and Field's prior qualitative analyses of judges' sentencing remarks in cases of domestic murderers sentenced in New South Wales and Victoria between 2002 and 2009.¹ For the purposes of the current study, intimate partner homicide is defined as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses. Other forms of intimate partner relationships such as dating or homosexual were difficult to identify within the sentencing remarks, and were therefore omitted for research purposes.

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Regarding the research methodology used in this study, grounded theory encompasses a systematic set of methods which allow for the collation, coding and analysis of textual data.² The coding and analysis process includes three stages: open coding, selective coding and theoretical coding. All coding in the current study was undertaken manually. The first named author was the lead coder while the second named author acted as the validating coder. Using a grounded theory approach allows the data to speak for themselves. The researcher then reviews the literature to ascertain if the study results are consistent or inconsistent with previous research. Thus, this article presents a description of the research and the results, followed by a consideration of the results in the context of the literature.

Alcohol and/or drug use by the offender and/or victim was remarked upon as a contributing factor to the intimate partner homicide in 38 of the 52 cases in the sample (73%). While the offender and/or victim's use of drugs alone was remarked upon in only 6 of the 52 cases (12%), judges repeatedly discussed the alcohol use or abuse by the offender and/or the victim in 32 cases (61%).

Given the small number of cases involving drugs, this article will predominantly discuss judges' commentary pertaining to the use of alcohol, although there is also some reporting on the use of drugs.

The sample consists of 52 offenders. This comprised 21 non-Aboriginal males and 13 Aboriginal males (65%); together with 10 non-Aboriginal females and 8 Aboriginal females (35%). Alcohol was considered a contributing factor to the offence in 32 cases (61%). This comprised 7 non-Aboriginal male offender cases (22%) and 11 Aboriginal male offender cases (34%); as well as 6 non-Aboriginal female offender cases (19%) and 8 Aboriginal female offender cases (25%). Comparing offender types by race, alcohol was judicially viewed as a contributing factor to the offence in 13 non-Aboriginal offender cases (40%) compared to 19 Aboriginal offender cases (60%).

Figure 1 depicts by offender type the contribution of alcohol to the offence by the offender and/or the victim. Alcohol was considered a contributing factor to the offence in 61% of all cases in the sample. For males, this comprises 33% of non-Aboriginal offenders and 85% of Aboriginal offenders.

Figure 1. Intimate partner homicide – by offender race: alcohol considered as a contributing factor to the offence (percentages).

For females, this comprises 60% of non-Aboriginal offenders and 100% of Aboriginal offenders. Comparing offender types by race, alcohol was viewed as a contributing factor to the offence in 42% of non-Aboriginal cases compared to 90% of Aboriginal cases.

Judicial discourse concerning the contribution of alcohol to the offence was most common in Aboriginal offender cases. Specifically, an offender and/or victim's alcohol intake leading up to the offence was discussed in four of the five Aboriginal male offender murder cases and in seven of the eight Aboriginal male offender manslaughter cases. Both alcohol intake and the effects of alcohol on the offender and/or victim were discussed in all eight Aboriginal female manslaughter cases. No Aboriginal female offenders in the study were sentenced for murder. However, when analysing the data, information concerning victims was more difficult to determine, given that judges tended to focus their remarks on matters directly relevant to the offender and their sentencing. In particular, even where it was possible to identify that the victim was Indigenous, it was seldom possible to identify if that victim was of Torres Strait Island or Aboriginal descent. For this reason, such victims in the study are referred to as Indigenous throughout this article. Furthermore, some Indigenous victims may have been recorded as being of unknown race if there was no information in the sentencing remarks to indicate otherwise. Indigenous victims may therefore be under-reported in this study.

Limitations

Given that homicide is a rare event in almost all western, industrial countries,³ undertaking research generally on this type of crime presents numerous challenges. First, regarding the analysis of sentencing remarks, it can be problematic to accumulate sufficient data to recognise trends associated with the complex dynamics relating to the circumstances surrounding the offence and the interaction of

events and life circumstances between a victim and an offender. Second, sentencing regimes operate within an arena of ever-changing criminal law within multiple Australian jurisdictions. Also, differences in sentencing legislation, sentencing practices and judicial cultures across jurisdictions are difficult to capture within sentencing remarks given that this information is not always articulated by the sentencing judge. Finally, there is a persistent argument amongst many Aboriginal people that issues surrounding violence and homicide in their societies should not be discussed in public forums.⁴ Thus, the availability of statistics and research examining the extent and nature of family and more specifically intimate partner violence in Aboriginal communities is limited.⁵

The Research Methodology

Grounded theory is recognised as the leading method to analyse qualitative data in the social sciences and was adopted as the research methodology for this study.⁶ As opposed to beginning with a theory from which hypotheses are deduced, a grounded theory study commences with either a research question or field of study, and arrives at a theory systematically developed from the collated data.⁷ Grounded theory uses a systematic, detailed and rigorous set of methods which collates, codes and analyses textual data,⁸ and allows the data to speak for themselves. Researchers are then able to arrive at theories which are grounded in the data. In the current study, the task was a qualitative analysis of judges' sentencing remarks in order to uncover and compare themes present when males kill females and females kill males in the context of a current or previous intimate partner relationship.

When using grounded theory as the method, the initial step is to collate the data. Selection of the study data was based on the availability of relevant sentencing remarks covering the time period 1 July 2009 to 30

June 2014 inclusive; and sourced either directly from the Supreme Court or through the Australian Legal Information Institute database (AustLII). Data requests produced a sample of 10 sets of sentencing remarks for the Supreme Courts of NSW, SA, Vic and WA. Nine sets of relevant remarks were added for the Supreme Court (NT); and three sets of remarks for the Supreme Court (Tas). Thus, a total of 52 sets of sentencing remarks were available for analysis. As judges' sentencing remarks are available publically, the researchers had no interaction with the data participants, and therefore, no control over the data. The researchers began the analysis with male offender remarks, as males are more likely to kill than females.⁹ Commencing with jurisdictions in order of data receipt, each set of male offender remarks was examined, randomly and one at a time, until saturation point for that set of remarks was reached, the saturation point being when no new major ideas are forthcoming and analysis becomes merely confirmatory.¹⁰

Each sentence within each set of remarks was read and coded. Then, key judicial comments within a set of remarks were compared to other key judicial comments within the same set of remarks with respect to commonalities and differences. Similar concepts were then grouped which led to hypotheses about the relationships between categories. This in turn formed the basis for the emerging theory. Once saturation point was reached for the first set of sentencing remarks, then the next set of male offender remarks was chosen at random. The researchers then went back and forth between sets of sentencing remarks, comparing data, modifying and sharpening the developing theory. Saturation point for male offender remarks was reached following an analysis of 34 sets of remarks (21 non-Aboriginal males and 13 Aboriginal males). This then allowed for a comparison with female offenders. Accordingly, 18 sets of female offender remarks (10 non-Aboriginal females and 8 Aboriginal females) were also analysed. Saturation point for the whole study

was reached following an analysis of a total of 52 sets of sentencing remarks.

On the basis that critical thinking and discovery can be clouded by preconceptions, the grounded theory method does not consider a literature review prior to analysis as playing a key role in the research. Therefore, in this study, the literature review was commenced only after a complete analysis of both the male and female offenders' sentencing remarks was complete. In the course of the literature review, the researchers observed that the terms Aboriginal and Indigenous were used interchangeably by academic authors. For the purposes of this article, where academic findings are discussed, the term used in those findings is retained.

Judicial Commentary

For Aboriginal offenders, judges remarked upon officially recorded blood alcohol readings in a number of cases in the sample. Judges used their remarks to draw attention to two factors they considered an integral part of the sentencing matrix; first, the connection between the male offender and the female victim through their mutual intoxication at the time of the offence; and second, the history of alcohol addiction suffered by the male offender.

In the following three case examples, the judge remarked upon the mutual intoxication of the Aboriginal male offender and the Indigenous female victim in the following terms:

At the time of the attack, you and your victim were both heavily intoxicated. Her blood alcohol reading was 0.273%.¹¹

You both became highly intoxicated.¹²

[Y]ou and the victim were in Katherine township consuming alcohol at the Last Chance Saloon Bar, an appropriate name. ... [Y]ou, the victim and another male purchased two two-litre casks of white wine.¹³

In this next case example, despite an absence of judicial discourse pertaining to the Aboriginal male offender's blood alcohol reading at the time of the offence, in the course of discussing the offender's previous criminal history, the judge concluded that the offender had a long-standing problem with alcohol:

He has a criminal record for a variety of offences commencing in 1999 for various traffic offences, but as the years proceed there are convictions for disorderly conduct, driving under the influence and other alcohol-related offences, including driving with an excess alcohol level beyond 0.8% [sic]. This indicates, which I consider to be well established by other materials, a long-standing problem with alcohol and repeated excessive intoxication.¹⁴

In the following case example, while the judge discussed the offender's previous criminal history in the context of his excessive alcohol consumption, Barr J reinforced defence counsel's argument that the offender's wife's alcohol addiction contributed to the breakdown of the offender's marriage in the lead-up to the offence:

On 14 February 2009 you committed three offences: driving at a speed and in a manner dangerous, driving with a high range blood alcohol content, and being armed with an offensive weapon. Your blood alcohol concentration was 0.2 percent. I can easily infer from your offending in February 2009 that you were by that time drinking very significant amounts of alcohol. Your counsel explained in sentencing submissions that your long standing relationship with your wife deteriorated over the years as both you and your wife became progressively addicted to alcohol.¹⁵

Despite the considerable absence of judicial discourse on the blood alcohol reading of Aboriginal male offenders at the time of the offence, in contrast, judicial commentary on an Aboriginal female offender's blood alcohol reading at the time of the offence was

present in half of all cases in the sample. Also, where the Aboriginal female offender's blood alcohol reading did not appear to have been taken immediately following the offence, the judge, nonetheless, in each instance proceeded to draw conclusions as to what that reading may have been. Consider the following case examples:

His blood alcohol level was 0.28. I am unaware of your blood alcohol content, as no one thought to take it, but I presume that you would have had a similar level to that of Mr Mumin.¹⁶

His post mortem blood alcohol level was .215 grams per 100 millilitres. ... Your blood was not sampled until after 2am ... it was clear of alcohol. ... Professor Stramer's evidence is not challenged and, having regard to it, I find that it is probable that at 5 pm on 6 March your blood alcohol level was something over .139 grams per 100 millilitres.¹⁷

Where judges did remark upon an Aboriginal male offender's intoxicated state at the time of the offence, for the most part, those remarks were unclear as to whether the intoxication was considered as mitigating or aggravating to the offence.¹⁸ Indeed, an Aboriginal male offender's intoxication was judicially expressed as an aggravating factor in only one instance.¹⁹ Remarkably, the vulnerability of the intoxicated female victim as a contributing factor to the gravity of the offence was discussed in only one case.²⁰ The judicial commentary in this regard was limited to describing the victim as 'heavily intoxicated' with no further discourse on the diminished capacity of the offender's wife to anticipate the fatal assault.

In addition, rather than viewing the Aboriginal male offender as choosing to be violent, the sentencing judge frequently explained that the offender's homicidal actions were as a direct consequence of a force outside of his control. As the following case examples demonstrate, this external force could take a number of forms, such as

the female victim's behaviour, the effects of the male offender's alcohol use and/or alcohol addiction or indeed the male offender's upbringing:

[Y]our wife was intoxicated to the extent that she was incapable of walking back to your home at the Binjarri Community. She fell over on several occasions. You unsuccessfully tried to carry her but you fell over. At a certain stage, with your wife asleep and lying on your lap, you became frustrated that you could not get the both of you home. ... [Y]ou then beat your wife.²¹

[A]lthough it would appear that you did not fully appreciate the seriousness of what had occurred due to your intoxication.²²

I am persuaded you have an alcohol addiction, and that was very much part of the inevitability of this offence.²³

You were raised in an environment where eventually you were a part of a culture of violence and alcohol consumption. This was the type of environment you were living in at the time you killed the deceased.²⁴

Even where Aboriginal female offenders were affected by alcohol, in each instance, judges focused the extent of their remarks on the male victim's alcohol intake. Additionally, while no Aboriginal female offender's alcohol intake was considered aggravating to the offence,²⁵ there was only one case in which the female offender's alcoholic state was clearly considered as mitigating.²⁶ In that case, Jenkins J applied one of the principles articulated by Wood J in *R v Fernando* (1992) 76 A Crim R 58 (*Fernando*). Jenkins J commented as follows:

Lastly, I take into account that whilst drunkenness is not normally a mitigating factor, where, as in your case, the abuse of alcohol by an offender reflects the social circumstances and the environment in which you have grown up in, that can and should be taken into account to some extent as a mitigating factor: *R v Fernando* (1992) 76 A Crim R 58, *R v Churchill* [2000] WASCA

230, and *State of Western Australia v Munda* [2012] WASCA 164.²⁷

The *Fernando* principle pertaining to alcohol abuse was applied in only two cases in the study.²⁸ In the second instance, the principle was applied in an Aboriginal male offender case.²⁹

Regarding non-Aboriginal female offenders affected by alcohol and/or drugs, judges frequently painted a picture of a woman who was dysfunctional, with an inability to form positive personal relationships. Consider the following two case examples:

As an adult, you have had a succession of unsatisfactory relationships with a series of violent men and, as your counsel pointed out during submissions, it seems to have been all downhill from there.³⁰

There were other relationships, it would seem all of them disastrous, and ultimately you formed a relationship with a man named Caine who also has substance abuse problems, who apparently still visits you in prison. You have a history of exceedingly poor choices in male companions.³¹

Nonetheless, judicial narratives did, at times, indicate that a non-Aboriginal female offender had the potential to perform to society's expectations of being a good mother with the ability to lead a productive life. For example:

You are an intelligent woman and the affect [sic] of the shock of what you have done to Mr Dick and to your children may well have got through to you and got through the fog of alcohol and drugs in which you had surrounded yourself. I cannot be positive but I have a degree of hope that you may be able to reclaim your life and ultimately be the parent that these children so desperately need.³²

[T]he most powerful sign of real contrition will be if in the months and years ahead you do make the decision to break that cycle of

violence and abuse in your own life and decide to become the person you are undoubtedly capable of being and the mother your children need you to be.³³

[Y]ou are obviously a woman of some ability and could, if you ever become motivated, choose to lead a more productive and undoubtedly happier life. The choice is yours, no-one can make that choice for you.³⁴

Notably, judicial commentary on the parenting skills of both male and female Aboriginal offenders was non-existent, and rare for non-Aboriginal male offenders.

When comparing judges' comments on non-Aboriginal males and non-Aboriginal females, judges at times appeared to hold different views on offenders' alcoholic background, its effect on their homicidal actions and the subsequent sentence which should be imposed. In this first example, the non-Aboriginal male offender was sentenced in Victoria to five years imprisonment with a non-parole period of three years, following his conviction for the manslaughter of his domestic partner by criminal negligence and recklessly causing injury:

You were raised in a loving and caring family, though both of your parents were heavy drinkers. You adopted that habit at an early age. ... In 1991 you were placed on a disability pension when, as your counsel explained, 'alcohol got the better' of you.³⁵ ... According to Dr Stuart, testing revealed a marked impairment in your executive skills (which he says is the ability to sum up a situation and take appropriate action) and severe impairment of memory for verbal information. These deficits are a product of your alcohol abuse. Mr Cummins assessed you as being severely depressed. Both reports note that you have suffered from chronic alcoholism for many years. I accept that imprisonment will be a greater burden on you than on others by reason of your state of health. I take that into account.³⁶

By comparison, in the following example, for the purposes of sentencing, the judge took

a different view of the offender's alcoholic background. In this case, the non-Aboriginal female offender, who was also sentenced in Victoria, received a sentence of six years with a non-parole period of four years following her conviction for the manslaughter of her ex-husband who at the time of his death was under police investigation following a report of sexual abuse towards a child of both the offender and the victim. The female offender had also suffered domestic violence at the hands of the male victim throughout their relationship. King J commented as follows:

You informed Dr Sullivan that you commenced using alcohol from the age of 12 and more heavily from the age of 15. After you lost custody of your children you became a serious binge drinker, drinking anything you could lay your hands on, and, when drunk, you became nasty and aggressive.³⁷ ... You have a relatively recent history of psychiatric issues. You have overdosed on heroin. You had previous episodes of depression, you have had derogatory auditory hallucinations, together with associated symptoms of poor concentration, and poor sleep. You are also a person who becomes angry and violent with unstable moods and low impulsivity. ... Your inability to think clearly or make calm or rational choices due to the disinhibition of alcohol and your difficulties in handling anger, he found can be causally associated with the offences. I do not find that that is in any way ameliorating of the appropriate penalty that should be imposed.³⁸

Furthermore, in the context of this non-Aboriginal female offender's extensive drug abuse, King J proceeded to discuss the offender's parenting skills:

You reported to Dr. Sullivan that you enjoyed being stoned but agreed that it made you paranoid and was partly to blame for the loss of custody of the children because you were classified as an ineffectual and non-productive parent.³⁹

Nonetheless, while condemning the offender's actions leading to the death of her

ex-husband, King J took the opportunity to praise the male victim's parenting skills. Her Honour remarked as follows:

Your actions are reprehensible. You have deprived your children of their father. Even if he had been found to have committed the indecent act in the presence of one of the children, it would not necessarily have followed that he could and would not have been a good father to the other children.⁴⁰

Literature Overview and Discussion in the Context of the Results

The following literature overview and discussion considers one of the major themes pertaining to the current study, namely judicial commentary concerning the use of alcohol and/or drugs as a contributing factor in intimate partner homicide. In this instance, the purpose of the literature review was to identify previous research that was either consistent or inconsistent with this theme which emanated from the study. Such an approach is consistent with grounded theory.

Although homicide remains a rare event in almost all western, industrial countries,⁴¹ research continues to highlight the compelling relationship between homicidal violence and alcohol.⁴² Indeed, many intimate partner homicides are alcohol related, with studies citing that in the majority of Indigenous intimate partner homicides, alcohol played an integral part.⁴³ By example, Dearden and Payne's study found that between 2000 and 2006, 44% of intimate partner homicides were alcohol related, with alcohol being a specific factor in 87% of Indigenous intimate partner homicides.⁴⁴ These findings are consistent with the current study where alcohol as a contributing factor to the offence was judicially discussed in over 60% of all cases, and more specifically in 90% of Aboriginal offender cases.

Within the current study, a common narrative for judges sentencing Aboriginal male offenders was to point out that the homicide was preceded by the mutual intoxication of

both the offender and their Indigenous female victim. At times, judges also reiterated arguments by defence counsel which fostered the notion that a female victim's intoxication was, in some way, to blame for the offending. These findings are consistent with those of Coates, who, when researching the connections between language, violence and responsibility (in the context of judges sentencing individuals convicted of sexualised violence), identified that certain judicial 'linguistic representations of violence' allowed perpetrator responsibility to be reduced by shifting the focus away from the offender and onto to the victim.⁴⁵

Furthermore, regarding Aboriginal male offenders and non-Aboriginal male offenders, the current study also identified that while the offender's alcohol abuse was rarely explicitly accepted as a mitigating factor in sentencing, judges frequently accepted that the offender's alcohol abuse or addiction was a force outside of the offender's control. Coates also found that judges obscured alcohol-fuelled offending by constructing external factors to explain an offender's violent behaviour.⁴⁶ In the current study, rather than viewing the offender as choosing to be violent, judges continuously explained away homicidal actions. Commentary such as 'alcohol got the better of you',⁴⁷ and 'you did not fully appreciate the seriousness of what had occurred due to your intoxication'⁴⁸ are indicative of judges accepting a male offender's argument that his intoxication was a cause of the homicidal violence. Warner states that treating intoxication as a mitigating factor allows offenders to avoid taking responsibility for their violence.⁴⁹ Furthermore, regarding Aboriginal victims, Newton asserts that a court's preparedness to view a male offender's alcohol abuse as mitigating only serves to proliferate the victimisation of Aboriginal women.⁵⁰ While judges did not overtly excuse a male offender's intoxicated behaviour at the time of the offence, the data do reflect that judges frequently sought to explain offenders' intoxication. Warner argues that such judicial

explanation does not give clear direction as to how offender intoxication is being judicially considered.⁵¹

Studies continue to show that women remain in the majority as victims of domestic homicide.⁵² The most recent data from the National Homicide Monitoring Program show that in Australia, during the time period of the current study,⁵³ one woman a week was the victim of a domestic homicide incident with more than half of those incidents classified as intimate partner⁵⁴ homicides.⁵⁵ In the current study, for the purposes of sentencing, the male offender's alcohol consumption was considered the principal cause of the killing. McKenzie et al point out that while legal rules and the criminal justice system's adversarial nature endorse such narratives, the end result is that misconceptions concerning violence are propagated and condoned.⁵⁶ This opinion is reflected in studies which show that male offenders continue to blame their female victim after killing them. By example, Dobash and Dobash's study found that once imprisoned, men continued to express a lack of remorse for the killing or empathy for their victim. Instead, men 'blamed alcohol, claimed it was an accident and/or blamed the victim in particular or women in general'. In these instances, men considered themselves the victim and that their anger and related violence were justified in the circumstances.⁵⁷

Seventy-five percent of Aboriginal female offenders in the study were also affected by alcohol at the time of the offence. This information contrasts with Brady's findings that when compared to Aboriginal men, Aboriginal women appear to consume less alcohol, often abstain and are considered 'vanguards of initiatives' controlling access to alcohol by Aboriginals.⁵⁸

For the most part, judges in the current study failed to provide clear direction as to whether the Aboriginal female offender's intoxication was considered aggravating or mitigating, with the application of the *Fernando* principles in only one instance.⁵⁹ The

Fernando principles were first articulated in *R v Fernando* (1992) 76 A Crim R 58 (*Fernando*) by Wood J of the New South Wales Supreme Court. In that case, Wood J expressed eight common law principles, applicable in New South Wales, relating to Indigenous offender sentencing, in order to provide a framework to consider the disadvantages surrounding the personal circumstances of an Indigenous offender.⁶⁰ Baldry and Cunneen comment that there are in fact very few cases where the *Fernando* principles have been considered or applied to Indigenous women, with no clear judicial explanation as to how these principles may in fact relate to such women. However, Jackson points out that *Fernando* concerns itself with socio-economic disadvantage generally, and not specifically Aboriginality.⁶¹

In *Bugmy v The Queen* [2013] HCA 37 (*Bugmy*) and *Munda v Western Australia* [2013] HCA 38, the High Court determined that in the context of offending, a person's membership of a particular ethnic group in and of itself does not constitute a mitigating factor.⁶² Jackson opines that by viewing Aboriginality per se as not being relevant in sentencing, 'the law now not only makes Indigenous people's experiences of systemic social disadvantage invisible, it also makes the unique systemic social disadvantage of Indigenous women invisible'.⁶³ Jackson contends that for the purposes of sentencing Indigenous women, it is important for defence lawyers to lead evidence regarding their client's background pertaining to 'systemic race and gender disadvantage'.⁶⁴

In *Bugmy* the majority of the Court affirmed the proposition put forward by Wood J in *Fernando*, that drunkenness does not usually excuse or mitigate an offender's conduct.⁶⁵ That said, one of the principles distilled by Wood J in *Fernando* included the consideration that drunkenness may be a mitigating circumstance in relevant cases.⁶⁶ Regarding the current study, the *Fernando* principle pertaining to alcohol abuse was applied by sentencing judges in only two

cases (one Aboriginal male offender and one Aboriginal female offender).

Stubbs and Tolmie postulate that Indigenous women may be judged unfavourably against the standards of 'white, often middle-class stereotypes of women's behaviour'; and as a result, be denied mitigation of sentence.⁶⁷ This viewpoint was not evident in the current study.

Observing sentencing practices in Western Australian higher courts, Jeffries and Bond found that Indigenous females, as compared to non-Indigenous females, were more likely to receive lenient sentences when they appeared before the court in like circumstances.⁶⁸ In a previous study, Bond and Jeffries considered the possibility that the extension of leniency to Indigenous women may arise as a result of the judiciary's sensitivity to Indigenous women's unique circumstances when compared to non-Indigenous society generally.⁶⁹ Bond and Jeffries argue that as such, the judiciary, in Western Australia at least, may recognise Indigenous women as less culpable than their non-Indigenous counterparts.⁷⁰ In the current study, despite some variations in sentence length between Aboriginal and non-Aboriginal female offenders, the sample size was too small for statistical analysis, and no trend could be identified.

Non-Aboriginal female offenders who were intoxicated at the time of their offending were frequently viewed judicially as domestically dysfunctional. The ability of non-Aboriginal female offenders to be good and caring mothers, loyal and supportive wives or to form lasting personal relationships in the wake of their alcohol or drug use was frequently questioned. The negative descriptors pertaining to domestic incompetence attributed to non-Aboriginal female offenders are consistent with Chan's findings which state that women's treatment in the criminal justice system is determined by long-standing myths and stereotypical views of women, rather than the circumstances surrounding their offence.⁷¹ Moreover, recent research

literature has identified that strategies critical to both the prevention of domestic violence and intimate partner homicide involve addressing attitudes towards women, as well as the promotion of gender equality.⁷²

Conclusion

This article reports on part of a larger study undertaken by Whittle and Hall to analyse judges' sentencing remarks for males and females convicted of intimate partner homicide. Specifically, this article examined the part of the larger study as it relates to judges' commentary on the use of alcohol and/or drugs as a contributing factor to the offending.

A qualitative analysis of the sentencing remarks shows that despite the seriousness of the offence, there is often a failure by sentencing judges to clearly attribute a sufficient degree of responsibility to the male offender for their voluntary consumption of alcohol or drugs and their subsequent violent behaviour. Judicial explanations regarding the effect of intoxication on the offender are unproductive, as they do not provide clear direction as to whether the court views the intoxication as mitigating or aggravating to the offence. In particular, blaming external forces should not be allowed to enable male offenders to avoid taking responsibility for their homicidal violence. Judges play a pivotal role in the criminal justice system and must seize the opportunity to instil in offenders a sense of responsibility for their actions, and reflect this in sentencing practices. In this way, the criminal justice system is upholding its responsibility to act as a deterrent, preventing others from acting in a similar way.

Also within the data, judges attributed more blameworthiness to non-Aboriginal female offenders who they believed were unable to take control of their dysfunctional lives whilst in an alcohol- or drug-induced state. However, rather than reinforce long-standing myths and stereotypical views of women, sentencing remarks are an

opportunity for the judiciary to challenge gender-based attitudes and promote a message of equality in the courtroom.

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- The Queen v Esau Hodgson* [2012] NTSC SCC 21007364 (12 April 2012) [20] (Barr J).
- The State of Western Australia v Attwood* [2013] WASCSR 157 (9 August 2013) [26] (Corboy J).
- The State of Western Australia v Brooking* [2014] WASCR 102 (6 June 2014) [2] (McKechnie J).
- The State of Western Australia v Narrier* [2014] WASCSR 105 (18 June 2014) [24] (Commissioner Sleight).
- R v Doolan* [2010] NSWSC 615 (7 June 2010); *R v Hudson* [2013] VSC 184 (26 April 2013); *R v Melissa Anne Kulla Kulla* [2010] VSC 60 (9 April 2010); *R v Hudson* [2013] VSC 184 (26 April 2013).
- R v Sherridan Rose Hodder* [2013] WASC 211 (5 December 2013) [25] (Jenkins J).
- R v Sherridan Rose Hodder* (n 26).

28. A principle of law articulated in *Fernando* is applied to a new set of facts by the court in these cases.
29. *The State of Western Australia v Attwood* [2013] WASC SR 157 (9 August 2013) [42] (Corboy J).
30. *R v Leeanne Moorfoot* [2011] SAS SCCRM-11-49 & 10-189 (22 March 2011) [4] (Kelly J).
31. *R v Downie* [2012] VSC 27 (2 February 2012) [31] (King J).
32. *R v Downie* (n 31) [37].
33. *R v Cassandra Lee Dodd* [2011] SAS SCCRN-11-183 (9 September 2011) [11] (P. Kelly J).
34. *R v Leeanne Moorfoot* [2011] SAS SCCRM-11-49 & 10-189 (22 March 2011) [6] (Kelly J).
35. *R v Reid* [2009] VSC 326 (10 August 2009) [19] (Whelan J).
36. *R v Reid* (n 35) [31]–[34].
37. *R v Downie* [2012] VSC 27 (2 February 2012) [27] (King J).
38. *R v Downie* (n 37) [32]–[33].
39. *R v Downie* (n 37) [28].
40. *R v Downie* (n 37) [18].
41. AIC Reports (n 3).
42. Jack Dearden and Jason Payne, 'Alcohol and Homicide in Australia' (2009) No 372 Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice 1, 2.
43. Mitchell (n 5) 7; Dearden and Payne (n 42).
44. Dearden and Payne (n 42).
45. Linda Coates, 'Twice a Volunteer: Mutualizing Violence' (Paper presented at the Women's Resistance Group, Duncan, British Columbia); Linda Coates, 'The Emperor's New Clothes: Manufacturing Consent in Sexual Assault Cases' (Paper presented at the ORCAS Society, Language, Violence and Responsibility Conference, Duncan, British Columbia), cited in Linda Coates and Allan Wade, 'Telling It Like It Isn't: Obscuring Perpetrator Responsibility for Violent Crime' (2004) 15(5) Discourse and Society 499, 502.
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47. *R v Reid* [2009] VSC 326 (10 August 2009) [19] (Whelan J).
48. *The State of Western Australia v Attwood* [2013] WASC SR 157 (9 August 2013) [26] (Corboy J).
49. Kate Warner, 'Sentencing the Violent Spouse' (1996) 3 Psychiatry, Psychology and Law 107, 115.
50. Alex Newton, 'Domestic Violence in Indigenous Communities: Competing Explanations and Criticisms' 2002 13(1) Polemic 33.
51. Warner (n 49).
52. 'Figuring Violence' (n 9).
53. Released in February 2015, the National Homicide Monitoring Program report contains information regarding the nature and context of homicides occurring during the period 1 July 2010 to 30 June 2012.
54. Within the National Homicide Monitoring Program, intimate partner violence is described as when the victim and offender share a current or former intimate relationship, including homosexual and extramarital relationships.
55. 'Figuring Violence' (n 9).
56. Mandy McKenzie and others, 'Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005–2014' (Discussion Paper No 10, Domestic Violence Resource Centre Victoria, 2016) 72.
57. R Emerson Dobash and Russell P Dobash, *When Men Murder Women* (OUP 2015) 87–89.
58. Maggie Brady, 'Alcohol Use and Its Effects Upon Aboriginal Women' in Julia Vernon (ed), *Alcohol and Crime* (Australian Institute of Criminology 1990) 135.
59. *R v Sherridan Rose Hodder* [2013] WASC 211 (5 December 2013) [25] (Jenkins J).
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61. Lucy Jackson, 'Sentencing Indigenous Women After *Bugmy*' (2015) 40 Alternative Law Journal 171, 172; Ian Freckelton, 'Imprisonment of Australia's Indigenous Offenders' (2013) 20(6) Psychiatry, Psychology and Law 799.
62. *Bugmy v The Queen* [2013] HCA 37 [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Munda v Western Australia* [2013] HCA 38 [53] (French CJ, Hayne, Crennan, Kiefel, Gageler, Keane JJ).
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64. Jackson (n 61) 173.
65. *Bugmy v The Queen* [2013] HCA 37 [38].

66. *R v Fernando* (1992) 76 A Crim R 58 [62]–[63] (Wood J).
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71. Wendy Chan, *Women, Murder and Justice* (Palgrave 2001) 22.
72. Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth, ‘Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia’ (Our Watch, 2015) 9.