The Test for Dangerousness

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Background
Sections 224 to 236 and schedules 15 and 15A to the Criminal Justice Act 2003 provide measures for sentencing ‘dangerous offenders’. The original scheme came into effect on 4 April 2005 and applies to offences committed on or after that date. It built on earlier provisions for the imposition of ‘longer-than-commensurate’ sentences created by the Criminal Justice Act 1991. The new scheme was different from what went before, in that it was much broader (many more offences now brought offenders within the scope of such sentences) and less flexible. In what follows in order to keep this paper within bounds I shall refer simply those parts of the scheme which apply to offenders aged 18 and over. I shall also confine my attention to the offences of life imprisonment and imprisonment for public protection, largely leaving out of account the somewhat different provisions for the ‘extended sentence’, although the test for dangerousness, which is the topic of my paper, is relevant and applicable in those contexts as well.

The Original Dangerous Offender Scheme
The original scheme applied to an offender convicted of a ‘specified sexual offence’ or a ‘specified violent offence’, where the court is of the opinion that ‘there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences’. All ‘specified offences’ are listed in schedule 15 to the CJA 2003, and there is very large number of them.\(^1\) The original scheme, in general terms, provided that (i) if the offence of conviction was a specified offence with a maximum penalty between 2 and 10 years and the offender was found to be dangerous, the offender must receive an ‘extended sentence’ (a form of determinate sentence with an extended licence period\(^2\)). If the offence of conviction was 10 years or more (known as a ‘serious specified offences’) and the offender is found to be dangerous, the offender must receive either a life sentence\(^3\) or a sentence of imprisonment for public protection (IPP). There was also a presumption of dangerousness. If the offender convicted of the specified offence had previously been convicted of one or more specified offences, the court must assume that the offender is dangerous (ie poses a ‘significant risk …) unless the court considers that it would be unreasonable to conclude that there is such a risk.

For a life sentence or IPP the sentencing judge must fix a ‘minimum term’, which must be served in full before the offender can first be considered for release on licence. The minimum term is calculated by taking the ‘notional determinate sentence’ appropriate for the offence, and dividing it by two.\(^4\) Life sentences and IPP

\(^{1}\) As originally drafted, 65 specified violent offences and 88 specified sexual offences.

\(^{2}\) Of up to 5 years if it was a specified violent offence and up to 8 years if it was a specified sexual offence.

\(^{3}\) Provided the offence carries life as its maximum.

\(^{4}\) Divided by two because (in general terms) an offender serves half of a determinate sentence before being released while an offender serves the whole of a minimum term. The calculation is also affected
are indeterminate sentences and will last for the rest of the offender’s life unless the parole board releases the offender, from which point the offender will be on licence and subject to recall to prison.

The scheme caused great practical difficulty. There were two reasons for this. First, it was drafted in an over-inclusive and inflexible way, leaving insufficient room for judges to exercise proper judgment. The shortcomings were made apparent to judges through the compulsory training on the CJA 2003 which all practitioners received. Lectures from Dr Thomas at these JSB seminars made it obvious to all that the provisions, if applied literally, would result in thousands of offenders being given indeterminate sentences in circumstances where their actual offending would make that hard to justify on any common sense basis. This would be a considerable departure from previous practice. The Court of Appeal, to its credit, moved quickly to assist judges with this issue and, in Lang, Lord Justice Rose interpreted the provisions in such a way as to give judges the maximum possible leeway consistent with their duty to apply the words of the statute. There was, however, no getting away from the mandatory terms in which the legislation was cast, nor from the limited discretion to avoid the operation of the presumption of dangerousness. The second reason that the scheme caused difficulty was its complexity. Perhaps practitioners and judges, after appropriate training, ought to have been able to get this right, but there was the need for the Court of Appeal to correct a significant number of mistakes made by sentencing judges. Offenders being sentenced for several offences at the same time, one or more of which specified offences and others were not, prompted particular difficulty and occasioned a number of appeals.

Despite the best efforts of the Court of Appeal it was inevitable that many more defendants would receive indeterminate sentences than before, and that soon proved to be the case. To give one example, a conviction for a street robbery by an offender with a previous conviction for assault occasioning actual bodily harm would trigger the presumption. Let us assume that the robber used a knife to threaten the victim, but there was no injury. Applying the SGC Guidelines the sentence range for the robbery is 2-7 years and the starting point is 4 years, but with one third reduction from those figures for a timely guilty plea. The judge might properly take a notional determinate sentence of 3 years, giving a minimum term of 18 months, less time served on remand. The eighteen months would have to be served in full, and after that time release is a matter for the parole authorities. When the impact of increased numbers was felt on the prison population, protests were heard from the Parole Board. The Board was overwhelmed by weight of numbers and, in particular, were often unable to make any proper brisk assessment on offenders given short minimum terms simply because there was not enough time to do so. This was in part because minimum terms were short. Half of offenders given IPP had received a minimum term of 20 months or

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5 [2006] 1 WLR 2509. See also Johnson [2007] 1 WLR 608
6 In Reynolds [2007] 2 Cr App R (S) 553 the Court of Appeal dealt with eight such cases on a single occasion.
7 For a mind-boggling analysis of the intricacies of these provisions see C [2007] 2 Cr App R (S) 627
8 SGC, Definitive Guideline on Robbery (July 2006) and Reduction of Sentence for a Guilty Plea (revised guideline July 2007)
less, and 20 per cent had been given an 18 month minimum term. It was pretty rich to blame the judges, rather than the legislators, for this, but that is what happened.  

The Revised Dangerous Offender Scheme

The original scheme was significantly amended by the Criminal Justice and Immigration Act 2008, sections 13 to 18 and schedule 5, which came into force on 14 July 2008. First, the presumption of dangerousness was abolished, and I say no more about that in this paper. Second, if the serious specified offence did not carry life as its maximum penalty, or if it did but the court considers that its seriousness does not justify a life sentence, the court may (rather than must) impose a sentence of IPP, but only where the condition in s.225(3A) or the condition in s.225(3B) is made out. The former condition is where, at the time of the offence, the offender had been convicted of an offence which is listed in schedule 15A. This is a new schedule, with a small number of undoubtedly serious offences, such as murder, manslaughter, armed robbery and the like. The latter condition is that, if the court were to impose IPP, the nominal determinate sentence would be at least four years, so that the minimum term must be for at least two years. These changes are clearly designed to reduce the number of offenders eligible for indeterminate sentences, and the changes have been widely welcomed, not least by judges who have to apply them. It is clear that the numbers of offenders so sentenced will fall considerably as a result of these statutory amendments.

The Test for Dangerousness

Section 229 of the 2003 Act is central for our purposes, because it deals with the necessary evidence base for the assessment of dangerousness: to establish whether the offender poses ‘a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences’. The Court of Appeal in Lang provided valuable guidance on the meaning of this phrase, as well as on the operation of the scheme more generally. Much of what was said in Lang is still valid, but the judgment has to be read in light of the 2008 Act amendments. Further guidance on the operation of the amended scheme can be found in AG’s Reference (No 55 of 2008). It is clear that any test for the determination of risk involves a number of different dimensions. These include – (i) the nature of the anticipated harm, (ii) the likelihood of its occurring, and (iii) the magnitude of the harm should that risk materialise. Let us consider briefly the dangerousness test in the 2003 Act, as interpreted and applied by the courts.

(i) Significant risk

The requirement that a risk be ‘significant’ means that it is more than a possibility – it must be ‘noteworthy; [of] a considerable amount of importance’ (Lang).

(ii) Significant risk of serious harm

There must be a ‘significant risk’ of ‘serious harm’, and ‘serious harm’ is defined in the Act as ‘death or serious personal injury, whether physical or psychological’. This is a similar test to that which applied in earlier legislation. The fact that the offender is foreseen as committing a ‘specified offence’ does not mean that the test is satisfied.

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10 An example is Gore [2010 EWCA Crim 369]

11 [2008] EWCA Crim 2790
unless such an offence is foreseen as resulting in ‘serious harm’, so defined. According to Rose LJ in *Lang*, if the offence which is foreseen is not a serious specified offence then it will be rare that there is a ‘significant risk of serious harm’. In *Terrell* (below) the Court said that ‘serious personal injury’ had to be read in the context of the word ‘death’, with which it had been coupled. The effect of these judicial comments is to narrow the scope of the provisions.

(iii) *To members of the public*
This is a general term, and should not be construed to exclude any class of citizens, such as prison or mental hospital staff (*Lang*). It is clear that the risk can be made out where it exists not to the public at large, but in respect of a particular individual (such as the offender’s ex-partner) or a small group of individuals (such as anyone forming a relationship with the offender’s ex-partner) (*Hashi*¹² and *S*¹³, both pre-2003 Act authorities).

(iv) *By the commission by him of further specified offences*
It will be appreciated that the ‘significant risk’ relates to the commission of further ‘specified’ offences, rather than further ‘serious specified’ offences, but see the limiting comment from *Lang* at (ii) above.

**The Information Base**
When assessing dangerousness a variety of information needs to be considered, including (a) the nature and circumstances of the offence, (b) the nature and circumstances of other offences committed by the offender, (c) any pattern of behaviour of which the offence forms part, and (d) any information about the offender which is before the court. These matters are set out in section 229(2). The first is expressed in mandatory terms; the court may take any of the others into account, but little seems to turn on this difference. Dr Thomas has said that these considerations are glaringly obvious, and that it is hard to see how else the court might approach its task.¹⁴ The court will, in each case, be relying on a number of sources of information – the facts of the offence (especially where these have emerged in the course of a contested trial), the other offences including previous convictions, and the contents of and especially the risk assessment within, a pre-sentence report. Sometimes there will also be a psychiatric report. It is not a requirement for eligibility for IPP that the offender have previous convictions, and in principle a first offender might qualify (*Lang*), but where there are such offences, in the assessment of dangerousness it is not just previous specified offences which are relevant. All offences on the record may be relevant, especially where they reveal an escalating pattern of seriousness (*Lang*). Nor is it necessary that serious harm (or, indeed, any harm) has been caused by the past offence(s), since that may simply have been a matter of good fortune (*Lang*). Often it is the circumstances of the earlier offences, rather than simply the fact of their existence, which will inform the decision on risk. So, wherever possible, counsel must be in a position to describe the facts of the earlier convictions.¹⁵

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¹² (1995) 16 Cr App R (S) 121
¹³ (1994) 15 Cr App R (S) 765
¹⁵ *Samuels* (1995) 16 Cr App R (S) 858, decided on the earlier legislation.
The Court of Appeal has made it clear that the risk analysis in the pre-sentence report will often be crucial when sentencing a dangerous offender, but the decision whether or not to impose such a sentence remains one for the court. The sentencer may disagree with the assessment, but would be expected to warn counsel that this was in the offing and then of course to give full reasons for taking a different line. It may sometimes be appropriate to call the report writer to be cross-examined on the issue of risk.

The risk assessment for adult offenders is generated by way of a program called OASys, the Offender Assessment System, developed by the probation service and in operation nationally. For young offenders there is a different assessment framework, known as Asset. OASys requires the probation officer producing the report to input data into twelve separate fields (such as offending information, lifestyle and associates, drug misuse, alcohol misuse, emotional well-being, thinking and behaviour), each of which carries a numerical weighting depending on general research evidence as to its predictive value in terms of reconviction. Completion of the sections generates a numerical risk score. There is also an optional self-assessment form which provides the offender’s own perspective on his offending behaviour. Completion of the form may alert the officer to the need for additional and more specific assessment, such as violent offender assessment, mental health assessment, or dangerous and severe personality assessment. OASys is designed to address specific risks, including harm to the public, harm to known adults, and harm to children. Levels of risk of serious harm are generated, which range from low, through medium and high, to very high. If the offender falls within the upper two categories the pre-sentence report will conclude with a risk management plan for consideration by the sentencer.

The OASys scheme has been criticised by Lancaster and Lumb as relying too heavily on static factors and underestimating individual agency, motivation etc. Static risk factors ‘can produce worrying risk assessments which remain fixed … whereas for clinicians it is the need to engage in a process to actively reduce the probability of violence which should be paramount, hence requiring a greater focus on dynamic variables.’ Clearly any assessment of risk must be subject to change and reassessment over time as the offender, and surrounding circumstances, change. However, as explained below, the respective risk assessment roles of the judge and the clinician are very different.

Judges and the Assessment of Risk
The assessment of risk clearly involves looking forward to a future event. This is, in very general terms, the process the judges are involved in. The Court of Appeal has stressed that when applying the dangerous offender scheme, judges are concerned with future risk and public protection rather than punishment for past offences. In one sense this is clearly true - an indeterminate sentence should not be imposed as the

16 Pluck [2007] 1 Cr App R (S) 43
17 S [2006] 2 Cr App R (S) 224
18 See the National Probation Service, Probation Bench Handbook, 2nd ed, 2007
19 Details can be found on the Youth Justice Board website: www.yjb.gov.uk
means to mark the heinousness of the offence.\textsuperscript{22} But judges, unlike clinicians, are not required to make an assessment of risk, nor are they required to estimate for how long the offender will continue to represent the requisite degree of danger, nor to suggest the nature or extent of necessary interventions. Judges receive no training at all in risk assessment or prediction, and this is for good reason. The judge is concerned with whether the offender crosses a certain threshold, as defined in the 2003 Act, and so in that sense, they are NOT engaged in risk measurement or risk assessment, but in answering a yes / no question - whether the offender qualifies as ‘dangerous’ or not. This is a threshold decision – at that particular time, on all the available evidence, does the offender fulfil the statutory test? Essentially this boils down to a matter of application of statutory wording – something which judges do all the time. Much of the evidence relevant to that test is the kind of evidence that judges feel entirely comfortable to assess for themselves (the full facts and circumstances of the current offence, the facts and circumstances of previous offences on the record). The rest of the evidence, in the form of reports, they are also well used to reading and considering when making a sentencing judgment. The judge decides whether the test for dangerousness is made out. If it is not, a commensurate determinate sentence, perhaps coupled with specified licence conditions or other requirements, is imposed.\textsuperscript{23} If it is, a commensurate minimum term is fixed, normally being 50 per cent of the determinate sentence which would otherwise have been imposed. Of course since the 2008 Act amendments to the dangerous offender scheme there is the further threshold requirement that the offence itself must be sufficiently serious to justify a notional determinate sentence of four years. There have been a number of recent appeals to the Court of Appeal on this issue, but again it is clear that this is a matter of gauging offence seriousness, and is nothing to do with risk prediction. What may or may not happen after the expiry of the minimum term is simply not a matter for the judge. The judge may make observations in his or her sentencing remarks relevant to the nature and degree of the risk posed by the offender, and these will be retained in the file which will later be considered by the Parole Board, but the judge’s observations are simply that, and are in no way binding upon the Board when making its decision over release. If risk factors in relation to the offender change over time, as they almost certainly will, that is a matter for the executive authorities and not for the judge.

Finally, a couple of decisions of the Court of Appeal usefully illustrate the operation of the threshold test in practice.

In Terrell [2008] 2 All ER 1065 the defendant had pleaded guilty before magistrates to making indecent images of a child, and had been committed to Crown Court for sentence. The Court of Appeal quashed a sentence of IPP, despite the fact that the statutory presumption of dangerousness had operated in that case. Although there was a clear risk that the offender might re-offend in a similar way in future, there had been no evidence before the judge that his offending would escalate to photographing children, or to child abuse. It could not therefore be said that the offender represented

\textsuperscript{22} Although, perhaps oddly, recent decisions of the Court of Appeal clearly state that what makes the difference in selection between a ‘life sentence’ and a sentence of IPP is the seriousness of the latest offence: Kehoe [2009] 1 Cr App R (S) 41; Wood [2009] EWCA Crim 651.

\textsuperscript{23} In AG’s Ref (No 55 of 2008) [2009] 2 Cr App r (S) 142 Lord Judge CJ said that in deciding whether an IPP should be passed, the suitability of all other available means of providing public protection must be considered, and if an overall sentencing package short of IPP could be found, IPP should not be used.
a ‘significant risk … of serious harm’ where ‘serious harm’ meant death or personal injury, the latter phrase being deliberately coloured by the word ‘death’. The Court of Appeal went on to advocate the use of a determinate custodial sentence in this case coupled with a sexual offences prevention order. The Court said that the threshold of dangerousness for a sentence of IPP was higher than that required for a SOPO, and that the restrictions available under a SOPO should always be in the judge’s mind when considering whether IPP had to be invoked in a particular case.

In *Owen [2009] EWCA Crim 2259* the defendant was one of three people convicted by a jury in respect of the death of baby Peter, a case which attracted a huge amount of publicity and media interest at the time. Peter’s mother and her boyfriend had been living together with the mother’s four children for over a year before Peter died. The defendant, who was the brother of the boyfriend, moved in to the household about five weeks before Peter’s death. The defendant brought with him three of his own children and his new girlfriend, who was aged just 15 and had run away from home to be with him. Peter’s mother, her boyfriend, and the defendant were all convicted of the offence of causing or allowing the death of a child, contrary to s.5 of the Domestic Violence, Crime and Victims Act 2004. The mother received a sentence of IPP with a minimum term of five years and her boyfriend received a determinate sentence of imprisonment of 12 years. The sentence passed on the defendant, aged 37, was one of IPP with a minimum term of three years. The defendant appealed. The Court of Appeal said that the sole issue in the appeal was whether there was a sound basis for the judge’s finding that the defendant represented a significant risk to the public of serious harm in the future from the commission of further specified offences. Lord Justice Hughes considered in detail the material which had been before the judge, including the defendant’s previous convictions (there were four, for theft and burglary committed when he was aged 16 and 18, carrying an offensive weapon when he was 20 and, when he was 33, two more burglaries and an offence of arson, for none of which had he served a custodial sentence) and the pre-sentence report, the tentative adverse conclusion and some of the factual contents of which were seriously in dispute. The Court of Appeal noted that the offence was ‘deeply unpleasant because a completely innocent child whom he could have protected was not protected by him against harm by others’, but that although there was *some* possible potential to commit an offence in future which *might* cause harm and, it *may be*, serious harm, to someone, *some* risk is not the test. ‘The test is the existence of a serious risk, enough to warrant a sentence which may never end. This man has no history of either violence or exploitative or dangerous sexual offending’. The indeterminate sentence was quashed and a determinate sentence of six years was substituted. The case provides a detailed and helpful review by the Court of Appeal of the evidence which ultimately, according to the Court of Appeal, fell short of satisfying the stringent test for dangerousness in the CJA 2003, s.225(1).