

## From the High, Hard Ground of Theory to the Swampy Lowlands of Risk Assessment in Practice: The Real-Life Challenges of Decision-Making

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**Summary:** Assessment of risk, both the likelihood of reoffending and Significant Risk of Serious Harm to Others, is a core component of a Probation Officer's role. Arguably, nowhere in a Probation Officer's work is Schön's 'swampy lowland' (see below) more obvious than in the assessment for Significant Risk of Serious Harm to Others, where theory can jar with the reality of everyday practice. This article considers the implications of that tension within wider literature. It outlines PBNI's approach to the Significant Risk of Serious Harm to Others assessment and draws on a case study to explore decision-making and risk assessment, considering the immediate and wider influences.

**Keywords:** Risk assessment, risk of harm, significant risk of serious harm, decision-making, professional judgement.

In the varied topography of professional practice, there is a high, hard ground overlooking a swamp. On the high ground, manageable problems lend themselves to solutions through the use of research based theory and technique. In the swampy lowlands, problems are messy and confusing and incapable of technical solution ... The practitioner is confronted with a choice. Shall he remain on the high ground where he can solve relatively unimportant problems according to his standards of rigor, or shall he descend to the swamp of important problems where he cannot be rigorous in any way he knows how to describe? (Schön, 1987: 3)

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## The theory of risk assessment

‘Risk is a complex practice issue’ (Kemshall *et al.*, 2013: 1) and the limited predictive power of risk assessment is readily acknowledged in the literature (Drake *et al.*, 2014), with McSherry (2014: 783) proposing that ‘it is impossible to identify the *precise* risk an individual poses’ (emphasis in original). Horsefield (2003: 374) states that risk assessment ‘has a history which belies its success, since, if its value was based only on accuracy in prediction of future events, it would have vanished years ago’.

The growing interest in risk assessment in criminal justice evolved from a widespread disquiet with Martinson’s ‘Nothing Works’ doctrine (Burman *et al.*, 2007), a revival of interest in rehabilitation through the Risk–Need–Responsivity Model (Bonta and Andrews, 2007) and an emergent public protection agenda, with a stronger focus on managing risks and maximising public safety (Hsieh *et al.*, 2015). This is in keeping with Feeley and Simon’s (1992) ‘New Penology’ that saw rehabilitative efforts displaced by rational and efficient management of resources. These developments prompted a wealth of international research (Powis, 2002; Burman *et al.*, 2007; Barry *et al.*, 2007). A preoccupation with risk definitions and categorisations is evident in the literature (Kemshall, 2003), with some recognition that violent individuals are not a ‘homogenous group that can easily be set apart or distinguished from others’ (Barry, 2007: 31). This challenges risk assessment and management practices to be individualised.

The generational language of risk assessment tools adds to the dialogue (Lewis, 2014), with ‘first generation’ professional judgements replaced by ‘second generation’ actuarial static risk assessments, and a never-ending tussle between actuarial methods and clinical assessments persisting (Lancaster and Lumb, 2006; Fazel *et al.*, 2012). With much consideration given to static and dynamic risk factors (Serin *et al.*, 2016), ‘third generation’ dynamic risk assessments, ‘sensitive to changes in an offender’s circumstances’ (Bonta and Andrews, 2007: 4), forged the way for ‘fourth generation’ assessments, expanding to case management and incorporating responsivity (Burman *et al.*, 2007). McNeill (2012; cited in Weaver, 2014) argues that a preoccupation with tools and practices has created an inward-looking approach of ever-increasing regulation that focuses on practitioners to the detriment of those being assessed. Kemshall *et al.* (1997) perceptively foresaw the forensic rather than predictive use of risk, whereby failures to prevent serious reoffending

from known individuals become ‘blameworthy’ (Nash, 2012: 3). Stalker (2003: 219) suggests that ‘risk management is characterized in the literature as little more than social work watching its own back’. Kemshall *et al.* (2013) warn of this leading to precautionary decision-making and risk aversion whereby risk and its impact are overestimated, resulting in over-intrusive and disproportionate responses. Conversely, they also acknowledge the inherent tensions for staff tasked with determining future risk. This goes to the heart of risk assessment within the realm of public protection and contemporary probation practices.

### **Risk assessment in PBNI**

Probation Officers in PBNI use the Assessment, Case Management and Evaluation (ACE) tool to assess the likelihood of general offending. The ACE is a ‘fourth generation’ assessment tool. PBNI commissioned an independent review of ACE in 2012 to assess its predictive validity for reoffending and its relevance to the evolving role of the Probation Officer. The review concluded that ACE is among the best available risk assessment tools for use in Northern Ireland, particularly as it focuses on dynamic criminogenic needs (Cooper and Whitten, 2013). Included in this is a Risk of Serious Harm filter, which, if triggered, leads to an assessment for Significant Risk of Serious Harm to Others, using the Risk Assessment Inventory, commonly referred to as RA1.

Assessment as a Significant Risk of Serious Harm to Others means that there is a high likelihood an individual will commit a further offence of serious harm, causing death or serious physical or psychological injury. This assessment is generally prompted when an individual has been convicted of a ‘serious’ offence, as defined by the Criminal Justice (Northern Ireland) Order 2008. Originally based on the work of Brearley (1982; cited in Kemshall and Pritchard, 1996), PBNI’s RA1 considers the key risk factors that have stood the test of time, including previous convictions; age at first conviction; substance abuse; mental health; employment; and demographic, social and personal factors, together with attitude to offending, victim awareness, attitude to others, and internal and external protective factors.

As the RA1 has been refined over time, there is now a clear focus on the extent to which serious harm has been caused, including frequency and escalation; associated triggers and whether opportunities for harmful behaviour are increasing or decreasing; the nature and degree of violence

including any aggravating factors; relevant information about victims, and the relationship, if any, to the individual being assessed; motivation and ability to change; and the presence or lack of protective factors to mitigate risk (Probation Board for Northern Ireland, 2017).

Essentially, the RA1 affords a structured process for Probation Officers to gather, verify and evaluate information. Where it is concluded that an individual could meet the threshold for presenting with a Significant Risk of Serious Harm to Others, a multidisciplinary PBNI-led risk management meeting is convened. Attended by the Probation Officer, a representative from PBNI's psychology department, investigating police officers and any other relevant professionals, it is chaired by the Probation Officer's line manager. It is in this arena that the assessment for Significant Risk of Serious Harm to Others is fully considered and a collective determination is made.

PBNI's Significant Risk of Serious Harm to Others assessment can have important implications for sentencing decisions. The Criminal Justice (Northern Ireland) Order 2008 provides for public protection sentences for 'dangerous' individuals, where courts can impose a lengthier period of imprisonment for relevant individuals (Bailie, 2008). PBNI's assessment assists the court in reaching a statutory test for 'dangerousness' but it is not binding. It is for the court to decide if 'dangerousness' has been met, having considered PBNI's Significant Risk of Serious Harm to Others assessment. Consequently, this has widened the scope of, and potential scrutiny of, PBNI assessments within the judicial system.

### **The real challenges of risk assessment**

In practice, the Significant Risk of Serious Harm to Others assessment can present very real challenges for staff, who can be constrained by partial information and time restrictions and bound by rules of evidence (Kemshall and Pritchard, 1999). Further obstacles can impact on Probation Officers, including the shortcomings of risk assessment tools (Drake *et al.*, 2014), together with the wider influences on contemporary practice, such as risk aversion, blame avoidance (Kemshall *et al.*, 2013) and what Fellowes (2018) refers to as an 'anxious organisational culture'.

The challenges of assessing Significant Risk of Serious Harm to Others in everyday practice are explored through an example from the author's practice. This case stands out as the most memorable assessment to date. It involved a young man, referred to here as Jim. He

pleaded guilty to the offence of manslaughter in a joint enterprise case. The circumstances, including the motivation for the offence, were not fully understood. Jim's exact role remained contested, but he was involved in a sustained assault which led to the death of the victim. The court requested a pre-sentence report from PBNI at the point of conviction. Determining if Jim was a Significant Risk of Serious Harm to Others was a key consideration in preparing the pre-sentence report. The assessment was far from straightforward and demanded a thorough and considered approach.

After information was gathered and Jim was interviewed, the risk and protective factors were collated in the RA1. Consideration was given to the risk factors that heightened his potential for future violence. He was a young, unemployed male, from a fractured background. His substance abuse, impulsivity and negative peer associates were noted. Protective factors included no evidence of mental illness or personality disorder and he was assessed as above average IQ. His verbalised insight into his offending, capacity for empathy and victim awareness were indicated (Powis, 2002: 8).

The absence of a prior pattern of violent offending was particularly noteworthy in this case, together with a limited generalised criminal record. Many studies have illustrated that a pattern of prior violence is the *best* predictor for future violence (Powis 2002: 3). Jim had a conviction for common assault and, although it demonstrated some capacity for aggression, it was at the lower end of the spectrum. It was not a clear enough indicator, on its own, to point towards a Significant Risk of Serious Harm to Others outcome. There was also a need to be conscious of the importance of not up-tariffing, in line with Kemshall's (1998: 67) 'precautionary principle', whereby risk is overestimated, with a net-widening effect.

Research indicates that violence prediction is constrained by a low 'base rate' (Kemshall, 2010), which is 'the known prevalence of a specific type of violent behaviour within a given population over a given period of time' (Borum, 2000: 1275). Moore (1996: 18) claims that ignorance of the base rate is the 'single most common source of error'. However, Murray and Thompson (2010: 161) suggest that 'there may be some relevant, recurring risk factors in a particular case that are not generally found in the population as a whole'. Therefore, risk assessment benefits from being individualised and targeted.

More recent research is focusing on the interplay between the conditional triggers and stressors which are inherently difficult to decipher and 'highly context-specific' (Baker, 2010: 50). Canton (2014: 76) elaborates: 'risk is a function of individuals *in* places and circumstances, *at* particular times, *with* other people ... it is these entirely unpredictable situational contingencies and interpersonal dynamics that lead to serious crime' (emphasis in original). This succinctly captures the challenges involved in assessing Jim.

A clinical psychologist's report was made available and the description of Jim's attitude to the index offence confirmed the author's assessment. Interestingly, Barry *et al.* (2007) found for violent individuals that self-reports of their behaviour appeared fairly accurate but Moore (1996: 16) remarked that self-report is more useful in a 'continuing, rather than snapshot assessment'. It would have been foolish not to consider Jim's potential to manipulate and present himself in an overly positive light. The assessment, after all, had ramifications for sentencing and he was likely to have a vested interest. The author was mindful that Jim had attempted to thwart the initial police investigation, demonstrating his capacity for self-protection. However, there appeared to be a real and considered regret for his involvement in the death of the victim and there was no evidence of excessive denial or minimisation in interview. In *R v Ryan Arthur Quinn* [2006]<sup>1</sup> the Court of Appeal highlighted the problem of distinguishing 'authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions' where the defendant, also guilty of manslaughter, maintained a false explanation for striking his victim and the court considered he failed to express an explicit and frank acceptance that his actions caused the victim's death.

A drawback that inevitably hampered the accuracy of the assessment on Jim was that little was known about the motivation and circumstances of the offence. Conflicting accounts were provided with limited contextual information. 'Assessing complex situations and people holistically is key to understanding presenting risks' (Barr and Montgomery, 2016: 152). But risk is about uncertainty, and Kemshall (1998) is credited with developing 'defensible decision-making' to achieve defensible practice. The assessment was progressed on 'contingent knowledge' (Kemshall, 1998: 67), evaluating, recording and applying the policies and procedures to what was known at the time.

<sup>1</sup> NICA 27.

The PBNi's Guidance Notes (2011) informed the completion of the RA1. However, it was the *decision* as to whether Jim presented a Significant Risk of Serious Harm to Others that proved challenging. With Jim, there were finely balanced risks that made the assessment difficult to conclude, and a risk management meeting was convened to consider the assessment fully. This experience fitted well with Wynne's (1988; cited in Kemshall, 1998: 69) view that 'in practice imprecision naturally occurs, and the actual practice rules present as more complex, ambiguous and very different from the neat, rule-bound image ... projected in public'.

Decisions of this significance are rightly taken at a multidisciplinary level as they outweigh individual assessment in terms of accuracy and thoroughness in risk prediction (Moore, 1996). The risk management meeting afforded face-to-face information sharing to fully consider the case. Kemshall and Wood (2007; cited in Burman *et al.*, 2007: 19) highlight the fact that reliable risk assessment requires effective information exchange across agencies, which was facilitated by the risk management meeting. Consideration was given to the potential for different tolerances of risk, with respect to the different professional agendas of those present and their varying knowledge of the assessment process. However, Nash (2012: 16) found that 'police and probation services had moved very closely together in formulating their view of risk'. Huxham and Vangen (2005; cited in Barry 2007: 36) describe the 'collaborative advantage' of multidisciplinary working when organisations can agree a shared rationale.

There were a number of real concerns about Jim's behaviour, including the nature of the index offence, the many unknowns about the circumstances, Jim's failure to source help and his initial attempts to thwart the police investigation. However, the collective decision hinged on there being insufficient grounds to fully evidence Significant Risk of Serious Harm to Others, and after lengthy deliberations, it was unanimously agreed that Jim fell short of the threshold. *R v Lang* [2005],<sup>2</sup> the leading authority on Significant Risk of Serious Harm to Others, was approved by our Court of Appeal in *R v Owens* [2011].<sup>3</sup> It upheld that risk must be significant, taking account of the index offence, the individual's personal circumstances and their offending history. More recently, the Court of Appeal held in *R v Lukas Kubik* [2016]: 'If

<sup>2</sup> EWCA Crim 2864.

<sup>3</sup> NICA 48.

a finding of harm is to lead to an increased sentence of imprisonment it must be convincingly established'.<sup>4</sup> This highlights the fact that the evidential basis is more than speculation or mere apprehension.

Falling shy of the threshold does not of itself point to no risk. Perry and Sheldon (1995: 18) point out: 'There are no criteria which enable us to place individuals into sharply defined, once-and-for-all categories of "dangerous" or "not dangerous". Rather there is a continuum of statistical risk with uncomfortably limited predictive capacity.' It was imperative to devise an individualised risk management plan at the risk management meeting to target risk factors and promote protective factors, in keeping with desistance theory, good risk assessment principles and PBNI's risk management policies. In fact, risk assessment, in itself, is a defunct process without the formulation of a plan.

It can be an uneasy position to reach a conclusion that an individual who has been convicted of manslaughter does not meet the threshold for Significant Risk of Serious Harm to Others. This challenged the author to reflect on the assessment. One critique offered was that insufficient weight was placed on the impact of the death on the family of the victim. It was true that if the court accepted PBNI's Significant Risk of Serious Harm to Others assessment, an extended sentence for public protection would not be imposed. Understandable abhorrence at the index offence can conjure deep emotions that drive a 'victim championing' agenda (Kemshall, 2016). However, *R v Lang* [2005] rightly cautioned against 'assuming there is a significant risk of serious harm merely because the foreseen specified offences are serious'. Moore (1996: 75) warns that 'demonising the perpetrator should never be condoned on the grounds that it is necessary for effective risk reduction'. There is a need to be mindful that decisions influenced in this way lead to over-prediction of risk, erosion of proportionality and defensive practice, which in essence are the hallmarks of discriminatory practice.

It is accepted that the RA1 is not without its limitations. However, it offers a framework which is methodically sound and founded on theory and research. Its generalised approach is also its strength and its open-endedness provides for a considered and individualised assessment that can be adapted and complemented as the case requires. It is perhaps more imperative that the Probation Officer is equipped with the requisite skills, values and knowledge base to improve the quality and validity of risk

<sup>4</sup> NICA 3.

prediction. Whitehead and Thompson (2004: 81) write that the efficacy of risk assessment ‘is predicated upon practitioners acquiring a range of skills associated fundamentally with interviewing and communicating’.

One recognised downfall in the assessment of risk is vulnerability to biases, and it would be erroneous to suggest that this assessment of Jim was wholly objective. Strachan and Tallant (2010) suggest that good decision-makers have awareness of the cognitive processes they go through when assessing risk, and Munro (2011) highlights the difficulty in changing one’s mind when faced with new information. The author reflected on the potential for bias. Looking for evidence to support an initial hypothesis on Jim might have been tempting but the collective multidisciplinary and multiagency context of the risk management meeting served to temper confirmation bias (Murray and Thompson, 2010). Optimism bias was perhaps more difficult to combat; Kemshall *et al.* (2013) highlight the importance of knowing our weaknesses. A fundamental value Probation Officers subscribe to is the inherent belief in rehabilitation. The Significant Risk of Serious Harm to Others process highlights the tension between rehabilitation and risk management, but Weaver and Barry (2014) argue that the challenge for practitioners is to move beyond the confines of risk and capitalise on strengths. This assessment had to guard against being overly optimistic by weighting the factors and bringing the case through the risk management meeting process to garner a multidisciplinary perspective.

As Jim’s case was complex and had a high media profile, in line with PBNi practice standards, the assessment and subsequent report were subject to gatekeeping. The purpose of gatekeeping is to check that a draft report and assessments follow best practice guidance, distinguish between verified fact and opinion, and provide a balanced, objective and impartial view. The assessment was accepted by the gatekeeper; however, there was a discussion about future reoffending against the backdrop of this being a high-profile media case.

The need to consider public perceptions about future serious reoffending is an inevitable feature of modern probation practice as there is the potential for reputational damage. Fellowes (2012: 68) highlights the existence of organisational anxiety whereby practitioners work in a threatening environment ‘where fear of public and political censure rides high’. It would appear in contemporary practice that many Probation Officers ‘fear’ external ridicule. In considering reputational damage, Tuddenham (2000: 175) remarks that ‘there are few prizes for taking

risks in work with offenders, only penalties'. A 'political risk' of not being seen to do something about crime, described by Carlen (2002; cited in Barry, 2007: 38), is attributable to the 'blame culture' of modern society. With this, the focus shifts to communities that *feel* safer as opposed to communities that *are* objectively better protected (Crook and Wood, 2014). Tuddenham (2000: 174) argues that the wider social and political influences negatively impacting on our work need to be acknowledged if risk assessment practice is to be enhanced and human rights and anti-oppressive practices are to be preserved.

In Jim's case, the court accepted PBNI's assessment on Significant Risk of Serious Harm to Others. The subsequent media reaction and its 'exploited constructions of dangerousness' (Nash, 2012: 9) reinforced the importance of due diligence in practice but moreover illuminated the potentially wide-ranging ramifications of decision-making in the course of a Probation Officer's work. They also reinforced McCaughey's (2010: 18) assertion that 'Public confidence in our entire criminal justice system ... can only be achieved when the public fully understands the different roles and responsibilities of organisations within that system and, more importantly, how they work together to increase community safety and prevent crime'.

In Jim's case, the assessment process, including the scrutiny of the case, was a challenging experience but ultimately created a rich source of reflection and learning. It is those uncomfortable experiences that sometimes offer us the best opportunities for learning if we allow ourselves to be open to the process. It is to the credit of those involved in what was a very difficult decision-making forum that a potentially unpopular, yet defensible, decision was reached. However, there is no philosopher's stone. Another Probation Officer could have reached a different assessment outcome and, importantly, Jim could go on to cause serious harm again, such is the fallibility of risk prediction. Kemshall *et al.* (2013: 11) recognise this uncertainty as an 'intrinsic feature of the risk-assessment process', and therein lies the challenge for contemporary practice.

The shift towards public protection is now well embedded in our criminal justice landscape. Nash's (2011: 481) observation underpins the current state of play in probation: 'Once enshrined in a welfarist and befriending relationship, the information obtained in probation interviews now has an increased impact upon the liberty of the offender'. This highlights the key role PBNI's assessment of Significant Risk of Serious Harm to Others now plays in determining the sentencing of

individuals who come before our courts convicted of very serious offences. Significant Risk of Serious Harm to Others assessments are formally ratified in a multidisciplinary context, with the court ultimately determining dangerousness, and can impose public protection sentences. But why has this process evolved? McSherry (2014: 780) suggests that ‘taking away a person’s liberty ... because of *who* they are and what they *might* do, rather than what they have done, not only breaches human rights, but focuses resources at the wrong end of the spectrum’ (emphasis in original). Clearly the dilemma of relying on fallible tools to guide sentencing for offences not yet committed is apparent. Lancaster and Lumb (2006: 278) write that ‘the needs of the offender have been replaced by protection of the public as a rationale for action’. Probation Officers, however, strive to strike a balance between their responsibilities to individuals under suspension and their public protection responsibilities. Indeed, Kemshall *et al.* (2013) suggest that both the employer and the public have come to expect it.

## Conclusion

Individuals assessed as posing Significant Risk of Serious Harm to Others represent a very small proportion of the workload in PBNI (approximately 3%). But effective risk assessment and management strategies targeted at those critical few whose actions could otherwise be devastating can serve to reduce harm and ultimately protect the public. Having an awareness of the pitfalls and the wider influences is essential in order to understand and make risk-based decisions in the real world of probation. Almost two decades ago, Tuddenham called on us to ‘resist both insidious and obvious pressures to formulate practice shaped by political imperatives, and explicitly assert the primacy of *professional* judgements’ (2000: 181; emphasis in original). This challenge is likely to demand continued attention in a culture of increasing public, political and media scrutiny, together with the advancement of managerialism in criminal justice services.

Nash (2012: 4) observes that ‘it is next to impossible to prevent the unknown from occurring but the system needs to ensure it does all it can to “anticipate”’. Notwithstanding the critics describing defensible decision-making in risk-based reasoning as protectionist (Parton, 1998; cited in Stalker, 2003), it is perhaps a necessary lifejacket for Probation Officers wading through the ‘swampy lowlands’ of our day-to-day

practice, protecting our professional integrity and competence, which is compromised by ‘contingent’ knowledge, fallible tools and wider influences. In terms of the very real challenges of accurate risk prediction, Lawrie (1997: 302) forges a way through this quagmire of uncertainty by reminding us that: ‘The quintessential test of good practice is not whether a person ... seriously harms someone else, it is whether the quality and content of the work is appropriate on the basis of the known facts about the case’.

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