INTIMATE FEMICIDE: A STUDY OF SENTENCING TRENDS FOR MEN WHO KILL THEIR INTIMATE PARTNERS

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This article examines sentencing trends over the past 18 years for men who kill their intimate partners. Using a sample of 252 cases, the article demonstrates that sentences for second degree murder rose significantly after the Supreme Court of Canada's decision in Shropshire *but have more recently levelled off to a range that is still higher than the pre-*Shropshire *era. With respect to manslaughter, the amendments to the* Criminal Code *making the spousal nature of the crime an aggravating factor and changing social attitudes have resulted in increasingly severe sentences for spousal manslaughters. While a large number of the cases in this sample involved the intoxication of the accused and/or the victim, the defence of intoxication rarely reduced murder to manslaughter. Similarly, the number of successful provocation defences was lower than expected.*

Cet article examine les tendances relatives à la sentence des 18 dernières années en ce qui concerne les hommes ayant tué leur partenaire intime. Grâce à un échantillon de 252 causes, l'article démontre que les sentences pour meurtre au deuxième degré ont considérablement augmenté après la décision Shropshire *de la Cour suprême du Canada; elles se sont par la suite stabilisées à un niveau toujours supérieur à ce qu'elles étaient avant la décision* Shropshire. *En ce qui concerne l'homicide involontaire coupable, les amendements au* Code criminel *qui aggravent le facteur du crime et changent les attitudes sociales ont entraîné des sentences de plus en plus sévères pour homicide involontaire coupable d'un conjoint. Alors qu'un grand nombre de causes de cet échantillon impliquaient l'intoxication de l'accusé et (ou) de la victime, la défense pour intoxication réduit rarement le crime de meurtre à homicide involontaire coupable. Le nombre de défenses réussies pour provocation était également inférieur aux attentes.*

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I. INTRODUCTION

A. THE GENDERED NATURE OF SPOUSAL HOMICIDE

In recent years, considerable attention has been given in academic legal literature to the prosecution of women who kill their abusive partners.[1] However, women are much more likely to die at the hands of a violent partner than they are to kill that partner to escape the violence. Approximately 60 women in Canada are killed each year by their intimate (or former intimate) partners.[2] In many cases, the homicide is not the first incident of violence against the victim by the accused.[3] Women are at greatest risk when they are separated from their male partner or when they have announced their intent to separate.[4] In some cases, men kill not only their spouse, but also other family members or members of their spouse's extended family.[5] Particularly after multiple familial homicides, men may commit, or attempt, suicide.[6] Some groups of women are at greater risk, notably younger women and Aboriginal women.[7] Additional risk factors include a history of violence in a previous intimate relationship, a common-law relationship (as opposed to a legal marriage),[8] the presence of guns, alcohol abuse, and pregnancy.[9] Women are at greatest risk in their own homes,[10] and the presence of children in the home does not appear to be a protective factor.

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1 See e.g. Tim Quigley, "Battered Women and the Defence of Provocation" (1991) 55 Sask. L. Rev. 223; Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" (1997) 47 U.T.L.J. 1; Julianne Parfett, "Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases" (2001) 12 Windsor Rev. Legal Soc. Issues 55; Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L.J. 529; Regina A. Schuller, "Expert Evidence and Its Impact on Jurors' Decisions in Homicide Trials Involving Battered Women" (2003) 10 Duke J. Gender L. & Pol'y 225; John W. Roberts, "Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides" (2003) 27 Law & Psychol. Rev. 135; Carol Jacobsen, Kammy Mizga & Lynn D'Orio, "Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency" (2007) 18 Hastings Women's L.J. 31.

2 Average, 1996-2005: Geoffrey Li, "Homicide in Canada, 2006" (2007) 27:8 Juristat 1.

3 See Canada, Department of Justice, *Report on Sentencing for Manslaughter in Cases Involving Intimate Relationships* (Calgary: Federal-Provincial-Territorial Ministers Responsible for Justice, 2003), online: Department of Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/smir-phiri/index.html> [*Manslaughter Study*]. See also *Measuring Violence Against Women: Statistical Trends 2006* by Holly Johnson (Ottawa: Minister of Industry), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf> [*Measuring Violence*].

4 Rosemary Gartner, Myrna Dawson & Maria Crawford, "Women Killing: Intimate Femicide in Ontario, 1974-1994" (1998-99) 26 Resources for Feminist Research 151 at 158 ["Femicide in Ontario"]. The authors were able to identify motives in approximately 75 percent of the cases. In 45 percent of those cases "one motive clearly predominated: the offender's rage or despair over the actual or impending estrangement from his partner." Suspected or actual infidelity accounted for another 15 percent while the culmination of ongoing serial abuse was the motive in 10 percent. Five percent were attributable to life circumstances "such as bankruptcy, job loss, or serious illness" and in 3 percent of the cases, there was evidence that the offender was mentally ill (at 163).

5 *Ibid.* at 163. The study states that in addition to the killing of the intimate partner and, in some cases, the suicide of the offender, 74 additional persons were killed in the context of intimate homicide, most of whom were children of the victims.

6 *Manslaughter Study*, *supra* note 3. Suicide after spousal homicide is almost entirely a male phenomenon. Between 1974 and 2000, 28 percent of male offenders but only 3 percent of female offenders took their lives following the incident, a total of 564 men and 15 women. In "Femicide in Ontario," *ibid.*, the authors found that 31 percent of offenders killed themselves after killing their female partners.

7 "Femicide in Ontario," *ibid.* at 159. The authors note that "Aboriginal women's rates of spousal homicide are between five and ten times higher than the rates for non-Aboriginal women."

8 *Ibid.* at 157. The authors suggest that "common-law partners are more likely to be poor, young, unemployed, and childless — all factors associated with higher homicide rates" (at 159). The authors also suggest that men are less secure in their proprietary claims in common-law unions than in marriage. See also Margo Wilson, Holly Johnson & Martin Daly, "Lethal and Nonlethal Violence against Wives" (1995) 37 Can. J. Crim. 331 at 343.

9 *Manslaughter Study*, *supra* note 3.

10 "Femicide in Ontario," *supra* note 4 at 158.

For example, in a study of femicides from 1974-94, 100 children witnessed their mothers' deaths.[11]

In this article, I examine judicial approaches to sentencing for men who kill their intimate partners. I have two reasons for focusing on men who commit spousal homicide. First, as noted above, women are much more likely to be killed by intimate partners than are men. One study found that more than three-quarters of all spousal homicides recorded in Canada between 1974 and 2000 were committed by men against women.[12] Second, spousal homicides committed by men against women are distinct from spousal killings committed by women. At the risk of oversimplifying the difference, men who kill their spouses often do so out of jealousy, possessiveness, or to prevent the spouse from leaving the relationship or entering a new relationship. These crimes bear unique characteristics:

> Men perpetrate familicidal massacres, killing spouse and children together; women do not. Men commonly hunt down and kill wives who have left them; women hardly ever behave similarly. Men kill wives as part of planned murder-suicides; analogous acts by women are almost unheard of. Men kill in response to revelations of wifely infidelity; women almost never respond similarly.[13]

When men kill their intimate partners, the killing is sometimes the final act of violence against a spouse after a period of repeated abuse. In contrast, women who kill their spouses are more likely to kill to protect themselves (and their children) from further violence at the hands of their partner. Thus, violence against women is often a precipitating factor in spousal killings committed by both men and women.[14] The proliferation of programs to assist abused women appears to have resulted in a reduction of women killing their male spouses rather than a reduction of men killing their spouses.[15] It has been suggested that giving women a safe place to go may, paradoxically, increase violence by jealous and controlling spouses.[16]

Some researchers identify the underlying dynamic for men who kill their spouses or former spouses as men's proprietary claim over women. The idea that "if I cannot have her, no one will" fits with the reality that women are most likely to be killed when they attempt to leave the relationship. Rosemary Gartner, Myrna Dawson, and Maria Crawford present this concept as follows: "an extreme, if apparently incongruous manifestation of male proprietariness is intimate femicide. If unable to control or coerce his partner through other means, a man may exert the ultimate control over her by killing her."[17]

While significant scholarship exists regarding the factors that lead to spousal homicide,[18] there is a dearth of literature on what factors the courts consider in sentencing an individual

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11 *Ibid.* at 163.
12 See Valerie Pottie Bunge, "National Trends in Intimate Partner Homicides, 1974-2000" (2002) 22:5 Juristat 1 at 13.
13 Russell P. Dobash *et al.*, "The Myth of Sexual Symmetry in Marital Violence" (1992) 39:1 Social Problems 71 at 81.
14 See "Femicide in Ontario," *supra* note 4; *Manslaughter Study*, *supra* note 3.
15 Myrna Dawson, *Examination of Declining Intimate Partner Homicide Rates: A Literature Review* (Ottawa: Department of Justice, Research and Statistics Division, 2001).
16 *Ibid.*
17 "Femicide in Ontario," *supra* note 4 at 160.
18 *Ibid.*; Wilson, Johnson & Daly, *supra* note 8.

convicted of the culpable homicide of his intimate partner. This article begins to address that void.

B. OBJECTIVES

This article looks at sentences imposed on men who killed their intimate female partners over a period of 18 years to identify trends in sentencing patterns and judicial attitudes towards spousal homicide. Spousal killings span the range of first and second degree murder as well as manslaughter, although convictions for first degree murder are less common in this context. Using a sample of 252 cases, this article demonstrates that, while the line between second degree murder and manslaughter can be a fine one, a conviction for manslaughter instead of murder has a very significant impact on how long an offender is incarcerated. Identifying the homicide offence for which the individual is convicted is the key determinant of sentencing. Accordingly, this article also examines the factors that reduce murder to manslaughter focusing on provocation and intoxication, which are particularly relevant in the spousal homicide context.

Finally, this article examines the impact of two recent changes in the law of sentencing. First, s. 718.2 of the *Criminal Code*[19] was amended in 1995 to provide that it is an aggravating factor in sentencing if the victim is the accused's spouse or if the accused violates a position of trust vis-à-vis the victim.[20] These statutory factors apply to manslaughter sentencing and setting the period of parole ineligibility for second degree murder. Second, in *Shropshire*,[21] the Supreme Court of Canada opened the door to higher periods of parole ineligibility for second degree murder generally, and to a more deferential standard of appellate review.

Historically, intimate femicide was often characterized as a less serious example of culpable homicide. There are a few reasons why this may have been the case. First, spousal killings are inextricably linked to domestic violence, which our legal system traditionally viewed as a private rather than criminal matter.[22] Second, men who killed their partners were often viewed as less culpable due to the "emotional" nature of such crimes.[23] Finally, judges have tended to view spousal killings as less blameworthy than stranger killings: the accused was characterized as less of a continuing threat to society where he "*only*" killed his spouse.[24]

This article demonstrates that, in recent years, there has been a trend towards harsher sentences for spousal homicides and an increasing awareness that the intimate nature of the crime is an aggravating, not a mitigating, factor. This is not to suggest that higher sentences

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19 R.S.C. 1985, c. C-46.

20 Section 718.2 was enacted by *An Act to Amend the Criminal Code (sentencing) and Other Acts in consequence thereof*, S.C. 1995, c. 22, s. 6.

21 *R. v. Shropshire*, [1995] 4 S.C.R. 227 [*Shropshire*].

22 Mark Anthony Drumbl, "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals For Reform" (1994) 12 Can. J. Fam. L. 115.

23 For example, the defence of provocation developed out of a judicial belief that men who killed adulterous wives should be partly excused: see Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 24.

24 See *R. v. Jackson* (1996), 184 A.R. 93 (C.A.) [*Jackson*], where a man who killed his spouse was viewed as deserving of a lesser sentence than a man who killed a stranger.

are inherently good, but it does demonstrate where judges place spousal killings on the gradations of fault.

With respect to provocation and intoxication, the article illustrates that both of these defences have had a relatively low success rate in recent years. Although the majority decision in *Thibert*[25] seemed to suggest that a spouse's jealous reaction to his estranged wife's new partner may provide a sufficient basis for a provocation defence, judges following that decision have applied the defence cautiously, and juries do not often accept the defence. The concern that *Thibert* would lead to separation per se being regularly relied on to support provocation appears to have been unfounded.[26] However, the few cases in which provocation is successful raise some troubling questions about whether in fact the accused's blameworthiness should be construed as less than that of a murderer. With respect to intoxication, triers of fact appear even more reluctant to allow the defence to be used to reduce an offender's culpability to manslaughter. In fact, some of the cases in the sample show that intoxication has been treated as an aggravating factor in sentencing.

Because of the legislative and jurisprudential changes relating to sentencing for spousal homicide, it is difficult to attribute a trend towards increased sentences to any one particular factor. For example, the trend towards harsher sentences for spousal manslaughter may be a result of both s. 718.2 of the *Criminal Code* and of changing judicial attitudes towards spousal violence. It is possible that s. 718.2 itself merely reflects a change in societal (and perhaps judicial) attitudes about the seriousness of spousal violence. Parole ineligibility periods for second degree spousal murder convictions may have increased as a result of s. 718.2, *Shropshire*, or a combination of both.

C. THE DATA

This article uses a sample of all reported spousal homicide cases available on Quicklaw, Westlaw, and CanLII between January 1990 and June 2008. Cases were also found using the Canadian Sentencing Digest and the Department of Justice *Manslaughter Study*.[27] The sample included 252 cases.

The term "spousal" is used broadly in this article and includes married and common-law relationships as well as estranged, separated, or divorced relationships. Although cases involving dating relationships were excluded, sometimes cases using the term "girlfriend" involved a common-law relationship and thus, were included. A majority of these cases are at the appellate level,[28] predominately involving appeals by the defence.

This sample is clearly not comprehensive of all spousal homicide cases and thus the results do *not* paint a complete picture of the phenomenon of spousal homicide in Canada. In this sample, convictions will inevitably be overrepresented because of the large number

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25 *R. v. Thibert*, [1996] 1 S.C.R. 37 [*Thibert*].

26 In *R. v. Lees*, [1999] B.C.J. No. 1294 (S.C.) (QL), aff'd 2001 BCCA 94, 148 B.C.A.C. 253 [*Lees*], for example, both an impending separation and a threat to falsely accuse the defendant of sexually abusing his daughter were not sufficient to satisfy the objective test for provocation. The Court of Appeal agreed with this assessment.

27 *Manslaughter Study*, *supra* note 3.

28 There are 161 appellate decisions.

of defence appeals. Furthermore, this article will not catch acquittals where the Crown does not appeal or cases where there was a guilty plea and no written reasons for sentence. The sample bias in favour of convictions does not detract from the analysis of sentencing because only convictions lead to a sentencing decision. Similarly, it should not distort the defences of provocation and intoxication since both lead to a conviction for manslaughter, and not an acquittal.[29] This sample does demonstrate the significant difference between sentences for manslaughter and those for second degree murder, which in turn highlights the importance of defences (or plea agreements) that reduce second degree murder to manslaughter.

The sample includes cases dealing with 252 accused persons. Because there may be multiple judgments dealing with one accused person, the total number of trials, sentencing hearings, and appeals exceeds 252. The sample consists of 16 trial decisions, 98 sentencing decisions, 161 appeals on liability issues, and 55 appeals from sentence. Of the 161 appeals, 152 are appeals from conviction by the accused and only nine are appeals by the Crown.[30] In only three of these cases was the Crown appealing from an acquittal as opposed to a reduced verdict.[31] There are 12 Crown sentence appeals.

TABLE 1
OVERVIEW OF SPOUSAL HOMICIDE CASE SAMPLE

	First Degree Murder	Second Degree Murder	Manslaughter	Not Criminally Responsible	Acquittals	New Trial Ordered	Totals
Charge	87	145	20				252
Outcome	45 (9)*	134 (13)*	65(2)*	6	2	24	252

* The bracketed numbers indicate cases where a new trial was ordered and information on the ultimate outcome at the subsequent trial was unavailable.

Of the 252 cases, 87 involved charges of first degree murder, 145 involved a charge of second degree murder, and 20 involved manslaughter charges. The conviction information paints a significantly different picture from that of the charging pattern. There were 45 convictions for first degree murder, 134 convictions for second degree murder, and 65 convictions for manslaughter. Thus, fewer than half of the first degree murder charges resulted in convictions for that offence, and there were three times more manslaughter convictions than there were manslaughter charges. This suggests that some overcharging and/or significant plea bargaining occurs. There were six findings of not criminally responsible on account of a mental disorder[32] and two acquittals. Although acquittals are

29 It is possible that cases involving a successful intoxication or provocation defence are less likely to be appealed by the accused although some of these cases will come to light as sentencing decisions and/or Crown appeals.

30 There were 317 separate decisions included in the sample. Fourteen involved both an appeal from conviction and a sentencing appeal; one involved both an appeal from conviction and a sentencing decision.

31 *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.); *R. v. Charemski*, [1998] 1 S.C.R. 679; *R. c. Laflamme* (1999), 141 C.C.C. (3d) 74 (Qc. C.A.).

32 While these cases are beyond the scope of this article, it is fair to say that in five of them there was very strong evidence of mental illness. See *R. v. Di Medio*, [1996] Q.J. No. 1440 (S.C.) (QL); *R. v. McDonald*, 2002 BCSC 269, [2002] B.C.J. No. 552 (QL); *R. v. Singh*, 2003 BCSC 1455, [2003] B.C.J. No. 2226 (QL); *R. v. Weldon* (1995), 86 O.A.C. 362, where the Court of Appeal found a jury conviction to be unreasonable and substituted a verdict of not criminally responsible by reason of mental disorder.

under-represented in this sample, the rate of convictions in spousal homicides is generally high.[33]

While each of these cases involved its own unique mix of brutality and loss, after reading more than 250 judgments, one is struck by the similarity of the cases. The relationship has often been characterized by ongoing violence or persistent arguments.[34] The quarrels are frequently triggered by the accused's suspicions of infidelity, which are occasionally substantiated, but more often not.[35] Alcohol is very often a precipitating factor even where the state of intoxication is not sufficient to reduce murder to manslaughter. The victim is often also intoxicated. While there are some cases where the woman is killed by a single stab wound or gunshot, the degree of "overkill" in these cases is very disturbing. It is not uncommon to see descriptions of 20 to 40 stab wounds,[36] or cases where multiple means are used to cause death, such as stabbing, strangulation, and a beating.[37] Where there is evidence of provocation on the part of the deceased, it is often verbal, rather than physical, and trivial in nature.[38]

II. SENTENCING TRENDS IN SPOUSAL HOMICIDE

A. THE SENTENCING REGIME

Sentencing anchors the entire legal regime for culpable homicide. The only real impact the type of homicide charge or the degree of murder has on the accused relates to sentencing. For first degree murder there is a mandatory life sentence and a mandatory period of parole ineligibility of 25 years.[39] For second degree murder there is also a mandatory life sentence but the parole ineligibility period will be set by the trial judge at somewhere between 10 and

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In the sixth case, *R. v. Sullivan* (1995), 54 B.C.A.C. 241, by contrast, the Court of Appeal upheld a jury finding of not criminally responsible in a case where the accused claimed to suffer a severe psychological blow from the words of his wife. The case resembles a number of second degree murder cases where the parties had been drinking and returned home arguing. The evidence of mental disorder was questionable at best. It is important to note that this case was tried before the Supreme Court of Canada's judgment in *R. v. Stone*, [1999] 2 S.C.R. 290 [*Stone*].

33 See Myrna Dawson, *Criminal Justice Outcomes in Intimate and Non-Intimate Partner Homicide Cases* (Ottawa: Department of Justice, Research and Statistics Division, 2004). This report states that accused persons who killed their intimate partners are more likely to plead guilty and more likely to be convicted overall than accused persons who killed non-intimate victims.

34 This is consistent with the social science data generally. Between 1991 and 2004 there was a history of domestic violence in 59 percent of homicides against women by their male partners: see *Measuring Violence*, *supra* note 3.

35 On the role of jealousy in spousal homicides, see Margo Wilson & Martin Daly, "Till Death Do Us Part" in Jill Radford & Diana E.H. Russell, eds., *Femicide: The Politics of Women-Killing* (New York: Macmillan, 1992) at 86-89.

36 See e.g. *R. v. Young* (1993), 117 N.S.R. (2d) 166 (C.A.) [*Young*] involving more than 20 stab wounds with a hunting knife; *R. v. Hanna* (1993), 27 B.C.A.C. 42 where the victim suffered an ongoing and very brutal beating; *R. v. Sychuk*, [1990] A.J. No. 6 (C.A.) (QL) [*Sychuk*] where the victim suffered 22 stab wounds, broken bones, and blunt force trauma to her face; *Stone*, *supra* note 32 where the accused stabbed his wife more than 40 times; *Jackson*, *supra* note 24 where the accused stabbed his wife 59 times with a pocket knife.

37 See e.g. *R. v. Curry*, 2004 BCCA 144, 197 B.C.A.C. 6 [*Curry*] involving lacerations to the hands and face, a brutal beating, and ultimately strangulation; *Samson c. R.*, 2005 QCCA 1151, [2005] J.Q. no 17404 (QL) where the victim's home was set on fire after she was shot and killed inside; *R. v. Tate*, 2002 BCCA 189, 169 B.C.A.C. 175 where the victim was force-fed sleeping pills and then attacked with a pick axe.

38 See e.g. *R. v. Kent*, 2005 BCCA 238, 29 C.R. (6th) 33 [*Kent*]; *R. v. Muir* (1995), 80 O.A.C. 7 [*Muir*].

39 *Criminal Code*, *supra* note 19, ss. 235(1), 745(a).

25 years after a recommendation from the jury.[40] Finally, for manslaughter, there is a maximum life sentence with no minimum sentence except where a firearm has been used, in which case there is a mandatory four years of imprisonment.[41] Where a firearm is not used, the range is anything from a suspended sentence to life imprisonment.[42]

This article focuses on sentencing for second degree murder and manslaughter while less attention is given to the first degree murder cases. It is difficult to draw conclusions about sentencing from the first degree cases because the trial judge has no discretion whatsoever in imposing sentence. A brief description of the first degree cases follows primarily to distinguish them from the second degree murder cases.

B. FIRST DEGREE MURDER

Because the sentence for first degree murder is fixed by law, there is no opportunity for the trial judge to assess the seriousness of the particular crime. If there is a jury, it will make the determination as to whether a murder is first or second degree. If first degree, the trial judge then automatically imposes a life sentence with a parole ineligibility period of 25 years. A killing does not constitute first degree murder unless it fits within one of the criteria set out in s. 231 of the *Criminal Code*, which include, in this context, planned and deliberate murders,[43] contract murders,[44] and murders during the course of a forcible confinement,[45] a sexual assault,[46] or criminal harassment.[47]

Information regarding the grounds for first degree murder is available for 44 of the 45 cases where a conviction was entered at trial. Of these 44 cases, 40 were based on planning and deliberation under s. 231(2). In one of these cases s. 231(5)(b), which elevates death caused while committing sexual assault to first degree, was also raised while in another s. 231(6) involving criminal harassment was also raised.[48] In three cases, allegations were made solely under s. 231(5) where it was alleged that death occurred while the victim was forcibly confined or sexually assaulted.[49] In a fourth case, the allegation was made under s. 231(3), contract murder.[50]

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40 *Ibid.*, s. 236. Whenever the accused is sentenced to more than 15 years of parole ineligibility, whether for first or second degree murder, he can apply after 15 years to have that period reduced but this does not apply to murders involving multiple victims (s. 745.6). Note that the Conservative government announced its plans to get rid of the "faint hope clause" in June 2009: see "Tories move to eliminate faint-hope clause from Criminal Code" *The Globe and Mail* (5 June 2009), online: The Globe and Mail <http://www.theglobeandmail.com/news/national/tories-move-to-eliminate-faint-hope-clause-from-criminal-code/article1170810/>.

41 See *Criminal Code*, *ibid.*, s. 236. In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, the Supreme Court of Canada upheld this mandatory minimum sentence.

42 A conditional sentence is no longer available for manslaughter: see *Criminal Code*, *ibid.*, ss. 742.1, 752.

43 *Ibid.*, s. 231(2).

44 *Ibid.*, s. 231(3).

45 *Ibid.*, s. 231(5)(e).

46 *Ibid.*, s. 231(5)(b).

47 *Ibid.*, s. 231(6).

48 *R. v. Tavenor* (2001), 140 O.A.C. 78 [*Tavenor*] (*Criminal Code*, *ibid.*, s. 231(5)(b)); *R. v. Bradley*, 2003 PESCTD 30, 32 Nfld. & P.E.I.R. 225 [*Bradley*] (*Criminal Code*, s. 231(6)).

49 *R. v. Halnuck* (1996), 151 N.S.R. (2d) 81 (C.A.) [*Halnuck*]; *R. v. Liu* (2004), 190 C.C.C. (3d) 233 (Ont. C.A.); *R. v. Bohnet*, 2003 ABCA 207, 339 A.R. 175.

50 *R. v. McCaw*, [1998] O.J. No. 730 (C.A.) (QL).

Bradley[51] is the only case relying on s. 231(6), which elevates murders that occur during the course of a criminal harassment to first degree. However, even *Bradley*, which involved overwhelming evidence of harassment, also relied on planning and deliberation. In *Bari*,[52] s. 231(6) was not raised even though the accused had already been convicted of criminal harassment against the victim.

Thus, planning and deliberation is by far the most common route to a first degree murder conviction. The basis for such a finding is often established through evidence of motive such as an insurance policy,[53] infidelity on the part of the accused or the deceased,[54] a custody dispute,[55] or the accused's unhappiness over the fact of estrangement.[56]

The planned and deliberate nature of most first degree spousal murder cases makes such killings distinguishable from second degree and spousal manslaughter cases, which tend to occur in the course of a domestic assault or dispute. For example, first degree murders are more likely to take place outside the home than manslaughter or second degree murder cases[57] and more likely to involve firearms.[58] Financial motives, such as an insurance policy, are much more common in first degree murder cases.[59] The accused may be characterized as in dire financial straits; an insurance policy may be the only evidence supporting planning and deliberation.[60]

The first degree murder cases are more likely to involve estranged spouses where the accused is angry over the split.[61] He may attend the victim's place of work[62] or her home[63] to commit the crime. It is not uncommon for first degree cases to involve multiple victims;[64] such cases occur more frequently where the spouses are estranged.[65] Intoxication appears to

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51 *Supra* note 48. Section 231(6) was added to the *Criminal Code* as part of Bill C-27, *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16.

52 *R. v. Bari*, 2006 NBCA 119, 308 N.B.R. (2d) 247 [*Bari*].

53 See e.g. *R. v. Grewall*, 2001 BCSC 45, [2001] B.C.J. No. 75 (QL) [*Grewall*]; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 [*Khan*]; *R. v. Ragunauth* (2005), 203 O.A.C. 54 [*Ragunauth*]; *R. v. Beaucage* (2005), 200 O.A.C. 149 [*Beaucage*].

54 See e.g. *R. v. Holtam*, 2002 BCCA 339, 168 B.C.A.C. 278 where the Crown alleged that Mr. Holtam murdered his wife and daughter and attempted to murder his son to prove his level of commitment to the woman with whom he was having an extramarital affair. See also *Tavenor*, *supra* note 48 where the Crown relied on testimony of an informant that indicated Tavenor had confronted the victim prior to her death about sleeping with other men.

55 See e.g. *R. v. Merz* (1999), 46 O.R. (3d) 161 (C.A.) [*Merz*].

56 See e.g. *Bari*, *supra* note 52 where the accused wrote letters to relatives that indicated his anger and belief that his estranged wife should not be allowed to live if she would not reconcile with him.

57 See e.g. *R. v. Wallen*, [1990] 1 S.C.R. 827 [*Wallen*] where the accused shot his wife at the law firm at which she worked after harassing her there previously. This case might well have constituted a murder in the course of a criminal harassment had that legislation been enacted at the time. See also *R. v. Belowitz* (1990), 38 O.A.C. 189; *R. v. Wolfe*, 2003 BCSC 505, [2003] B.C.J. No. 1054 (QL) [*Wolfe*].

58 *Grewall*, *supra* note 53; *Khan*, *supra* note 53; *Ragunauth*, *supra* note 53; *R. v. Samuels* (2005), 198 O.A.C. 109; *Beaucage*, *supra* note 53.

59 For example, in *Beaucage*, *ibid.* at para. 5, the Court noted "a $200,000 life insurance policy that the appellant and the victim had purchased shortly before her death" as the motive for the killing.

60 See e.g. *Beaucage*, *ibid.*; *Ragunauth*, *supra* note 53; *Grewall*, *supra* note 53; *Khan*, *supra* note 53.

61 See e.g. *R. v. Boussaada*, 2004 ABQB 401, 360 A.R. 113 [*Boussaada*]; *Bradley*, *supra* note 48; *Merz*, *supra* note 55; *Wallen*, *supra* note 57.

62 See e.g. *Wallen*, *ibid.*

63 See e.g. *Boussaada*, *supra* note 61; *Bradley*, *supra* note 48; *R. v. Peepeetch*, 2003 SKCA 76, [2004] 1 W.W.R. 552; *R. v. Desmond*, 2002 NSCA 40, 203 N.S.R. (2d) 67; *Halnuck*, *supra* note 49.

64 Of 43 cases where the information was available, seven involved multiple victims: see e.g. *Wolfe*, *supra* note 57. Mr. Wolfe shot his estranged wife and her new lover.

65 Of seven multiple victim cases in the sample, five involved an estranged spouse. See e.g. *Wolfe*, *ibid.*

be involved less often in first degree murder cases than in manslaughter or second degree cases probably because of the high incidence of planning and deliberation.[66]

1. THE ROLE OF ALCOHOL IN NEGATING PLANNING AND DELIBERATION

In order to assess the relevance of intoxication in negating planning and deliberation, all 87 cases in which the accused was charged with first degree murder were examined. Of the 16 cases in which intoxication was involved, there were six first degree convictions, eight second degree convictions, and two manslaughter convictions.[67]

Of the 16 cases involving intoxication, the relationship between intoxication and planning and deliberation was a significant factor in only three cases.[68] In two of these cases, *Bradley* and *Allen*,[69] the accused's assertion of intoxication sufficient to negate planning and deliberation failed. In both of these cases, the purposive nature of the accused's behaviour and the post-offence conduct of the accused were sufficient to establish planning and deliberation.[70]

In *Wallen*,[71] the accused's first degree murder conviction was overturned and a new trial ordered after a divided Supreme Court of Canada held that the trial judge should have instructed the jury that a lesser level of intoxication is required to negate planning and deliberation than is required to negate *mens rea*. However a differently constituted majority agreed that "there is no hard and fast rule that the trial judge must always give explicit instructions clearly distinguishing between the degree of intoxication necessary to negative intent to kill and that necessary to negative planning and deliberation."[72] This decision was followed in *Allen*, where the accused's first degree murder conviction was upheld after the trial judge's charge on planning and deliberation was found to be sufficient. The Newfoundland Court of Appeal affirmed that the jury must consider intoxication when determining whether the accused had the capacity to plan and deliberate and whether he did plan and deliberate.[73]

In one additional case, *R. v. Daley*,[74] an appeal based on the defence of intoxication went all the way to the Supreme Court of Canada. While there was significant evidence of intoxication, it was not related to the issue of planning and deliberation but only to whether

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66 There was evidence that the accused was intoxicated in 65 out of the total 252 cases in the sample (26 percent). Out of 87 cases in which the accused was charged with first degree murder, only 16 (18 percent) involved intoxication.

67 In *Wallen*, *supra* note 57, the appeal from conviction for first degree murder resulted in a new trial being ordered.

68 *R. v. Allen* (1994), 120 Nfld. & P.E.I.R. 188 (Nfld. C.A.) [*Allen*]; *Wallen*, *ibid.*; *Bradley*, *supra* note 48.

69 *Allen*, *ibid.*

70 In *Bradley*, *supra* note 48, the accused had been arguing with his estranged spouse and attempting to enter her apartment. He left temporarily after the police were called, but returned later with an axe, which he used to break into the building and kill his former spouse. The accused in *Allen*, *ibid.*, was involved in a custody dispute with his common-law wife. Prior to the murder, the accused went to his mother's house and retrieved a shotgun and ammunition, which he later used to kill his ex-wife. After shooting the victim, the accused told police that he had made up his mind to kill his ex-wife the previous day.

71 *Supra* note 57 at para. 6. A majority of the Court held that such an instruction was not required in every case.

72 *Ibid.* at para. 10. See also *Allen*, *supra* note 68 at paras. 69-70.

73 *Allen*, *ibid.* at para. 71.

74 2007 SCC 53, [2007] 3 S.C.R. 523.

the accused had the *mens rea* to commit murder. It is not clear why the effect of drunkenness on the issue of planning and deliberation was not considered.

Given the role of alcohol in spousal violence and homicide, and the fact that the majority of first degree cases are based on planning and deliberation, it is surprising that more first degree murder cases in the sample did not involve assertions of intoxication negating planning and deliberation. It is plausible to suggest that the Crown was more likely to accept a plea to second degree murder or manslaughter where significant intoxication was involved. The higher incidence of cases involving alcohol in the second degree murder and manslaughter cases would support this speculation.[75]

C. SECOND DEGREE MURDER

Unlike first degree murder, the sentencing regimes for second degree murder and manslaughter both provide discretion to trial judges to recognize a wide range of culpability within each offence. Therefore, an examination of the sentences meted out for second degree spousal murder and manslaughter reveals information about judicial attitudes about the culpability of such crimes. Because second degree murder carries a mandatory life sentence, the sentencing judge's discretion lies in setting the period of parole ineligibility.

The second degree murder cases paint an all too familiar picture. A majority of the killings take place in the home, intoxication by alcohol or drugs by either or both the victim and the accused is common, and a large number of cases involve arguments and fights that got out of hand. These are very similar to the manslaughter cases and the line between the two offences is often very fine. The degree of intoxication, whether there was any provocation, whether *mens rea* can be established, and whether a guilty plea to manslaughter was accepted are the determining factors in the offence for which the accused is ultimately convicted.

Until the mid-1990s, the killing of a spouse was not viewed as a particularly serious form of second degree murder and changes were slow to develop.[76] In the mid-1990s, the Ontario Court of Appeal took the approach that the spousal nature of the murder did not necessarily justify an increase in parole ineligibility. In *Pabani*,[77] the Court of Appeal reduced a 12-year period of parole ineligibility to ten years, rejecting the trial judge's characterization of the victim as particularly vulnerable:

> While everything the trial judge recites as to the cowardly and brutal nature of the conduct leading to the victim's death is true, it falls short of depicting conduct that requires special consideration over and above the minimum term of incarceration prescribed by the *Code*. Murder is a brutal concept, but it is often directed towards a vulnerable class of society. It is for this reason that Parliament has seen fit to provide for a minimum term of incarceration.[78]

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75 See text accompanying *supra* note 66.

76 This is acknowledged in the Nova Scotia Court of Appeal decision in *R. v. Doyle* (1991), 108 N.S.R. (2d) 1 (C.A.) [*Doyle*].

77 *R. v. Pabani* (1994), 17 O.R. (3d) 659 (C.A.) [*Pabani*].

78 *Ibid.* at 671.

In *McCormack*,[79] the trial judge had imposed a period of 14 years parole ineligibility for a man who murdered his wife of 25 years. The trial judge stressed the brutality of the killing, the vulnerability of the wife, and the betrayal of trust that is involved in spousal murder. He stated, "[i]t is that vulnerability and the betrayal of that trust which sets wife murder apart from other forms of murder. It is itself an exceptional circumstance which justifies the increase of the period of parole ineligibility."[80] The Ontario Court of Appeal reduced the parole ineligibility period to 12 years, holding that it was an error for the trial judge to base an increase in parole ineligibility on the fact that the victim was the accused's spouse.[81] The Court also stated:

> Spousal murder is horrible. But all murder is horrible. Parliament has not seen fit to legislate that any particular type of murder automatically justifies the increase of parole ineligibility beyond the basic ten years contemplated by [s. 745.4]. If any specific type of murder is automatically to call for an increase in parole ineligibility that is something which can only be legislated by Parliament.[82]

The Nova Scotia Court of Appeal was a lone voice in rejecting this attitude beginning with two cases in the early 1990s. In 1991, in *Doyle*,[83] that Court increased the parole ineligibility period from the ten years set by the trial judge to 17 years for a man who shot his wife as she slept in their bed. The Court stressed that the spousal nature of the homicide was aggravating and should lead to parole ineligibility in the upper range.[84] The Court explicitly recognized the serious societal problem of violence against women and the courts' previously insufficient response to such violence. The fact that Parliament had not singled out spousal homicides did not preclude it from being an aggravating factor:

> Although Parliament has not singled out wives for special protection, sentencing jurisprudence recognizes that courts attach significance to the relationship between the perpetrator of an offence and the victim, with special emphasis on crimes involving victims in positions of vulnerability and to whom the perpetrator is in a position of trust. With respect, it is wrong to say that one cannot consider as an aggravating factor the spousal nature of this murder simply because Parliament did not specifically say it should be done. The husband/wife relationship in this case is of great importance, and is a factor to be taken into account in moving towards the upper end of the range of parole ineligibility. Family and spousal violence are all too prevalent, and if courts have not sufficiently shown their stern disapproval of such conduct the time has now come to do so.[85]

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79 *R. v. McCormack* (1995), 83 O.A.C. 73, leave to appeal to S.C.C. refused, 24873 (8 February 1996) [*McCormack*].

80 *Ibid.* at para. 6 [emphasis omitted].

81 *Ibid.* at para. 8.

82 *Ibid.* See also *Muir*, *supra* note 38 where the Court of Appeal also reduced a 12-year period of parole ineligibility to ten years on the basis that there was no justification for increasing parole ineligibility above the minimum.

83 *Supra* note 76.

84 The trial judge in *Doyle*, *ibid.*, by contrast, did not consider the spousal nature of the crime an aggravating factor but focused on the lack of brutality involved in shooting a sleeping wife: "Can we say that any time a wife is shot and killed that the penalty should be extended so the eligibility for parole is longer. The answer has to be no, not because wives don't have a special position in society and not because wives are not protected, but because if that were the law, then Parliament would have said so and not created the section that they did" (at para. 38, cited in Teresa Scassa, "Sentencing Intimate Femicide: A Comment on *R. v. Doyle*" (1993) 16 Dal. L.J. 270 at 279).

85 *Doyle*, *ibid.* at para. 39.

The Nova Scotia Court of Appeal followed this case with *Baillie*,[86] where it raised a 13-year parole ineligibility period to 17 years. The accused in *Baillie* had abused his wife over a 24-year marriage and their children were in the house at the time of the homicide.

Parliament resolved this discrepancy by enacting s. 718.2 of the *Criminal Code* in 1996 as part of a major codification of sentencing principles. This provision sets out various aggravating factors in sentencing across all offences. Specifically, the existence of a spousal relationship between the accused and the victim as well as a breach of trust in relation to the victim are now statutorily mandated aggravating factors in sentencing for all crimes.[87]

The Supreme Court of Canada has held that s. 718.2 only applies to cases where sentencing took place after the enactment of the provision.[88] However, in *Stone*,[89] the Court also held that there was common law authority to treat the spousal nature of the homicide as aggravating, stating that "there is ample authority for the proposition that courts considered a special connection between offender and victim to be an aggravating factor in sentencing at common law."[90] However, prior to *Stone*, courts were not consistently applying this principle.

Another significant development in the second degree sentencing context was the Supreme Court of Canada's 1995 decision in *Shropshire*. While not a spousal case, the Court held that extraordinary circumstances were not necessary to justify raising parole ineligibility over ten years. The trial judge in *Shropshire* raised the parole ineligibility period to 12 years in part because the accused would not indicate his reasons for the killing. The Supreme Court of Canada upheld the parole ineligibility period and gave judges more discretion to raise that period. For the Court, Iacobucci J. held that special circumstances were not necessary to justify elevating the period of parole ineligibility and that the power to raise "parole ineligibility need not be sparingly used."[91]

The Court held that the "unusual circumstances" test for raising parole ineligibility was "too high a standard and makes it overly difficult for trial judges to exercise the discretionary power to set extended periods of parole ineligibility."[92] Rather, trial judges are instructed to apply the test as follows:

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86 *R. v. Baillie* (1991), 107 N.S.R. (2d) 256 (S.C. (A.D.)) [*Baillie*].

87 *Criminal Code*, *supra* note 19, s. 718.2 provides:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
>
> …
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> …
>
> shall be deemed to be aggravating circumstances.

88 *Stone*, *supra* note 32.

89 *Ibid.*

90 *Ibid.* at para. 241 [footnotes omitted].

91 *Shropshire*, *supra* note 21 at para. 31.

92 *Ibid.* at para. 26.

> [A]s a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744, the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.[93]

The other important aspect of the Court's judgment in *Shropshire* relates to the appropriate standard of appellate review. An appellate court should not substitute its own view of the appropriate period of parole ineligibility. Rather, deference should be shown to the trial judge's decision on parole ineligibility unless the trial judge applied the wrong principles or the period imposed is manifestly unfit.

Shropshire applies to all second degree murders, not just to spousal murders. Thus, one must be cautious in attributing any increase in sentencing for spousal murders to a change in attitudes about violence against women in particular. It is likely that *Shropshire* has led to an increase in parole ineligibility across the board for second degree murder. It is also difficult to separate the impact of s. 718.2 from that of *Shropshire* because both developments took place so close in time.[94] However, because s. 718.2 applies to manslaughter one would expect to see a corresponding increase in sentencing for that crime if the legislation is having a significant impact.

The present sample has sentencing information from 88 second degree murder cases. The range of parole ineligibility periods is from ten to 25 years. There are only two cases where 25-year parole ineligibility periods were imposed by the sentencing judge; in both of those cases the periods were reduced on appeal.[95] There was one additional 25-year parole ineligibility period imposed based on s. 745(b) of the *Criminal Code* because the accused had a previous murder conviction.[96] The average parole ineligibility period for the entire sample is 13.4 years. However, a closer look at the data suggests a change in the pattern of sentencing over the years covered in this study. For ease of discussion, the article divides the cases into three time periods: those in the five years prior to *Shropshire*, those in the five years immediately after the decision, and those in the final seven years of the study.

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93 *Ibid.* at para. 27.

94 *Shropshire*, *ibid.*, was handed down on 16 November 1995 and s. 718.2 was enacted on 3 September 1996.

95 *R. v. Sarao* (1995), 80 O.A.C. 236 [*Sarao*]; *Poissant c. R.*, 2007 QCCA 205, [2007] J.Q. no 998 (QL) [*Poissant*].

96 *R. v. Falkner*, 2004 BCSC 986, 122 C.R.R. (2d) 241 [*Falkner*].

TABLE 2
PAROLE INELIGIBILITY FOR SECOND DEGREE MURDER

Parole ineligibility	10 years	11-15 years	>15 years	Average parole ineligibility[§]	# sentence varied on appeal	Total
1990-1995	12 (57%)	5 (24%)	4 (19%)	12.5 years (11.7)*	7 (33%)	21
1995-2000	2 (7%)	17 (65%)	7 (27%)	14.3 years (14)*	2 (7.7%)	26
2001-June 2008	7 (17%)	25 (61%)	9 (21%)	13.25 years (12.2)*	2 (4.9%)	41

[§] Where there is an appeal from sentence, it is the final sentence imposed by the appellate court that was used for these calculations.

[*]Average sentence after excluding multiple murders.

1. PRE-*SHROPSHIRE* SECOND DEGREE MURDER SENTENCING CASES: 1990-1996[97]

In the early cases before *Shropshire*, raising the period of parole ineligibility appears to have been the exception rather than the norm. *Shropshire* was decided 16 November 1995. In the present sample, there are 21 cases in the five years immediately preceding *Shropshire* where the sentence for second degree murder is available. In 12 of those 21 cases (57 percent), the minimum parole ineligibility of ten years was imposed. In the remaining nine cases (43 percent), parole ineligibility was raised. In both *Doyle* and *Baillie*,[98] the Nova Scotia appellate court raised the parole ineligibility to 17 years, significantly increasing the average period of parole ineligibility in the pre-*Shropshire* period.[99] There were five cases in which a defence appeal resulted in a reduction of parole ineligibility. All of these cases were in Ontario,[100] raising the spectre of sentencing disparity across provinces, particularly between Ontario and Nova Scotia. The average parole ineligibility period of the pre-*Shropshire* cases is 12.5 years. If the two cases involving multiple victims[101] are removed from the sample, the average parole ineligibility period drops to 11.7 years. Factors that lead to a higher period of parole ineligibility include multiple victims,[102] a history of domestic abuse,[103] and the presence of children in the house at the time of the killing.[104]

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97 See Appendix 1 for a table setting out the period of parole ineligibility imposed in the cases five years immediately before *Shropshire*.

98 The trial judge had set parole ineligibility at ten years in *Doyle*, *supra* note 76 and at 13 years in *Baillie*, *supra* note 86.

99 Without these two cases the average would have been 12 years.

100 See *R. v. McMurrer* (1991), 89 Nfld. & P.E.I.R. 36 (P.E.I.S.C. (A.D.)) where a period of ten years was raised on appeal to 12 years. In both *Pabani*, *supra* note 77 and *Muir*, *supra* note 38, ineligibility was reduced from 12 to ten years. In *McCormack*, *supra* note 79, parole ineligibility was reduced from 14 to 12 years and in *Sarao*, *supra* note 95 from 25 to 22 years. It should be noted that *Sarao* involved the murder of three people, the accused's spouse and her parents.

101 In *Sarao*, *ibid.*, 22 years of parole ineligibility was imposed and in *R. v. Loubier*, [1995] O.J. No. 2035 (Ct. J. (Gen. Div.)) (QL) [*Loubier*] a 17-year parole ineligibility period was imposed.

102 *Loubier*, *ibid.* and *Sarao*, *ibid.*.

103 See e.g. *Baillie*, *supra* note 86; *McCormack*, *supra* note 79; *R. v. Munroe* (1995), 79 O.A.C. 41; see also *R. v. Randhawa* (1990), 104 A.R. 304 (C.A.) [*Randhawa*]; *Pabani*, *supra* note 77.

104 See e.g. *Randhawa*, *ibid.*; *Baillie*, *ibid.*; *R. v. Morrow*, [1995] O.J. No. 4052 (Ct. J. (Gen. Div.)) (QL). In *Randhawa*, the accused's grown daughter was involved in the confrontation but, unlike her mother, managed to escape.

2. POST-*SHROPSHIRE* SECOND DEGREE MURDER SENTENCING CASES: 1996-2000[105]

The picture painted by the cases immediately after *Shropshire* is different. In this sample, 26 cases were decided in the five years after *Shropshire*. The ten-year minimum parole ineligibility period was imposed in only two cases (7 percent).[106] The remaining 24 cases involved an increase in the parole ineligibility period. The average parole ineligibility period imposed in these 26 cases is 14.3 years. As with the earlier group of cases, two cases involved multiple homicides. In *D.B.*,[107] the accused killed his former spouse and her parents while in *Ullah*,[108] the accused killed his wife and three-year-old son. If one excludes the two cases involving multiple homicides[109] the average period of parole ineligibility decreases to 14 years.

As mentioned, it is difficult to attribute this increase to attitudes about spousal homicides given that *Shropshire* may have elevated parole ineligibility across the board for second degree murder. There is some evidence of this from a British Columbia Court of Appeal decision. In *Paterson*,[110] a second degree murder case involving an accused who killed his former same-sex partner, Lambert J. of the British Columbia Court of Appeal demonstrated that parole ineligibility imposed for second degree murder had increased, at least in British Columbia, post-*Shropshire*. His findings were summarized as follows:

> I have endeavoured to find all of the British Columbia cases of second degree murder where the final sentence (at trial, or in this Court) was imposed in the five years before the 1995 decision of the Supreme Court of Canada in *Shropshire*. I have found eighteen cases. In eight of those cases (44%) the period of parole ineligibility was set at ten years. The average length of the period of parole ineligibility was 12.9 years. The median period was 13 years.
>
> I have made the same search for all the British Columbia cases of second degree murder where the final sentence, (at trial or in this Court) was imposed in the five years after the 1995 decision of the Supreme Court of Canada in *Shropshire*. I have found 23 cases. In only four of those cases (17.4%) was the period of parole ineligibility set at ten years. The average length of the period of parole ineligibility has risen to 15.2 years. The median period was 15 years.[111]

Comparing the results of the present study to those cited by Lambert J., one can see that the minimum period of parole ineligibility was imposed in a greater percentage of spousal cases from the pre-*Shropshire* time period than was the case for non-spousal homicides (58 percent versus 44 percent). Furthermore, a higher percentage of the post-*Shropshire* spousal

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105 See Appendix 2 for a table setting out the period of parole ineligibility imposed in the cases five years immediately after *Shropshire*.

106 *R. c. Coutu*, [1999] J.Q. no 1809 (C.S.) (QL) [*Coutu*]; *R. v. Krugel* (2000), 129 O.A.C. 182 [*Krugel*]. *Coutu* involved the accused hiring a killer to kill his wife. The Crown and defence made a joint submission recommending the minimum parole ineligibility period. The accused had no criminal record or prior history of violence. Reasons for sentence for *Krugel* are not available.

107 *R. v. D.B.*, [1996] B.C.J. No. 1485 (S.C.) (QL) [*D.B.*]. The accused received 20 years of parole ineligibility, which was upheld on appeal.

108 *R. v. Ullah*, [1999] O.J. No. 2767 (Sup. Ct. J.) (QL) [*Ullah*]. The accused received the period of parole ineligibility of 15 years.

109 *D.B.*, *supra* note 107; *Ullah*, *ibid.*

110 *R. v. Paterson*, 2001 BCCA 11, 149 B.C.A.C. 56 [*Paterson*].

111 *Ibid.* at paras. 23-24 [emphasis omitted].

cases in this sample elevated the minimum period of parole ineligibility than in the British Columbia sample (93 percent versus 83 percent). The British Columbia average period of parole ineligibility, which includes all second degree murders, is higher than the average in this sample. Thus, a greater degree of change appears to have occurred in the spousal homicide cases than in second degree cases generally, with fewer early cases elevating the parole ineligibility period and more later cases doing so.

While the norm used to be the minimum ten years of parole ineligibility for spousal homicides, that has changed such that a period of ten years of parole ineligibility is now the exception. One must be cautious about comparing national data to data from one province. However, to the extent that it is representative, the British Columbia data suggests that the increase in cases elevating the parole ineligibility period for spousal second degree murders is greater than for second degree murders generally. The average sentence in this sample remains slightly below the British Columbia average, thus suggesting that *Shropshire* may not be the only factor at play.

One of the most influential of the post-*Shropshire* appellate cases, which would go on to shape the setting of the parole ineligibility period, particularly in Ontario, was *McKnight*.[112] In this case, the trial judge imposed a parole ineligibility period of 17 years after the accused stabbed his wife in a brutal attack, which resulted in over 50 defensive wounds alone. The accused had a long history of major depression and related mental health issues and had attempted to kill his wife on an earlier occasion. He argued unsuccessfully that he should be found not criminally responsible by reason of mental disorder, but the jury convicted him of second degree murder (despite a period before the killing during which he contemplated killing his wife). While citing *Shropshire* and the importance of appellate deference, a majority of the Ontario Court of Appeal held that 17 years was outside the acceptable range and suggested that, in all but exceptional cases, "similar cases from this province of brutal second-degree murders of an unarmed wife or girlfriend suggest a range of 12 to 15 years."[113] The Court held that this case should be towards the higher end of that range and set the parole ineligibility period at 14 years. This case is cited in virtually all the subsequent Ontario cases and in some cases from other provinces as well.[114] The biggest increase after *Shropshire* is in those sentenced to parole ineligibility of 11 to 15 years, almost identical to the range identified in *McKnight* (see Table 2, above). Thus, while the parole ineligibility period is consistently raised above ten years post-*Shropshire*, at least one appellate court is attempting to limit the degree to which these sentences are elevated and to set some guidelines for trial judges.[115]

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112 *R. v. McKnight* (1999), 44 O.R. (3d) 263 (C.A.) [*McKnight*]. Although the trial in *McKnight* took place prior to *Shropshire*, *supra* note 21, the appellate Court applied *Shropshire* in reducing the period of parole ineligibility.

113 *McKnight*, *ibid.* at para. 47.

114 See e.g. *R. v. Oigg*, 2006 MBQB 68, 202 Man. R. (2d) 219 [*Oigg*]; *R. v. Legge*, 2005 NLTD 156, 250 Nfld. & P.E.I.R. 235.

115 There are exceptions to raising the parole ineligibility period. See e.g. *R. v. Diep*, 2005 ABQB 81, [2005] A.J. No. 106 (QL) [*Diep*], where the trial judge dismissed a Crown application to raise the period of parole ineligibility above ten years and held that the fact that the killing was a spousal homicide is not in itself justification for increasing parole ineligibility.

3. POST-*SHROPSHIRE* SECOND DEGREE MURDER SENTENCING CASES: 2001-2008[116]

In the final time period under study (2001 to June 2008), the courts appear to have settled into what one would call a range of parole ineligibility, although there are still differences among provinces. There were 41 cases for which we have sentencing information during this period. Of those 41, only seven (17 percent) impose the minimum parole ineligibility period. Although this is an increase from the immediate post-*Shropshire* cases, it remains lower than in the pre-*Shropshire* period. Of these seven cases, four were in British Columbia,[117] one in Ontario,[118] one in Quebec,[119] and one in Alberta.[120] In four of these cases, including three of the four British Columbia cases, the Crown did not request an increase in the parole ineligibility period. This suggests that Crown counsel did not see these cases as particularly egregious.[121] Twenty-five of the 41 cases (61 percent) fell in the range of 11 to 15 years of parole ineligibility, with 23 (56 percent) falling in the 12- to 15-year range described by the Ontario Court of Appeal in *McKnight* as the appropriate range of parole ineligibility absent unusual circumstances for intimate homicide. The Quebec Court of Appeal has also referred to a range from ten to 15 years.[122]

In nine of the 41 cases (22 percent) during this period, the parole ineligibility period was raised above 15 years.[123] In one of the cases,[124] the accused had a previous murder conviction, thus, there was a mandatory 25-year parole ineligibility period pursuant to s. 745(b) of the *Criminal Code*. Despite the range set out in *McKnight*, the Ontario Court of Appeal has been willing to uphold periods of parole ineligibility greater than 15 years. For example, in *R. v. Czibulka*,[125] the accused was given a parole ineligibility period of 17 years based on the brutality of the murder and his history of spousal abuse. In *Wristen*,[126] the Court upheld parole ineligibility of 17 years in a case where the body of the victim was never found and the accused continued to deny involvement in her death. The history of spousal abuse, the refusal to disclose where the victim's body was located, and the spousal nature of the killing were all considered aggravating factors. The Ontario Court of Appeal has held, however, that a trial judge wishing to exceed the period of parole ineligibility set in *McKnight* must provide clear reasons for departing from that range.[127]

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116 See Appendix 3 for a table setting out the period of parole ineligibility imposed in the cases decided between 2001-2008.

117 *R. v. D.W.M.*, 2005 BCSC 1061, [2005] B.C.J. No. 1578 (QL) [*D.W.M.*]; *R. v. Taylor*, 2007 BCSC 390, [2007] B.C.J. No. 593 (QL) [*Taylor*]; *Curry*, *supra* note 37; *R. v. Waraich*, 2008 BCSC 919, [2008] B.C.J. No. 1309 (QL) [*Waraich*].

118 *R. v. Guiboche*, 2004 MBCA 16, 180 Man. R. (2d) 276.

119 *R. c. Picard*, [2004] J.Q. no 4332 (C.S.) (QL) [*Picard*].

120 *Diep*, *supra* note 115.

121 *D.W.M.*, *supra* note 117; *Taylor*, *supra* note 117; *Curry*, *supra* note 37; *Waraich*, *supra* note 117; *Picard*, *supra* note 119.

122 *Poissant*, *supra* note 95.

123 *R. v. Czibulka*, [2001] O.J. No. 6115 (Sup. Ct. J.) (QL); *R. v. Johnson*, 2001 NSSC 119, 196 N.S.R. (2d) 267 [*Johnson*]; *R. v. Teske*, [2001] O.J. No. 1900 (Sup. Ct. J.) (QL) [*Teske*]; *R. v. Kianipour*, 2003 BCCA 703, 192 B.C.A.C. 220 [*Kianipour*]; *R. v. K.W.M. (Machell)*, 2003 BCCA 688, 190 B.C.A.C. 294 [*Machell*]; *Falkner*, *supra* note 96; *Poissant*, *ibid.*; *R. v. J.V.*, [2006] O.J. No. 2392 (Sup. Ct. J.) (QL); *R. v. White*, 2006 ABQB 909, 408 A.R. 64.

124 *Falkner*, *ibid.*

125 (2004), 190 O.A.C. 1. The Ontario Court of Appeal ordered a new trial in this case on other grounds.

126 *R. v. Wristen* (1999), 47 O.R. (3d) 66 (C.A.) [*Wristen*].

127 See *R. v. Teske* (2005), 202 O.A.C. 239 where the Ontario Court of Appeal reduced to 13 years a 16-year period of parole ineligibility set by the trial judge.

Four of the nine cases in this period involved multiple murders. In *Johnson*,[128] the accused received a period of parole ineligibility of 21 years for killing his common-law spouse and her two-month-old daughter. *Kianipour*[129] and *Machell*[130] both resulted in parole ineligibility of 20 years. In *Kianipour*, the accused killed his estranged wife and her parents. His two young children witnessed the murder of their grandparents. The accused also had a long history of spousal abuse. In *Machell*, the accused killed his wife and his mother-in-law in front of his two small children. In *R. c. M.P.*,[131] the trial judge imposed the maximum 25 years of parole ineligibility for four counts of second degree murder (his spouse, two of her children, and one of their friends) and one count of attempted murder with respect to a friend who was able to escape. The Quebec Court of Appeal reduced this to 15 years parole ineligibility without a very satisfactory explanation other than to indicate that there was no precedent for imposing 25 years parole ineligibility.[132] Thus, while killing more than one person is an aggravating factor, it does not necessarily lead to periods of parole ineligibility close to the maximum 25 years.

Similar reasons are given for raising the parole ineligibility period in the pre- and post-*Shropshire* period. These include: more than one victim,[133] brutality,[134] a history of violence towards the victim or towards another spouse,[135] evidence of planning and deliberation,[136] breach of a restraining order,[137] high risk of reoffending,[138] attempts to cover up the killing and to deny involvement,[139] and the presence of children in the house at the time of the killing.[140] The absence of a history of violence is a significant mitigating factor and may in some cases lead to a parole ineligibility not being raised above ten years.[141]

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128 *Supra* note 123.

129 *Supra* note 123.

130 *Supra* note 123.

131 [2004] J.Q. no 8702 (C.S.) (QL).

132 *Poissant*, *supra* note 95.

133 *Ullah*, *supra* note 108; *D.B.*, *supra* note 107.

134 *R. v. Sodhi* (2003), 66 O.R. (3d) 641 (C.A.) [*Sodhi*]; *R. c. Dagenais*, [2004] J.Q. no 12142 (C.S.) (QL) [*Dagenais*]; *R. v. Nichols*, [2006] O.J. No. 2868 (Sup. Ct. J.) (QL); *Oigg*, *supra* note 114; *R. c. Morin-Cousineau*, 2006 QCCS 2289, [2006] J.Q. no 3872 (QL) [*Morin-Cousineau*]; *R. v. VanEindhoven*, 2007 NUCJ 2, [2007] Nu.J. No. 2 (QL) [*VanEindhoven*]; *R. v. Bajrangie-Singh* (2003), 170 O.A.C. 99; *R. v. Beamish* (1996), 144 Nfld. & P.E.I.R. 357 (P.E.I. S.C. (T.D.)) [*Beamish*]; *R. v. Stewner* (1996), 113 Man. R. (2d) 78 (C.A.) [*Stewner*]; *R. c. Artesen*, [1997] J.Q. no 1845 (C.S.) (QL) [*Artesen*]; *R. v. Assoun* (1999), 182 N.S.R. (2d) 344 (S.C.) [*Assoun*]; *McKnight*, *supra* note 112; *R. v. Gray*, [2000] O.J. No. 5317 (Sup. Ct. J.) (QL) [*Gray*]; *R. v. G.W.F.*, 2000 BCSC 508, [2000] B.C.J. No. 1853 (QL); *R. v. Ogden* (2000), 187 Nfld. & P.E.I.R. 134 (Nfld. S.C.) [*Ogden*].

135 See e.g. *R. c. Bolduc*, [2001] J.Q. no 1532 (C.S.) (QL); *R. v. Peterffy*, 2001 BCCA 698, 162 B.C.A.C. 24 [*Peterffy*]; *Teske*, *supra* note 123; *R. c. Daigle*, [2004] J.Q. no 13829 (C.S.) (QL); *R. v. Moo*, [2004] O.J. No. 2234 (Sup. Ct. J.) (QL); *R. v. Howard*, [2006] O.J. No. 1350 (Sup. Ct. J.) (QL) [*Howard*]; *R. v. Labidi*, [2006] O.J. No. 3138 (Sup. Ct. J.) (QL) [*Labidi*]; *Oigg*, *ibid.*; *VanEindhoven*, *ibid.*; *Beamish*, *ibid.*; *Stewner*, *ibid.*; *R. v. Parmar*, [1997] O.J. No. 3302 (Ct. J. (Gen. Div.)) (QL); *R. c. R.P.*, [1997] J.Q. no 279 (C.S.) (QL); *R. v. Cross* (1998), 171 N.S.R. (2d) 56 (S.C.); *Assoun*, *ibid.*; *R. v. Stewart*, [1999] N.B.J. No. 415 (Q.B.) (QL); *R. v. Stephen*, 1999 ABCA 190, 244 A.R. 372; *Wristen*, *supra* note 126; *Ogden*, *ibid.*

136 *Dagenais*, *supra* note 134; *R. v. Lenius*, 2007 SKCA 65, 299 Sask. R. 139 [*Lenius*]; *R. v. Neumann*, 2005 BCSC 1820, [2005] B.C.J. No. 2883 (S.C.) (QL); *R. c. Rizzolo*, [2005] J.Q. no 19927 (C.S.) (QL); *Labidi*, *ibid.*

137 *Howard*, *supra* note 135; *VanEindhoven*, *supra* note 134.

138 *R. c. Parent*, [2001] J.Q. no 6833 (C.S.) (QL) [*Parent*]; *Peterffy*, *supra* note 135; *Oigg*, *supra* note 114; *Morin-Cousineau*, *supra* note 134.

139 See e.g. *Sodhi*, *supra* note 134; *Wristen*, *supra* note 126; *Teske*, *supra* note 123.

140 See *R. v. Savoie* (1998), 209 N.B.R. (2d) 378 (Q.B.); *R. v. Rushton*, [1999] Y.J. No. 62 (S.C.) (QL); *Ogden*, *supra* note 134; *Howard*, *supra* note 135; *Lenius*, *supra* note 136.

141 See e.g. *D.W.M.*, *supra* note 117.

The Supreme Court of Canada also held in *Shropshire* that appellate courts should be hesitant in interfering with the trial judge's determination of the appropriate sentence unless there has been a specific error in principle and the sentence is clearly unreasonable.[142] This change is reflected in the cases. In the pre-*Shropshire* cases, an appellate court interfered with parole eligibility in seven of 21 cases (33 percent). In the five years after *Shropshire*, there are only two cases (7.7 percent) in which a Court of Appeal interfered with the parole ineligibility period set by a lower court. During the final time period under study only two (5 percent) of the cases were altered on appeal, both sentences being reduced by the Court of Appeal.[143]

Almost all of the cases occurring after 1996 refer to s. 718.2(a)(ii), which makes it an aggravating factor that the victim was the offender's spouse. Some refer to s. 718.2(a)(iii), which makes the abuse of a position of trust or authority aggravating. On reading the cases, one is left with the impression that both *Shropshire* and the amendments (and the changing social values they reflect) are at play. Judges and courts of appeal are definitely more willing to raise the period of parole ineligibility over ten years after *Shropshire*. But the attitude towards spousal homicide in particular, as reflected in the cases, has also changed. The clear legislative statement that the spousal nature of the crime is an aggravating factor gives the courts a specific reason for raising the parole ineligibility period in the spousal context.

The data suggest that sentences for spousal second degree murder peaked in the period immediately following *Shropshire* and levelled off in the 2001-2008 time period, albeit, at a level still higher than that prior to *Shropshire*.

D. MANSLAUGHTER

This sample has a total of 58 manslaughter cases for which the sentence is available. Manslaughter has a wider sentencing range than either form of murder. There is no minimum sentence, except where a firearm is used.[144] The maximum sentence is life imprisonment. This sample had only two suspended sentences[145] and two life sentences.[146]

The sentencing cases reveal that the difference between a murder conviction and a conviction for manslaughter is very significant in terms of how long an offender is going to be incarcerated. The average sentence for manslaughter in this sample was 8.6 years, with typical parole eligibility after serving two-thirds of a sentence. There were no manslaughter sentencing cases in this sample where a period of parole ineligibility was imposed pursuant to s. 743.6(1). By contrast, for second degree murder the average is a parole ineligibility period of more than 13 years.

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142 *Shropshire*, *supra* note 21 at para. 46. See also *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 at 251 (S.C. (A.D.)).

143 *Lenius*, *supra* note 136; *Teske*, *supra* note 123.

144 Where a firearm is used, the minimum sentence is four years imprisonment: see *Criminal Code*, *supra* note 19, s. 236.

145 *R. v. Shorty*, [1993] Y.J. No. 101 (S.C.) (QL) [*Shorty*]; *R. c. Jenkins* (1993), 57 Q.A.C. 5 [*Jenkins*].

146 *R. v. Zagorac* (1997), 200 A.R. 305 (C.A.) [*Zagorac*]; *R. v. Montgrand*, 2007 SKCA 102, 304 Sask. R. 150.

It is sometimes difficult to determine the precise reason a jury has reduced a charge of murder to a conviction for manslaughter, be it intoxication, a lack of *mens rea*, provocation, or simply the jury's sense of what verdict is most just. Similarly, it is difficult to speculate on the reasons for Crown counsel accepting a guilty plea to manslaughter where the original charge was second degree murder. Intoxication and provocation account for some, but not all, of the accepted guilty pleas.

In the previous section, the article outlined changes to the law of spousal homicide for sentencing for second degree murder and examined the impact of *Shropshire* and s. 718.2. *Shropshire* is only relevant to manslaughter for the standard of appellate review whereas s. 718.2 does apply to manslaughter sentencing. Thus, if judges are meting out higher sentences because of s. 718.2, one would expect the same pattern for manslaughter sentencing. If no change is evident, then one could more easily attribute the change in second degree murder sentencing primarily to *Shropshire*.

The data in this study reveal that there has been an increase in sentencing severity for spousal manslaughter. However, the pattern of this increase was different from that for second degree murder.

TABLE 3
MANSLAUGHTER SENTENCING

Time period	# of Cases	Average sentence[§]	<5 years	5-7 years	8-10 years	> 10 years
Pre-amendment 1990-96	22	7.1 years*	5 (23%)	8 (36%)	6 (27%)	3 (13.6%)
Post-amendment 1996-2002	14	7.9 years	2 (14%)	3 (21%)	9 (60%)	1 (7%)
Post amendment 2002-June 2008	22	10.6 years*	3 (13.6%)	1 (4.5%)	10 (45.5%)	8 (36%)

[§] Where there is an appeal from sentence, it is the final sentence imposed by the appellate court that was used for these calculations.

*Each of these periods had one life sentence, which was excluded from the calculation of the average sentence but included in the rest of the data. Thus the average for each of these periods is slightly understated.

1. PRE-S. 718.2 SPOUSAL MANSLAUGHTER SENTENCING CASES: 1990-1996[147]

For the 22 cases that were sentenced between 1990 and 1996, prior to the *Criminal Code* amendments, the average sentence imposed was 7.1 years.[148] In 59 percent of the cases, the sentence was seven years or less.

The cases ranged from a suspended sentence[149] to life imprisonment.[150] A suspended sentence was given to a 90-year-old alcoholic who accidentally shot his wife while they were both drinking.[151] The other suspended sentence was imposed in *Jenkins*,[152] where the crime was described as completely out of character and there was psychiatric evidence that the accused was in a dissociative state at the time of the killing. In both cases the accused pleaded guilty to manslaughter. The life sentence was imposed in a case where there had been a long history of spousal abuse and a previous conviction of assault against the accused's former spouse.[153]

In 23 percent of cases, a sentence of less than five years was imposed.[154] For example, in *Archibald*,[155] where there was evidence of both provocation and intoxication, the trial judge imposed a sentence of five years for manslaughter. However, the Court of Appeal reduced it to four years (in part because the accused was engaged to marry a doctor by the time of the appeal). In *Strong*,[156] the accused killed his common-law wife while both were intoxicated. Mr. Strong was sentenced to 30 months imprisonment. Both of these cases involved provocation defences.

A sentence of more than ten years was given in only three cases (13.6 percent).[157] In *Calladine*,[158] for example, the accused had an extensive criminal record (although mainly for non-violent offences) and the judge seemed primarily concerned with general deterrence.[159]

In this early period, there were some comments made about the range of sentences for spousal manslaughter. In *R. v. Zimmer*,[160] the Saskatchewan Court of Appeal stated that from 1965-1980, sentences in the range of three to five years were common but that, more recently, seven- and eight-year sentences had been appearing. The reason given was that "the

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147 See Appendix 4 for a table setting out manslaughter sentencing cases that were decided between 1990-1996.

148 The average is slightly understated because the life sentence was excluded from the calculation: see *Zagorac*, *supra* note 146. The two suspended sentences were counted as zero years of imprisonment for the purposes of calculating the average sentence.

149 *Shorty*, *supra* note 145.

150 *Zagorac*, *supra* note 146.

151 *Shorty*, *supra* note 145.

152 *Supra* note 145.

153 *Zagorac*, *supra* note 146.

154 *R. v. Archibald* (1992), 15 B.C.A.C. 301 [*Archibald*]; *Jenkins*, *supra* note 145*; Shorty*, *supra* note 145; *R. v. Lastheels*, [1994] O.J. No. 1181 (Ct. J. (Gen. Div.)) (QL); *R. v. Strong*, [1996] O.J. No. 3558 (Ct. J. (Gen. Div.)) (QL) [*Strong*].

155 *Archibald*, *ibid.*

156 *Strong*, *supra* note 154, actually involved a guilty plea to manslaughter but it was clear from the trial judge's decision that the plea was accepted on the basis of a defence of provocation.

157 *R. v. Calladine*, [1993] O.J. No. 1637 (Ct. J. (Gen. Div.)) (QL) [*Calladine*]; *R. v. Wedel* (1993), 88 Man. R. (2d) 115 (C.A.) [*Wedel*]; *R. v. Lemay* (1998), 127 C.C.C. (3d) 528 (Qc. C.A.).

158 *Calladine*, *ibid.*

159 See also *Wedel*, *supra* note 157.

160 [1990] S.J. No. 654 (C.A.) (QL.).

judiciary in the Province, concerned about the frequency with which this crime is occurring has responded by gradually laying more emphasis on general deterrence, and hence broadening the range of sentencing for this offence in an effort to provide a greater measure of protection for society."[161]

In *Archibald*, the British Columbia Court of Appeal held that the range at that time was from a suspended sentence to something less than eight years. Thus, we can see in the early manslaughter sentencing cases spousal manslaughters were treated as among the less serious types of manslaughter.

Perhaps the most striking finding about the early cases is the lack of reference to the fact that the victim was the accused's intimate partner as an aggravating factor. The breach of trust involved in such killings was only occasionally mentioned and sentencing proceeded as it would for any other manslaughter case. In one of the few sentencing cases where the trial judge did note the seriousness of domestic violence, the accused appealed his five-year sentence in part on the basis that the trial judge was wrong to emphasize the domestic violence aspect of the case.[162] The British Columbia Court of Appeal dealt with the issue very briefly stating simply that the domestic violence was one aspect of the crime that should be considered. A few courts did acknowledge the relevance of the spousal nature of the killing but only as one of many factors. In *Williams*,[163] the British Columbia Court of Appeal upheld the sentence imposed at trial, saying:

> I do not consider that the sentencing judge gave an incorrect emphasis to domestic violence. The domestic aspect of this matter was one of the factors involved in the case and ought to have been taken into account as a circumstance of the crime by the sentencing judge. I do not think that she gave it an unwarranted significance.[164]

In *Jackson*,[165] the Crown sought a life sentence on appeal. In differentiating *Jackson* from another apparently more serious manslaughter case where a life sentence was imposed, the majority of the Alberta Court of Appeal noted that the other case involved a victim chosen at random unlike *Jackson*, which involved a spousal killing, thus implying that spousal killings are less serious than stranger killings. The dissent highlighted the problematic nature of this reasoning: "I do not think that it makes the murder by Nienhuis any more brutal or of 'stark horror' than the killing of his common-law wife by Jackson as a result of his stabbing her 59 times with a pocket knife and kitchen knife when a 4 year old child was in the house."[166]

In *Jackson*, the majority did acknowledge that the breach of trust involved in a spousal homicide is an aggravating factor, but held that the relationship between the parties

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161 *Ibid.* at para. 31.
162 *R. v. Williams (G.M.)* (1995), 61 B.C.A.C. 6 [*Williams*]. The British Columbia Court of Appeal upheld the five-year sentence.
163 *Ibid.*
164 *Ibid.* at para. 6.
165 *Supra* note 24.
166 *Ibid.* at para. 33.

> could hardly have been far from [the trial judge's] mind when he imposed sentence.… Although the trial judge did not specifically refer in his reasons to the "breach of trust" … he indicated quite clearly that he was aware that the victim stood in a special relationship to the respondent and that this was an aggravating factor.[167]

By contrast, in *Gray*,[168] the spousal nature of the killing was treated as a key factor in the sentencing of the offender. The Court acknowledged that deterrence is particularly important for spousal manslaughters. In *Klassen*,[169] the Yukon Territory Court of Appeal rejected the Crown argument that a special range of sentences should be imposed for spousal manslaughters. Thus, the pre-s. 718.2 spousal manslaughter cases demonstrate, at best, inconsistent support for the idea that spousal manslaughters should attract a more serious sentence.

The 1996 enactment of s. 718.2 of the *Criminal Code* and the Supreme Court of Canada's decision in *Stone* may have signalled a turning point in the sentencing of spousal manslaughters. In *Stone*, the Supreme Court of Canada confirmed that there is "ample authority for the proposition that courts considered a spousal connection between offender and victim to be an aggravating factor in sentencing at common law."[170] However, despite holding that the spousal relationship was an aggravating factor in *Stone*, the Court upheld a seven-year sentence for an accused who stabbed his wife 47 times. The Court resisted the suggestion that it should set a range for provoked spousal manslaughters and instead showed considerable deference to the trial judge even though the Court itself would have been inclined to impose a slightly more onerous sentence. After *Stone*, and, in particular the enactment of s. 718.2(a)(ii), there is a clear trend in sentencing decisions towards recognizing the breach of trust involved in spousal manslaughters.

2. POST-S. 718.2 SPOUSAL MANSLAUGHTER SENTENCING CASES: 1996-2002[171]

To aid comparison, the post-amendment manslaughter sentencing cases have been divided into two chronological periods as was done with second degree murder. The first time period includes the six years immediately following in the amendments and the second the last six years of the study.

The average sentence of 7.9 years for this post-amendment time period is somewhat higher than the initial period's average of 7.1 years. Part of this increase could be attributed to the exclusion of the one life sentence from the pre-amendment period. The fact that the earlier period had two suspended sentences also brought that average down. While there is not a lot of change in the average sentence, there is a change in the distribution of sentences. Prior to the amendments, 59 percent of cases received a sentence of seven years or less whereas this number dropped to 34 percent immediately after the amendments. Similarly, there was a large increase (from 27 percent to 57 percent) in the percentage of cases that

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167 *Ibid.* at para. 16.
168 *Supra* note 134.
169 *R. v. Klassen* (1997), 95 B.C.A.C. 136 (Y.C.A.) [*Klassen*].
170 *Stone*, *supra* note 32 at para. 241.
171 See Appendix 5 for a table setting out the manslaughter sentencing cases decided between 1996-2002.

were sentenced to between eight and ten years. However there were actually fewer cases over ten years in the immediate post-amendment period than there were in the initial period. Unlike with previous cases, every case in this group referred to the spousal nature of the homicide as an aggravating factor. In *Saunders*,[172] however, the Ontario Superior Court expressed doubt about whether this aggravating factor had changed the range of sentences appropriate for spousal manslaughters stating that the range is probably "still in the ten to 12 year range; perhaps eight to 12 year range."[173] In *Sheppard*,[174] the Court held that if there was to be an increase in the range of appropriate sentences, it was up to the Supreme Court of Canada to so decide. Thus, while the range of sentences does seem to be increasing in this period,[175] one can see some reluctance on the part of judges to impose sentences over ten years. Of the 15 cases during this period, only one sentence over ten years was upheld on appeal.[176]

3. POST-S. 718.2 SPOUSAL MANSLAUGHTER SENTENCING CASES: 2002-2008[177]

There was a significant increase in the average sentence from the pre-amendment time period to the final period under study, 2002-2008, which went from seven years in the former period to 10.6 in the latter. The change can be seen most clearly in the number of accused sentenced to a period of imprisonment greater than ten years, which was only 14 percent of the cases prior to the amendments and 36 percent of the cases in the 2002-2008 time period. Only 19 percent of cases received a sentence of seven years or less in this time period compared with 59 percent of the cases in the pre-amendment period.

Looking at cases individually, some severe sentences were imposed during this time period. In particular, the Quebec Superior Court meted out three sentences between 16 and 20 years. A 20-year sentence was imposed in *Dadgar*[178] where the accused had previously been incarcerated for committing a violent sexual assault against two women. The sentencing judge, Martin J., described Mr. Dadgar as a "street-wise, clever and manipulative man," and seemed disappointed that he was not convicted of murder at trial, given that the "homicide … had as its hallmark a level of violence and brutality which would be difficult to surpass."[179] The accused in *Kane c. R.*[180] was sentenced to 18 years in prison, also by Martin J. of the Quebec Superior Court. Justice Martin described the manslaughter as "particularly shocking," and noted that it was "carried out brutally and without warning."[181] In his reasons for sentence, he noted that the killing was "chillingly similar" to the one committed by the accused in *Dadgar*.[182] Finally, a 16.5-year sentence was imposed by Champagne J. in *Cook*,[183] another extremely violent manslaughter that took place in the course of a sexual

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172 *R. v. Saunders*, [2000] O.J. No. 5622 (Sup. Ct. J.) (QL) [*Saunders*].
173 *Ibid.* at para. 13.
174 *R. v. Sheppard*, 2001 PESCTD 56, 202 Nfld. & P.E.I.R. 172.
175 See e.g. *R. v. McCulloch*, 2001 BCCA 196, 153 B.C.A.C. 32 where a 12-year sentence was found by the Court of Appeal to be within the range of appropriate sentences.
176 *Ibid.*
177 See Appendix 6 for a table setting out the manslaughter sentencing cases decided between 2002-2008.
178 *R. c. Dadgar*, [2003] Q.J. No. 15818 (C.S.) (QL) [*Dadgar*].
179 *Ibid.* at paras. 5, 4.
180 2005 QCCA 753, 202 C.C.C. (3d) 113.
181 *Ibid.* at para. 20.
182 *Ibid.* at para. 26.
183 *R. c. Cook*, 2006 QCCS 3632, [2006] J.Q. no 7248 (QL) [*Cook*].

assault. The accused was charged with first degree murder, but convicted of manslaughter following a successful intoxication defence.

In the cases in this period, there is continuing recognition of domestic violence as an aggravating factor. In *R. v. Beaulne*, the Ontario Superior Court cautions:

> Domestic violence must, and will be, deterred in this community until hopefully it has been eradicated. Men, and sometimes women, but not too often, must come to the realization that society will not permit violence in a spousal relationship. Where it is found it will be severely dealt with by the Courts. That is why Mr. Beaulne will be receiving a lengthy sentence, the equivalent of ten years in jail for the crime of manslaughter.[184]

In *Boutilier*, the same Court says, "the range of sentence for manslaughter of this nature (that is, the sudden taking of a life with a weapon), is between ten years and 15 years imprisonment, before taking into account any pre-trial custody."[185]

Thus, it would appear that sentences for spousal manslaughters are on the rise. Section 718.2 is regularly cited to justify the seriousness of these cases. As will be discussed in more detail below, intoxication is generally seen as an aggravating factor while provocation tends to lead to sentences in the lower range for spousal manslaughters. It is to these two defences that the article now turns.

E. THE IMPACT OF THE DEFENCES OF INTOXICATION AND PROVOCATION ON SENTENCING FOR SPOUSAL HOMICIDE

Intoxication is highly implicated in spousal homicides.[186] Allegations of provocation are also quite common.[187] However, the two defences operate differently. Intoxication can negate the *mens rea* for murder. Provocation, on the other hand, only applies where the killing would otherwise be murder. Thus, the trier of fact must first determine whether the elements of murder can be established. It is only once intoxication is rejected and *mens rea* is established that the trier of fact should consider provocation.[188] This is complicated by the fact that evidence of provocation is relevant to *mens rea*,[189] although anger itself cannot negate *mens rea* under s. 229.[190] Intoxication, even where insufficient to negate *mens rea*, may still be relevant to the subjective component of the provocation inquiry.

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184 [2003] O.J. No. 5344 at para. 4 (Sup. Ct. J.) (QL).

185 *R. v. Boutilier*, [2003] O.J. No. 4515 at para. 24 (Sup. Ct. J.) (QL) [*Boutilier*].

186 Mia Dauvergne, "Homicide in Canada, 2004" (2005) 25:6 Juristat 1.

187 See e.g. *Sychuk*, *supra* note 36; *R. v. Marc* (1995), 159 N.B.R. (2d) 183 (C.A.); *Strong*, *supra* note 154; *Klassen*, *supra* note 169; *R. v. Ackland*, 2003 BCCA 343, 184 B.C.A.C. 85; *Kent*, *supra* note 38; *R. v. Li*, 2007 ONCA 136, 221 O.A.C. 179 [*Li*].

188 *Ibid.*

189 *Ibid.*

190 *Parent*, *supra* note 138. However, see Sanjeev Anand, "A Provocative Perspective on the Influence of Anger on the Mens Rea for Murder: The Alberta Court of Appeal's Interpretation of Parent in Walle" (2008) 54 Crim. L.Q. 27 (limiting *Parent* to s. 229(a)(i)).

1. INTOXICATION

It is well accepted that intoxication and spousal violence are inexorably linked. A majority of the 96 spousal homicides in 2004, for example, involved the intoxication of the victim and/or the accused.[191] Although it is clear that there is a correlation between alcohol use and spousal violence, studies hesitate to find a direct causal connection because "alcohol abusers tend to have other risk factors for violence, such as low occupational status and attitudes approving violence against women."[192]

In the cases examined for this article, the defence of intoxication failed far more frequently than it succeeded. However, the impact of intoxication on sentencing outcomes is probably understated as it is likely that the Crown accepted guilty pleas to manslaughter in some cases where the evidence supported an intoxication defence. Out of 252 cases examined, 65 (26 percent) mentioned that the accused was intoxicated at the time of the homicide. In many cases the victim was also intoxicated. Out of those 65 cases, intoxication was raised as a defence in 31 cases; in four of those 31 cases (13 percent) the defence was successful, and in 27 (87 percent) it was rejected.[193] In the four successful cases, the accused was convicted of manslaughter.[194] Generally, the defence was rejected by a jury, and thus no reasons were given.

Courts look to many factors in determining whether intoxication has negated the *mens rea* for murder. In *Diep*,[195] for example, the Court looked to the manner of death, the accused's post-offence conduct, the appearance of the crime scene, expert opinion, and statements to police and third parties. The post-offence behaviour of the accused seems to be particularly important.[196] If the accused behaves irrationally after the killing, intoxication is more likely to succeed, whereas efforts to cover up the crime and other goal-directed behaviour reduce the likelihood of success. In *Tipewan*,[197] for example, the accused had a blood-alcohol concentration of 0.19 six to seven hours after the crime.[198] The Court stressed his bizarre behaviour after the killing including remaining in his bloody clothing, drinking in the house with the victim's body for an hour after the killing, and going outside and firing a shot into the air. The trial judge stated:

> I have to say it strikes me as unusual that a person who is not a psychopath and had an operating mind could spend an unconcerned one half to one hour in the house with the deceased … given the horror of the scene,

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191 Dauvergne, *supra* note 186.

192 *Measuring Violence*, *supra* note 3.

193 See *Archibald*, *supra* note 154 where the jury either found on the basis of provocation or intoxication and the trial judge indicated that intoxication was more likely. See also *R. v. Tipewan*, [1998] S.J. No. 681 (Q.B.) (QL) [*Tipewan*]; *Saunders*, *supra* note 172; *Cook*, *supra* note 183.

194 In *R. v. Walker*, [2004] S.J. No. 850 (Q.B.) (QL), rev'd 2007 SKCA 48, 293 Sask. R. 113, rev'd 2008 SCC 34, [2008] 2 S.C.R. 245, the trial judge was somewhat unclear as to whether he had a reasonable doubt based on intoxication or accident but, in an appeal based on the insufficiency of the trial judge's reasons, the Supreme Court of Canada held that intoxication was not the basis of the reduced verdict.

195 *Supra* note 115.

196 The Supreme Court of Canada stresses the importance of this factor in *R. v. Lemky*, [1996] 1 S.C.R. 757. See also *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Seymour*, [1996] 2 S.C.R. 252.

197 *Supra* note 193.

198 The testimony of police officers as to an accused's high level of intoxication upon arrest is also important evidence because of their credibility: see *ibid.*

> during which period of time he apparently did nothing other than possibly drink more beer. There was no attempt by him to conceal anything, and no evidence that the scene was disturbed in any way.[199]

By contrast, rational behaviour after the crime can prevent a successful defence. In *R. v. McDonald*,[200] for example, the accused had the mental awareness to prevent his children from seeing the victim's body and this worked against his intoxication defence.

Intoxication may be relevant to setting the parole ineligibility period for second degree murder. In *Taylor*, for example, the Court suggests that even if the degree of intoxication is not sufficient to result in a lesser charge of manslaughter, intoxication may still be considered a mitigating factor in setting the parole ineligibility period.[201] By contrast, when dealing with manslaughter sentencing, courts generally see alcohol as an aggravating factor. For example, in *R. v. Anablak*, Kirkpatrick J. emphasized the role alcohol played in the spousal violence at issue:

> Alcohol gradually transformed [the accused's] relationship with [his partner] into something that was ugly, demeaning, and destructive. Instead of patience and understanding, instead of respect, there was to be fear, anxiety and hurt. In an accelerating crescendo of violence and anger, [the accused] repeatedly lashed out at his common law partner while highly intoxicated.[202]

In *R. v. Duval*, a manslaughter sentencing decision, the New Brunswick Queen's Bench emphasized the accused's intoxication when referring to the need for general deterrence "to others who may think that alcohol may be used as an excuse to physically abuse people and then be treated lightly by the courts because of the alcohol."[203] The link between intoxication and spousal violence was clearly denounced in *R. v. Foster* where the Court stated:

> An appropriate sentence for this type of case must reflect our society's concern for the sanctity of life, its denunciation of spousal violence and its revulsion that anyone in a state of self-induced intoxication would take an innocent life and thus a lengthy sentence must be imposed having in mind the gravity of such an offence.[204]

In *Cook*, where the Court assumed that the jury reached a manslaughter verdict on the basis of intoxication, intoxication was considered an aggravating factor in sentencing the accused to 16.5 years of imprisonment. A minority of courts have held that intoxication is neither mitigating nor aggravating. In *Boutilier*, for example, the Court concluded that the accused "ha[d] already received the benefit of this mitigating factor by being allowed to plead to manslaughter."[205] One context in which intoxication can indirectly be considered as a mitigating factor is if, prior to trial, the accused enrols in a treatment program.[206]

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199 *Ibid.* at para. 53.
200 2005 BCSC 473, [2005] B.C.J. No. 3091 (QL), aff'd 2007 BCCA 224, [2007] B.C.J. No. 1680 (QL).
201 *Taylor*, *supra* note 117 at para. 15.
202 2008 NUCJ 9, [2008] Nu.J. No. 8 at para. 3 (QL).
203 (1994), 145 N.B.R. (2d) 311 at para. 27 (Q.B.).
204 2004 NBQB 316, [2004] N.B.R. (2d) (Supp.) No. 57 at para. 51.
205 *Boutilier*, *supra* note 185 at para. 20.
206 See e.g. *Strong*, *supra* note 154 at para. 10.

In summary, courts appear to be acutely aware of the need to deter spousal violence and the link between violence and drugs and alcohol. Thus, they are reluctant to reduce murder convictions to manslaughter on the basis of intoxication except in the clearest possible cases. The cases in this study suggest that intoxication may play a bigger role in plea negotiations than as a defence at trial.

2. PROVOCATION

There are several reasons for examining provocation in a study of sentencing for spousal homicide. The first, and most obvious, is that provocation is a defence that only applies to murder and that it reduces murder to manslaughter, thus providing for discretion in sentencing. Second, provocation developed largely in response to men killing their wives or their wives' lovers when they were discovered committing adultery.[207] Third, the role of provocation in excusing male violence against women has attracted significant criticism in many jurisdictions.[208] These criticisms focus on the fact that provocation privileges the emotions of anger and jealousy and may result in excusing men who kill after a history of repeated abuse against the victim. There is particular concern about provocation defences that are triggered by a woman leaving or attempting to leave a relationship or a woman entering into a new relationship. Finally, the Supreme Court of Canada decision in *Thibert* has raised concerns that the mere fact of a wife finding a new partner may ground a provocation defence.[209]

The implications of a successful provocation defence cannot be overstated. Not only does provocation reduce murder to manslaughter, thus avoiding the mandatory minimum sentence for murder, the Supreme Court has also held that provocation may be considered a mitigating factor in setting the appropriate sentence for manslaughter.[210] While the Crown in *Stone* argued strenuously against this idea of a "double benefit," the Supreme Court rejected the characterization of a double benefit holding instead that it was necessary to consider provocation in sentencing for manslaughter.

> [T]o give s. 232 full effect, provocation must be considered in sentencing in cases where this section of the *Code* has been invoked. The sentencing judge was therefore correct in considering provocation as a mitigating factor in the present case. The argument that the provocation factor was spent because it had already served to reduce the legal character of the crime overlooks the purpose of s. 232 and therefore must fail.[211]

Thus, reducing murder to manslaughter on the grounds of provocation will have a substantial impact on sentencing in the context of spousal homicide.

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207 See Horder, *supra* note 23 at 15-45.

208 Wayne Gorman, "Provocation: The Jealous Husband Defence" (1999) 42 Crim. L.Q. 478; Caroline Forell, "Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia" (2006) 14 Am. U. J. Gender Soc. Pol'y & L. 27; Victoria Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 Yale L.J. 1331; Horder, *ibid.*

209 Gorman, *ibid.*

210 *Stone*, *supra* note 32.

211 *Ibid.* at para. 237.

Other than *Stone*, which dealt with provocation almost entirely in the sentencing context, we do not have a recent spousal homicide decision with provocation from the Supreme Court of Canada.[212] The most recent decision we have dealing with provocation in the intimate partner context involved an accused who killed his estranged wife's new partner. Thus, while not strictly speaking a spousal homicide case, *Thibert* raised similar issues about a man's perceived entitlement to access to his estranged wife and the mitigating role of sexual jealousy in this context. Further, *Thibert* suggests that, in some circumstances, a woman leaving a relationship may trigger the defence of provocation.

In *Thibert*, the accused's wife had left him and was having a relationship with one of her co-workers. Mr. Thibert was upset about the estrangement and made several attempts to contact her, eventually following her to her place of work where a confrontation took place involving Thibert, his wife, and her new male partner. The victim began walking towards the accused, with his hands on the wife's shoulders swinging her back and forth, saying, "[c]ome on big fellow, shoot me? You want to shoot me? Go ahead and shoot me."[213] Thibert then shot and killed him. He was charged with first degree murder but convicted of second degree murder. Thus, the jury clearly rejected the provocation defence.

Thibert appealed his conviction arguing that the trial judge erred in failing to tell the jury that the Crown had the burden of disproving provocation. On appeal, all parties agreed that the judge had erred in this respect. However, the Crown argued that the judge should never have put provocation to the jury in this case and, therefore, that the mistake did not prejudice the accused. Thus, the issue was whether there was an evidentiary foundation for putting provocation to the jury.

The Court was divided 3:2 with Cory J. writing for the majority and Major J. for the dissent. The majority held that the act or insult must be one that, in light of the history of the relationship, could have deprived an ordinary person of self-control, the ordinary person being of the same age and sex as the accused and sharing the same characteristics that gave the insult particular significance. The majority looked at the ordinary person whose marriage had broken up and who had gone to speak with his wife in private. With regard to the subjective test, the provoking words from the deceased were unanticipated and the events unfolded in a matter of seconds. Thus, there was sufficient evidence to put provocation to the jury and a new trial was warranted.

The majority decision in *Thibert* is troubling in several respects. Thibert precipitated the confrontation and took a loaded weapon to the scene.[214] Yet the victim's words in response to this threat were found capable of depriving the ordinary person of self-control. The accused admitted that he had earlier contemplated killing his wife. When he then triggers a deadly confrontation, how can he claim he was acting on the sudden in response to provocation by the words of the man he was threatening? The dissenting opinion in *Thibert*

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212 Provocation was in fact raised in *Parent*, *supra* note 138, but the Supreme Court of Canada chose to limit its analysis to the relationship of anger on *mens rea* under s. 229(a)(ii) and did not address the substance of the provocation claim.

213 *Thibert*, *supra* note 25 at para. 26.

214 For reference to the concept of men who engineer a confrontation and in essence set up the provocation see Jenny Morgan, "Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them" (1997) 21 Melbourne U. L. Rev. 237.

held that there was no evidence of a wrongful act or insult sufficient to deprive an ordinary person of self-control. Justice Major stressed the danger of characterizing the fact of an extramarital affair as the basis of provocation pointing out that no one has an "emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited."[215]

Thibert has been harshly criticized. Wayne Gorman suggests that the majority has turned provocation into the "defence of jealousy or anger."[216] Gorman goes so far as to say the Supreme Court has upheld the long-standing rule that life imprisonment is disproportionate for someone who kills an adulterous wife. Gary Trotter argues that it will be difficult for a judge to refuse to put provocation to the jury in cases where men kill their spouses as a response to infidelity.[217] In light of these concerns, this article examines the cases where provocation was raised in the present sample to see if these concerns have been borne out. How often is provocation successful and in what circumstances? Are courts of appeal more likely after *Thibert* to require that provocation be put to the jury?

There were 37 cases in this sample where provocation was raised, or approximately 15 percent of the 252 cases.[218] There were seven cases where the defence was successful,[219] and, in one of these it was impossible to tell whether the jury had based its decision on provocation or intoxication.[220] This represents a success rate of approximately 19 percent amongst the cases where provocation was raised and approximately 3 percent of the total sample. In two further cases, courts of appeal sent the case back for a new trial on the basis of the errors regarding the law of provocation.[221] In the first of these cases, *Kent*,[222] the accused first strangled his wife with his hands and then tied a dog leash around her neck ostensibly to end her suffering quickly in response to her verbal "provocation." The accused testified that he "flipped" when his wife started calling him "worthless" and "not even as good as her ex-husband."[223] In *R. v. Parent*,[224] not included as a successful case, provocation was successful at the first trial but unsuccessful after the Supreme Court of Canada sent the case back for a second trial.

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215 *Thibert*, *supra* note 25 at para. 65.

216 Gorman, *supra* note 208 at 478-79.

217 Gary T. Trotter, "Anger, Provocation, and the Intent for Murder: A Comment on *R. v. Parent*" (2002) 47 McGill L.J. 669.

218 This sample does not capture cases where the accused has killed his former partner's new lover such as in *Thibert*, *supra* note 25.

219 Success here refers to the defence being successful at trial and not reversed on appeal.

220 *R. v. Montgomery* (1997), 209 A.R. 38 (C.A.) [*Montgomery*]; *Stone*, *supra* note 32; *R. v. Cairns*, 2004 BCCA 219, [2004] B.C.J. No. 771 (QL) [*Cairns*]; *Li*, *supra* note 187; *R. v. Kimpe*, [2008] O.J. No. 2087 (Sup. Ct. J.) (QL) [*Kimpe*]; *Strong*, *supra* note 154. In *Archibald*, *supra* note 154, the manslaughter verdict could have been based on intoxication and/or provocation. In *Strong*, a charge of murder was reduced to manslaughter after the preliminary but the judge made it clear that the charge was reduced because of provocation and thus I am including it as a successful provocation case.

221 *R. v. Carpenter* (1993), 14 O.R. (3d) 641 (C.A.); *Kent*, *supra* note 38. However, note the comments of Southin J. in her (reluctant) concurring minority judgment in *Kent*, where she suggests that a jury verdict of manslaughter at a new trial "would be to condone quite appalling domestic violence" (at para. 77). See also *Strong*, *ibid.*.

222 *Kent*, *ibid.*

223 *Ibid.* at para. 11.

224 2001 SCC 30, [2001] 1 S.C.R. 761. The accused was originally charged with first degree murder then found guilty of manslaughter probably on the basis of provocation. The Supreme Court of Canada ultimately ordered a new trial because the trial judge erred in his instruction regarding the impact of anger on the *mens rea* for s. 229. At his second trial, the accused was convicted of second degree murder: see *Parent*, *supra* note 138.

If one considers the overall sample, the success rate for provocation is fairly low. However, when looking only at cases where the defence is raised, there is almost a 20 percent success rate. These numbers almost certainly understate the role of provocation in reducing murder to manslaughter. For example, it is clear from the cases that provocation may lead the Crown to accept a guilty plea to manslaughter, making a discussion of provocation unnecessary at trial.[225]

Nonetheless, the successful cases are useful in examining what factors are likely to be at play in these cases. Most notably, in all but one of the cases where provocation was successful, there was no history of violence between the parties. In the exception, *Li*,[226] the accused had been charged a month prior to the killing with punching his wife once. Similarly, several of the cases involving successful provocation defences involved physical provocation by the deceased against the accused. For example, in *Strong*, the deceased hit the accused with a beer bottle on the back of his head. In *Li*, the deceased slapped the accused and yelled at him. In *Montgomery*,[227] there were also allegations of assault by the deceased against the accused, which left visible marks of trauma on the accused's face.[228] In a few of these cases, there was evidence of an injury to the accused[229] or a witness to the victim's provoking actions, not just the testimony of the accused.[230] However, in none of these cases was the physical violence against the accused even close to being life-threatening.

In cases not involving physical provocation, the alleged provocation consisted of, in one case, asking for money in exchange for sex so that the victim could use the money for gambling.[231] In *Archibald*, the deceased had been having an affair and apparently had just told the accused that her lover was coming over at the time of the killing.[232] In *Stone*, the accused stabbed his wife after she allegedly taunted him about his sexuality and cast doubt on whether he was the biological father of his children from a previous relationship.[233]

Evidence of extreme brutality is evident in several successful provocation cases.[234] In *Stone*, the accused stabbed his wife 47 times;[235] in *Strong*, the accused inflicted 22 abrasions and punctures with a knife.[236] In *Archibald*, the accused stabbed the victim several times although we are not told the precise number.[237] In *Kimpe*, the accused strangled his partner

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225 See e.g. *R. v. Couture*, 2001 YKTC 51, [2001] Y.J. No. 137 (QL), where the victim attacked the accused immediately prior to the killing and the Crown accepted the plea of guilty to manslaughter likely on the basis of provocation.

226 *Supra* note 187. The Crown appealed in this case arguing that there was no air of reality to the defence of provocation but the Court of Appeal, while characterizing the evidence as weak, upheld the manslaughter verdict.

227 *Supra* note 220.

228 In *Kimpe*, *supra* note 220, it is impossible to decipher the nature of the provocation from the sentencing decision. We only know that her words "went beyond a repudiation of their relationship" (at para. 5).

229 In *Strong*, *supra* note 154, the deceased hit the accused with a beer bottle on the back of his head. This case has the lowest sentence of any of the successful provocation cases. See text below at notes 255-58 for discussion of sentencing in these cases.

230 See e.g. *Young*, *supra* note 36, where a witness heard the victim repeatedly telling the accused that their relationship was over and that she was leaving him.

231 See *Cairns*, *supra* note 220.

232 *Archibald*, *supra* note 154.

233 *Stone*, *supra* note 32.

234 See *Gray*, *supra* note 134, where the defence was unsuccessful.

235 *Stone*, *supra* note 32.

236 *Strong*, *supra* note 154.

237 *Archibald*, *supra* note 154.

to death with his hands; the Court noted that "this was an act of extreme violence with the use of strong force over an extended period of time."[238] It would appear that extreme brutality does not necessarily lead juries away from the defence of provocation. One could argue, by contrast, that extreme violence could sometimes be used to support the notion of a loss of self-control on the part of the accused. The normative question is whether this makes the killing less blameworthy and worthy of mitigation.

Of the seven cases where provocation was successful, only two were decided prior to *Thibert*.[239] Of the remaining five, three were clearly decided after *Thibert*.[240] Two others were decided right around the time of *Thibert*. In *Stone*, the jury trial took place before *Thibert* was released. The Supreme Court of Canada did cite *Thibert* in the appeal, albeit with no discussion. In *Strong*, the sentence was imposed after a guilty plea to manslaughter a few months after the release of *Thibert* and the case was not cited. It is also important to note that there are more than double the number of cases after *Thibert* than before, thus one would expect a higher number of successful provocation defences in this period. Thus, while the majority of successful defences take place after *Thibert* that case does not appear to be the determining factor in many, if any, cases.

The cases in this sample do not support the concern after *Thibert* that separation or rejection by a female spouse will necessarily support a provocation defence.[241] *Thibert* has not resulted in the widespread expansion of the defence of provocation in the spousal homicide context. Instead, we see courts referring to *Thibert* but interpreting it narrowly.

While courts acknowledge that triers of fact can look at the nature of the relationship between the parties, reference is often made to the judgment of Dickson C.J.C. in *Hill*[242] where he held that, while a jury may consider the circumstances and certain characteristics of the accused, that does not mean that a trial judge has to elaborate those circumstances for the jury.[243] As Dickson C.J.C. held in that case, "the 'collective good sense' of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question."[244] In *R. v. Simpson*,[245] for example, the British Columbia Court of Appeal held that *Thibert* allows the trier of fact to look at the history of the relationship but does not require the judge to instruct the jury as such.[246]

While *Thibert* has not resulted in a wide-scale application of provocation in spousal homicides, there are troubling aspects to several of the successful cases. In *Stone* itself, for example, provocation succeeded where the victim merely taunted the accused about the paternity of his children.[247] In *Cairns*,[248] the victim demanded money for sex and this was seen as sufficient provocation to cause an ordinary person to lose self-control. In those cases

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238 *Kimpe*, *supra* note 220.
239 See *Montgomery*, *supra* note 215; *Archibald*, *supra* note 154.
240 *Cairns*, *supra* note 220; *Li*, *supra* note 187; *Kimpe*, supra note 220.
241 *Lees*, *supra* note 26.
242 *R. v. Hill*, [1986] 1 S.C.R. 313 [*Hill*].
243 See e.g. *R. v. Nahar*, 2004 BCCA 77, 23 B.C.L.R. (4th) 269 [*Nahar*].
244 *Hill*, *supra* note 242 at para. 35.
245 1999 BCCA 310, 125 B.C.A.C. 44.
246 *Ibid.* at para. 55.
247 *Stone*, *supra* note 32.
248 *Supra* note 220.

where some physical altercation did take place, the injuries to the accused were never serious. Thus, while *Thibert* might not be the sole culprit, it is difficult to explain why some cases allowed the defence and others do not. For example, in *Lees*,[249] an impending separation and a threat to falsely allege that the accused sexually abused his daughter were held to be insufficient to satisfy the objective test; the Court of Appeal agreed with the assessment.[250] There thus seems to be a lack of consistency or predictability about what verbal insults will satisfy the objective test.

One argument that has been put forward on the basis of *Thibert* is that cultural and religious beliefs have to be incorporated into the objective test, a view that had been rejected prior to *Thibert*.[251] This issue has arisen in several spousal homicide cases involving women who do not conform with stereotyped expectations about their behaviour. The argument is that an accused person from a particular culture is more likely to lose self-control in the face of infidelity or assertions of independence by his spouse. Courts of appeal have been understandably reluctant to incorporate such an argument into the objective test. In *Nahar*, the accused, relying on *Thibert*, based his argument on the "shared expectations among the Sikh community, and the Indo-Canadian community at large, as to the proper conduct of a married woman and as to the importance attached to these expectations."[252] The accused's wife in this case did not accept his conventional beliefs about appropriate conduct for women and she asserted her independence and made friends with a number of young Sikh women who shared her views. The Court of Appeal did concede that *Thibert* requires that the ordinary person be one that shares the accused's cultural background. However, it was not enough to say that the ordinary person of this background would be upset by his wife's conduct, the issue was whether the ordinary person of this background would lose his self-control. The Court of Appeal agreed with the trial judge that this test could not be met and held, relying on *Hill*, that the judge need not necessarily tell the jury what attributes should be ascribed to the ordinary person.

In *Humaid*,[253] the accused proffered evidence by an expert on the Islamic religion and culture suggesting that infidelity on the part of a female member of the family was considered a serious violation of the family's honour and warranted severe punishment by the male members of the family. Immediately before the killing in *Humaid*, the victim made reference to being on a "little pill," which, in the context, was seen as an admission of infidelity. The accused argued, relying on *Thibert*, that such an insult had to be seen from the perspective of an ordinary Muslim man who had been faced with his wife's infidelity. The trial judge rejected the relevance of his religion to the objective test and this issue was appealed to the Ontario Court of Appeal. The Court of Appeal was able to skirt around the issue because it held that there was no evidence that the accused actually had these beliefs himself. However, in several passages the Court made clear that it had grave concerns about such an application of the objective test: "Assuming that an accused's religious and cultural beliefs that are antithetical to fundamental Canadian values such as the equality of men and

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249 *Supra* note 26.
250 *Ibid.*
251 See *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A.).
252 *Nahar, supra* note 243 at para. 3, citing the trial decision 2002 BCSC 928, [2002] B.C.J. No. 1424 at para. 4 (QL).
253 *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.) [*Humaid*].

women can ever have a role to play at the 'ordinary person' phase of the provocation inquiry, the expert evidence could not assist this appellant."[254] The Court went on to distinguish between revenge based on one's cultural beliefs and a loss of self-control:

> Provocation does not shield an accused who has not lost self-control, but has instead acted out of a sense of revenge or culturally driven sense of the appropriate response to someone else's misconduct. An accused who acts out of a sense of retribution fuelled by a belief system that entitles a husband to punish his wife's perceived infidelity has not lost control, but has taken action that, according to his belief system, is a justified response to the situation.[255]

The overriding factor for the Court of Appeal was that values that are antithetical to Canadian values, such as the view that women are inferior to men, should not become part of the objective test.

> It is arguable that as a matter of criminal law policy, the "ordinary person" cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide the basis for a partial defence to murder.[256]

The Court of Appeal in *Humaid* is recognizing the importance of gender equality in attributing qualities and characteristics to the ordinary person. One would be hard pressed to argue that the kind of stereotypical misogyny, depicted in Humaid's evidence as ordinary in his culture, should be incorporated into an objective test in order to excuse spousal murder. What is not mentioned, however, is how courts assume the ordinariness of the values demonstrated in cases like *Thibert* and *Stone*. Thibert did not need to argue that his proprietary view of his wife was consistent with typical Canadian cultural beliefs or with gender equality. Stone's reaction, losing his control, and stabbing his wife over 40 times after verbal provocation regarding the paternity of his children, is never examined in light of whether such a defence is consistent with gender equality in Canada.[257]

The biggest impact of the provocation defence is on sentencing because the manslaughter verdict gives the trial judge discretion in imposing a sentence. In *Stone*, as indicated above, the Supreme Court of Canada did hold that provocation could be a mitigating factor in sentencing although it is only one of numerous factors. In the present sample, there is a range of sentences after a successful provocation defence from 30 months at the low end to ten years at the high end. In *Stone*, the accused was sentenced to only seven years after stabbing his wife over 40 times after purely verbal provocation. In *Archibald*, where intoxication and provocation were raised, the accused was sentenced to four years at trial, which was reduced to three years on appeal. In *Strong*, where the accused stabbed his wife 22 times, he was sentenced to 30 months imprisonment. In *Cairns*, the victim demanded money for sex. Provocation was successful at trial and the judge imposed a sentence of four years but the

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254 *Ibid.* at para. 82.
255 *Ibid.* at para. 85 [footnotes omitted].
256 *Ibid.* at para. 93.
257 Rosemary Cairns Way has demonstrated the problematic nature of accepting without question mainstream views of our culture related to gender, class, and sexual orientation as ordinary: Rosemary Cairns Way, "Culture, Religion, and the Ordinary Person: An Essay on *R. v. Humaid*" (2009-2010) 41 Ottawa L. Rev. 1 [forthcoming].

British Columbia Court of Appeal held that the sentence did "not sufficiently express denunciation for spousal manslaughter" and substituted a sentence of seven years.[258]

The highest sentence in any of the provoked manslaughters was ten years, which was imposed in both *Montgomery*[259] and *Kimpe*. The accused in *Kimpe* strangled his wife to death and then set fire to his home while her body remained inside. He was convicted of manslaughter at a jury trial as a result of a successful provocation defence. Despite characterizing the accused as a "gentle giant" whose actions were completely out of character, the trial judge sentenced him to ten years imprisonment. He stressed that domestic violence is of particular concern to the courts and cannot be tolerated.[260]

There is the occasional judgment that takes the view that provoked manslaughters should be sentenced more harshly than other manslaughters because they involve intentional killings that would otherwise have been murder. In *Li*, for example, Ewaschuk J. took this position, stressing the intentional nature of a provoked killing, and the importance of denouncing spousal homicides, in imposing a sentence of eight years for a man who strangled his wife.

Thus, there is a wide range of sentences for provoked manslaughters from less than three years to ten years but no sentence over ten years. The majority of provoked manslaughters result in sentences below the average sentence for spousal manslaughter. It is not always apparent from the facts of the case why some are treated more harshly than others, especially given that provocation presumes an intentional killing. What is apparent, however, is that a sentence for a provoked manslaughter will be significantly below what the accused would have faced had he been convicted of murder. While the incidence of successful cases in this sample is not alarming, the details of some of the successful cases are and demonstrate that, despite the efforts of some courts, we have not reached a point where gender equality has been fully incorporated into the defence of provocation.

III. CONCLUSION

It is difficult to draw precise conclusions from the above data because there are numerous factors influencing the outcomes. For second degree murder, for example, the greatest impact has probably come from the *Shropshire* decision, which has led to an increase in parole ineligibility periods generally. It appears likely that s. 718.2 of the *Criminal Code* has also given judges a specific reason for elevating parole ineligibility in spousal homicide cases. Overall, parole ineligibility periods have increased since the pre-*Shropshire* era and are now levelling off as courts begin to set ranges for spousal second degree murders. With manslaughter, where *Shropshire* was not relevant, there has been an increase in the severity of sentences. This is possibly because of s. 718.2, or at least the values reflected in that section, although it took several years after the amendments to see the true impact of this change. Overall, it is fair to say that judges have changed their perceptions of spousal

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258 *Cairns*, *supra* note 220 at para. 98.

259 *Supra* note 220. The Court of Appeal gives no information as to the basis of the ten-year sentence on the unsuccessful Crown appeal of the provocation defence. It is worthy of note that the accused had been charged with first degree murder and the jury brought in a verdict of manslaughter.

260 *Kimpe*, *supra* note 220 at para. 7. It is difficult to determine from the appellate judgment in *Montgomery*, *ibid.*, what factors influenced the ten-year sentence.

homicides in terms of where they fit on a continuum of moral fault and that, in recent years, there has been recognition that killing an intimate partner is a particularly egregious form of homicide.

Despite concerns that provocation and intoxication would result in excusing significant numbers of men who kill their spouses, this fear does not appear to have materialized, although there are a few very troubling decisions.[261] With provocation, the success rate of the defence is low and judges do *not* appear to be broadening the scope of the ordinary person test significantly as was feared after the Supreme Court of Canada decision in *Thibert*. Provocation does appear to provide a double benefit to the accused, however, in that it may reduce murder to manslaughter and then still be seen as a mitigating factor in sentencing. Intoxication, by contrast, does not appear to bestow this kind of double benefit. Once intoxication has reduced a second degree murder to manslaughter, which only happens rarely, it is unlikely to be seen as a mitigating factor and may well be seen as aggravating.

In general, therefore, the data in this article support the suggestion that courts have taken an increasingly harsh stance against spousal homicides, which, prior to the late 1990s, were more likely to be seen as less serious forms of culpable homicide. This is not to suggest that increased sentences per se are always a positive development. Rather, what matters is the recognition that, on the gradation of blameworthiness, spousal homicides lie on the top end of the spectrum, not the bottom. The fact that one is killing someone with whom one has shared an intimate relationship and a relationship of trust makes these killings particularly blameworthy. Although one still sees remnants of the view that random killings will attract the greatest concern, women continue to be at greatest risk at the hands of people they have loved and the intimate and gendered nature of these homicides makes them particularly heinous.

[261] See e.g. *Stone*, *supra* note 32.

APPENDIX 1
PAROLE INELIGIBILITY IMPOSED IN THE SECOND DEGREE MURDER CASES FIVE YEARS IMMEDIATELY BEFORE *SHROPSHIRE*

	At Sentencing	On Appeal
R. v. McMurrer (1990), 84 Nfld. & P.E.I.R. 248 (P.E.I.S.C. (T.D.)).	10 years	
R. v. McMurrer (1991), 89 Nfld. & P.E.I.R. 36 (P.E.I.S.C. (A.D.)).		12 years
R. v. Randhawa (1990), 104 A.R. 304 (C.A.).	15 years	
R. c. Rhadbane, [1990] J.Q. no 2246 (C.A.) (QL).	15 years	
R. v. Banash (1991), 75 Man. R. (2d) 70 (C.A.).	10 years	
R. v. Doyle (1991), 108 N.S.R. (2d) 1 (S.C. (A.D.)).	10 years	17 years
R. v. Baillie (1991), 107 N.S.R. (2d) 256 (S.C. (A.D.)).	13 years	17 years
R. v. Edgecombe, [1991] O.J. No. 2044 (Ct. J. (Gen. Div.)) (QL).	10 years	
R. v. Cameron (1992), 7 O.R. (3d) 545 (C.A.).	10 years	
R. v. Lemky (1992), 17 B.C.A.C. 71.	10 years	
R. v. Guillemette, [1993] B.C.J. No. 2092 (S.C.) (QL).	10 years	
R. v. Allegretti, [1994] O.J. No. 172 (C.A.) (QL).	10 years	
R. v. Bain (1994), 130 N.S.R. (2d) 332 (C.A.).	10 years	
R. v. Pabani (1994), 17 O.R. (3d) 659 (C.A.).	12 years	10 years
R. v. Deocharran, [1994] O.J. No. 3145 (Ct. J. (Gen. Div.)) (QL).	10 years	
R. v. Joanisse (1995), 85 O.A.C. 186.	10 years	
R. v. Loubier, [1995] O.J. No. 2035 (Ct. J. (Gen. Div.)) (QL).	17 years	
R. v. Morrow, [1995] O.J. No. 4052 (Ct. J. (Gen. Div.)) (QL).	15 years	
R. v. McCormack (1995), 83 O.A.C. 73.	14 years	12 years
R. v. Muir (1995), 80 O.A.C. 7.	12 years	10 years
R. v. Munroe (1995), 79 O.A.C. 41.	12 years	12 years
R. v. Sarao (1995), 80 O.A.C. 236.	25 years	22 years

APPENDIX 2
PAROLE INELIGIBILITY IMPOSED IN THE SECOND DEGREE MURDER CASES FIVE YEARS IMMEDIATELY AFTER *SHROPSHIRE*

	At Sentencing	On Appeal
R. v. Bajrangie-Singh, [1996] O.J. No. 5336 (Ct. J. (Gen. Div.)) (QL).	15 years	
R. v. Bajrangie-Singh (2003), 170 O.A.C. 99.		13 years
R. v. Beamish (1996), 144 Nfld. & P.E.I.R. 357 (P.E.I.S.C. (T.D.)).	18 years	
R. v. D.B., [1996] B.C.J. No. 1485 (S.C.) (QL), aff'd 91 B.C.A.C. 298.	20 years	20 years
R. v. Tan (1996), 75 B.C.A.C. 181.	13 years	13 years
R. v. Stewner (1996), 113 Man. R. (2d) 78 (C.A.).	20 years	20 years
R. c. Artesen, [1997] J.Q. no 1845 (C.S.) (QL).	12 years	
R. v. Parmar (1997), 41 O.T.C. 104 (Ct. J. (Gen. Div.)).	15 years	
R. c. R.P., [1997] J.Q. no 279 (C.S.) (QL).	12 years	
R. v. Cross (1998), 171 N.S.R. (2d) 56 (S.C.).	12 years	
R. v. Savoie (1998), 209 N.B.R. (2d) 378 (Q.B. (T.D.)).	15 years	
R. v. Assoun (1999), 182 N.S.R. (2d) 344 (S.C.).	18.5 years	
R. v. Allen, 1999 BCCA 117, 122 B.C.A.C. 286.	13 years	
R. c. Coutu, [1999] J.Q. no 1809 (C.S.) (QL).	10 years	
R. v. McKnight (1999), 44 O.R. (3d) 263 (C.A.).	17 years	14 years
R. v. Plaha, [1999] O.J. No. 5577 (Sup. Ct. J.) (QL).	12 years	
R. v. Rushton, [1999] Y.J. No. 62 (S.C.) (QL), aff'd 2000 YTCA 5, 143 B.C.A.C. 295.	17 years	17 years
R. v. Stewart, [1999] N.B.J. No. 415 (Q.B. (T.D.)) (QL).	14 years	
R. v. Stephen, 1999 ABCA 190, 244 A.R. 372.	15 years	
R. v. Ullah, [1999] O.J. No. 2767 (Sup. Ct. J.) (QL).	15 years	
R. v. Wristen (1999), 47 O.R. (3d) 66 (C.A.).	17 years	17 years
R. v. Belliveau, 2005 BCCA 283, 212 B.C.A.C. 279.	13 years	
R. v. J.G.F., 2000 BCCA 140, 135 B.C.A.C. 35.	15 years	
R. v. Gray, [2000] O.J. No. 5317 (Sup. Ct. J.) (QL).	12 years	
R. v. G.W.F., 2000 BCSC 508, [2000] B.C.J. No. 1853 (QL).	17 years	
R. v. Krugel (2000), 129 O.A.C. 182.	10 years	
R. v. Ogden (2000), 187 Nfld. & P.E.I.R. 134 (Nfld. S.C. (T.D.)).	14 years	

APPENDIX 3
PAROLE INELIGIBILITY IMPOSED IN THE SECOND DEGREE MURDER CASES DECIDED BETWEEN 2001-2008

	At Sentencing	On Appeal
R. c. Bolduc, [2001] J.Q. no 1532 (C.S.) (QL).	12 years	
**R. v. Czibulka*, [2001] O.J. No. 6115 (Sup. Ct. J.) (QL).	17 years	
R. v. Johnson, 2001 NSSC 119, 196 N.S.R. (2d) 267.	21 years	21 years
R. v. Paquette (2001), 153 O.A.C. 149.	14 years	14 years
R. c. Parent, [2001] J.Q. no 6833 (C.S.) (QL).	12 years	
R. v. Peterffy, 2001 BCCA 698, 162 B.C.A.C. 24.	15 years	15 years
R. v. Spindler, [2001] O.J. No. 4899 (Sup. Ct. J.) (QL).	11 years	
R. v. Teske, [2001] O.J. No. 1900 (Sup. Ct. J.) (QL).	16 years	
R. v. Teske (2005), 202 O.A.C. 239.		13 years
R. v. F.K., 2003 BCCA 703, 192 B.C.A.C. 220.	20 years	20 years
R. v. K.W.M., 2003 BCCA 688, 190 B.C.A.C. 294.	20 years	20 years
R. v. Sodhi (2003), 66 O.R. (3d) 641 (C.A.).	14 years	14 years
R. v. Curry, 2004 BCCA 144, 197 B.C.A.C. 6.	10 years	
R. c. Daigle, [2004] J.Q. no 13829 (C.S.) (QL).	12 years	
R. c. Dagenais, [2004] J.Q. no 12142 (C.S.) (QL).	12 years	
R. v. Falkner, 2004 BCSC 986, 188 C.C.C. (3d) 406.	25 years	25 years
R. v. Moo, [2004] O.J. No. 2234 (Sup. Ct. J.) (QL).	12 years	
**R. v. Trochym* (2004), 71 O.R. (3d) 611 (C.A.).	10 years	10 years
R. v. Guiboche, 2004 MBCA 16, 180 Man. R. (2d) 276.	10 years	
R. c. M.P., [2004] J.Q. no 8702 (C.S.) (QL).	25 years	
Poissant c. R., 2007 QCCA 205, [2007] J.Q. no 998 (QL).		15 years
R. c. Picard, [2004] J.Q. no 4332 (C.S.) (QL).	10 years	
R. v. Diep, 2005 ABQB 81, [2005] A.J. No. 106 (QL).	10 years	
R. v. Lenius, [2005] S.J. No. 526 (Q.B.) (QL).	15 years	
R. v. Lenius, 2007 SKCA 65, 299 Sask. R. 139.		12 years
R. v. D.W.M., 2005 BCSC 1061, [2005] B.C.J. No. 1578 (QL).	10 years	
R. v. Neumann, 2005 BCSC 1820, [2005] B.C.J. No. 2883 (QL).	12 years	
R. c. Rizzolo, [2005] J.Q. no 19927 (C.S.) (QL).	13 years	
R. v. Howard, [2006] O.J. No. 1350 (Sup. Ct. J.) (QL).	15 years	
R. v. Ingraham, [2006] O.J. No. 1207 (Sup. Ct. J.) (QL).	11 years	
R. v. J.V., [2006] O.J. No. 2392 (Sup. Ct. J.) (QL).	17 years	
R. v. Labidi, [2006] O.J. No. 3138 (Sup. Ct. J.) (QL).	15 years	
R. v. Nichols, [2006] O.J. No. 2868 (Sup. Ct. J.) (QL).	12.5 years	
R. v. Oigg, 2006 MBQB 68, 202 Man. R. (2d) 219	14 years	
R. v. Ramkissoon (2006), 216 O.A.C. 388.	14 years	14 years
R. v. White, 2006 ABQB 909, 408 A.R. 64.	17 years	
R. v. W.J.D., 2006 SKCA 91, 285 Sask. R. 225.	14 years	
R. c. Morin-Cousineau, 2006 QCCS 2289, [2006] J.Q. no 3872 (QL).	13 years	
R. v. Parsons, 2007 NLTD 108, 267 Nfld. & P.E.I.R. 191.	12 years	

	At Sentencing	On Appeal
R. v. Taylor, 2007 BCSC 390, [2007] B.C.J. No. 593 (QL).	10 years	
R. v. VanEindhoven, 2007 NUCJ 2, [2007] Nu.J. No. 2 (QL).	12 years	
R. v. Waraich, 2008 BCSC 919, [2008] B.C.J. No. 1309 (QL).	10 years	

* A new trial was ordered in both of these cases and no sentencing information is available.

APPENDIX 4
MANSLAUGHTER SENTENCING CASES DECIDED BETWEEN 1990-1996

	Sentence (original)	Sentence (appeal)
R. v. Zimmer, [1990] S.J. No. 654 (C.A.) (QL).	15 years	10 years
R. v. Archibald (1992), 15 B.C.A.C. 301.	5 years	4 years
R. v. Pepin, [1992] O.J. No. 452 (Ct. J. (Gen. Div.)) (QL).	10 years	
R. v. Sinclair (1992), 81 Man. R. (2d) 154 (C.A.).	6 years	6 years
R. v. Calladine, [1993] O.J. No. 1637 (Ct. J. (Gen. Div.)) (QL).	13 years	
R. c. Jenkins (1993), 57 Q.A.C. 5.	Suspended	Suspended
R. v. Shorty, [1993] Y.J. No. 101 (S.C.) (QL).	Suspended	
R. v. Standring, [1993] O.J. No. 4233 (Ct. J. (Gen. Div.)) (QL).	8 years	
R. v. Wedel (1993), 88 Man. R. (2d) 115 (C.A.).	15 years	11 years
R. v. Duval (1994), 145 N.B.R. (2d) 311 (Q.B. (T.D.)).	6 years	
R. v. Lastheels, [1994] O.J. No. 1181 (Ct. J. (Gen. Div.)) (QL).	46 months	
R. v. Bell, [1995] O.J. No. 4533 (Ct.J. (Gen. Div.)) (QL).	7 years, 3 months	
R. v. G.M.W. (1995), 61 B.C.A.C. 6.	5 years	5 years
R. v. Ghazal, [1995] 28 W.C.B. (2d) 547.	9 years	
R. v. Gray, [1995] O.J. No. 236 (Ct. J. (Gen. Div.)) (QL).	6 years	
R. v. Mintert (1995), 57 B.C.A.C. 232.	7 years	7 years
R. v. Jackson (1996), 184 A.R. 93 (C.A.).	10 years	10 years
R. v. Strong (1996), 17 O.T.C. 252 (Ct. J. (Gen. Div.)).	30 months	
R. v. Montgomery (1997), 209 A.R. 38 (C.A.).	10 years	
R. v. Stone, [1999] 2 S.C.R. 290.	7 years	7 years
R. v. Zagorac (1997), 200 A.R. 305 (C.A.).	Life	
R. c. Lemay (1998), 127 C.C.C. (3d) 528 (Qc. C.A.).	20 years	13 years

APPENDIX 5
MANSLAUGHTER SENTENCING CASES
DECIDED BETWEEN 1996-2002

	Sentence (original)	Sentence (appeal)
R. v. Klassen (1997), 95 B.C.A.C. 136 (Y.C.A.).	5 years	5 years
R. v. Augustine, [1999] O.J. No. 2501 (Ct. J. (Gen. Div.)) (QL).	9 years	
R. v. Augustine, [2002] O.J. No. 1927 (C.A.) (QL).		7.5 years
R. v. K.E.L. (1999), 223 N.B.R. (2d) 27 (Q.B. (T.D.)).	9 years	
R. c. Ouellette, [1999] J.Q. no 6116 (C.S.) (QL).	2 years less a day	
R. v. Hyjek, [2000] O.J. No. 3094 (Sup. Ct. J.) (QL).	10 years	
R. v. Saunders, [2000] O.J. No. 5622 (Sup. Ct. J.) (QL).	8 years	
R. v. Couture, 2001 YKTC 51, [2001] Y.J. No. 137 (QL).	3.5 years	
R. v. McCulloch, 2001 BCCA 196, 153 B.C.A.C. 32.	12 years	12 years
R. v. Perrambalam, [2001] O.J. No. 3520 (Sup. Ct. J.) (QL).	5.5 years	
R. v. Raddi, 2001 NWTSC 50, [2001] N.W.T.J. No. 54 (QL).	10 years	
R. v. Sheppard, 2001 PESCTD 56, 202 Nfld. & P.E.I.R. 172.	10 years	
R. v. Pearson, 2002 NBQB 218, [2002] N.B.R. (2d) (Supp.) No. 49.	9 years	
R. v. White, 2002 SKQB 104, 216 Sask. R. 218.	9 years	
R. v. Wildeman, 2002 BCCA 112, 173 B.C.A.C. 214.	10 years	10 years

APPENDIX 6
MANSLAUGHTER SENTENCING CASES
DECIDED BETWEEN 2002-2008

	Sentence (original)	Sentence (appeal)
R. v. Beaulne, [2003] O.J. No. 5344 (Sup. Ct. J.) (QL).	10 years	
R. v. Boutilier, [2003] O.J. No. 4515 (Sup. Ct. J.) (QL).	11 years	
R. c. Dadgar, [2003] Q.J. No. 15818 (S.C.) (QL).	20 years	
Dadgar c. R., [2004] J.Q. no 5702 (C.A.) (QL).		20 years
R. v. D.R.W.C., 2004 ABQB 21, 351 A.R. 130.	10 years	
R. v. Ellsworth, 2003 BCSC 1315, [2003] B.C.J. No. 2031 (QL).	10 years	
R. c. Larochelle, [2003] J.Q. no 3381 (C.S.) (QL).	3 years	
R. v. T.J.N., 2003 BCPC 368, [2003] B.C.J. No. 2363 (QL).	8.5 years	
R. v. T.J.N., 2004 BCCA 374, 200 B.C.A.C. 274.		8.5 years
R. v. Cairns, 2004 BCCA 219, [2004] B.C.J. No. 771 (QL).	4 years	7 years
R. c. Dias, [2004] Q.J. No. 15780 (S.C.) (QL).	14 years	
R. v. Foster, 2004 NBQB 316, [2004] N.B.J. No. 335 (QL).	10 years	
Kane c. R., 2005 QCCA 753, 202 C.C.C. (3d) 113.	18 years	18 years
R. c. Lefebvre, [2005] J.Q. no 111 (C.S.) (QL).	8 years	
R. v. Li, [2005] O.J. No. 4145 (Sup. Ct. J.) (QL).	8 years	
R. v. S.J.I., 2005 NWTSC 92, [2005] N.W.T.J. No. 94 (QL).	8 years	
R. v. Chan, 2006 ONCJ 436, [2006] O.J. No. 4565 (QL).	4 years	
R. c. Cook, 2006 QCCS 3632, [2006] J.Q. no 7248 (QL).	16.5 years	
R. v. Jaworski (2006), 203 Man. R. (2d) 249 (Prov. Ct.).	34 months	
R. v. Loppie, [2006] O.J. No. 1025 (Sup. Ct. J.) (QL).	15 years	
R. v. Anbalak, 2008 NUCJ 9, [2008] Nu.J. No. 8 (QL).	15 years	
R. v. Bridle, 2007 BCSC 1302, [2007] B.C.J. No. 2051 (QL).	9 years	
R. v. Montgrand, 2007 SKCA 102, 304 Sask. R. 150.	Life	Life
R. v. Kimpe, [2008] O.J. No. 2087 (Sup. Ct. J.) (QL).	10 years	