The Use or Misuse of Psychological Reports to Assess Offenders for Extended Supervision Orders in NZ

R v Peta playing with statistics—Psychologists the new clairvoyants?

1. The New Zealand Court of Appeal case *R v Peta*[1] can either be seen as a step forward, or two steps backwards.

2. The Head note reads:

> **Criminal law — Sentence — Extended supervision order — Risk of recidivism — Assessment methodology — Parole Act 2002, s 107R(2) — Crimes Act 1961, s 385(3).**
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> The question on appeal was whether the appellant should be subject to an extended supervision order (ESO) for ten years. This in turn required assessment of his risk of sexually reoffending against children. As the reasons for the imposition of the ESO given by the trial Judge were considered inadequate, the Court of Appeal called for further reports and considered afresh whether an ESO should be imposed.
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> Held:
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> 1 Before imposing an ESO, the Court had to be satisfied, after considering a report from a health assessor, that the offender was likely to commit a relevant offence in the future. The jurisdiction for making an ESO depended upon the risk of relevant offending being real and ongoing and one that could not sensibly be ignored having regard to the nature and gravity of the likely reoffending. The Court was not concerned with ensuring that the term was proportionate to the offences already committed, but ESOs did amount to punishment. The Court was not merely to rubber-stamp the health assessor's report, but had to consider the factors set out in s 107F(2) and had to give reasons why the statutory tests had been met (see paras [5], [6], [10], [13], [57]).
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> Grieve v Chief Executive of the Department of Corrections (2005) 22 CRNZ 20 (CA) approved.
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> R v Brown (Ruka) (2005) 22 CRNZ 233 (CA) applied.
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> 2 ESOs were to be made for the minimum period required for the safety of the community and in particular that of children and young persons and vulnerable members of the community, in the light of the factors set out in s 107I(5), and not for the minimum period required to facilitate treatment (see para [11]).
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> Appeal allowed; ESO quashed.

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1 [2007] 2 NZLR 627

ther cases mentioned in judgment

> *Barr v Chief Executive of the Department of Corrections* (Court of Appeal, CA 60/06, 20 November 2006).
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> *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).[2007] 2 NZLR 627 page 628
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> *Corrections (Chief Executive of the Department of) v McIntosh (High Court, Christchurch,* CRI 2004-409-162, 8 December 2004, Panckhurst and John Hansen JJ).
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> *W v Chief Executive of the Department of Corrections* (Court of Appeal, CA 172/05, 9 November 2005).

3. The experts from both sides agreed:

> **Assessment tools used by health assessors**
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> [15] This section is based on the evidence of Mr Riley, called by the Crown, who is the director of the Psychological Service of the Department of Corrections, and Dr Vess, called by Mr Peta, who is currently a senior lecturer in abnormal psychology and adult mental health at Victoria University. Both men have extensive experience in assessing and treating sexual offenders; in Dr Vess' case, both in California and New Zealand.
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> [16] Mr Riley and Dr Vess were in general agreement that empirically validated actuarial measures for ascertaining risk based on static factors should form the foundation of risk assessments in relation to sex offenders. Various changeable or dynamic factors, any other risk factors such as psychopathy or sexual deviancy and other aetiological (causative) factors should then be considered in formulating an individualised assessment of the nature of the risk presented by an individual offender. Risk assessments using actuarial tools have, despite the limitations of those instruments, proved much more accurate than non-structured clinical assessments.

4. The Static-AS and ASRS Automated Sexual Recidivism Scale the shortened version, of the Static-99 measure which was developed in Canada using the technique of meta-analysis, Sex Offender Needs Assessment Rating "SONAR", and the "PCL-R" The revised psychopathy checklist and sexual deviancy , and other measures were considered.

5. According to the Court—

> [22] Actuarial measures should be validated on the population to which they are to be applied. This has been done with the ASRS. It was applied to all offenders released from prison in New Zealand after serving a sentence for a sexual offence in the years 1987 and 1992 – 2005 (a total of 5789 cases) and evaluated in terms of predicting sex

offender recidivism. In the validation exercise, it was found that the absence of the three items from Static-99 that are not captured in the ASRS did not appear to have reduced the ability of ASRS to discriminate between the risk categories. The development and validation of the ASRS is described in an article by Skelton, Riley, Wales and Vess, "Assessing risk for sexual offenders in New Zealand: Development and validation of a computer-scored risk measure" (2006) 12 Journal of Sexual Aggression 277.

6. The statistics applicable were recorded at Para 28 and at 29 the Court referred to the 16% risk of Mr Peta.

> [29]. …In Mr Peta's case, he belongs under the ASRS to a group where 16 per cent of offenders reoffend within ten years. There is nothing in the ASRS that can help assess whether he comes within that 16 per cent or the 84 per cent who do not reoffend. However, this does not mean the ASRS is of no utility. As Dr Vess noted, the fact that an offender belongs to a group in which 16 per cent have sexually reoffended at ten years following release from prison remains a useful measure, as it gives a relatively clear understanding of the level of reoffending that has occurred among similar offenders.

7. The SONAR was noted as:

> [37] Dr Andrew Harris, the co-developer of SONAR, has been retained by the Corrections Department and is facilitating a series of in-depth workshops on the use of this measure. Once all psychological staff have been trained, then the instrument will be "scored" in the formal sense in every case. There is no doubt that this will greatly increase the value of the SONAR assessment. In Dr Vess' view, once the SONAR is scored properly, no variation between different psychologists would be expected, given the detailed scoring system for SONAR.
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> [38] Dr Andrew Harris describes SONAR as "empirically informed" rather than "empirically validated". The amount of data available in published studies remains considerably less than that which supports the Static-99 on which the ASRS is based. There is, however, an increasing amount of data of a statistical nature which indicates that SONAR is a reasonable predictor of sexual reoffending. Currently there is, however, no specific New Zealand validation data in relation to either the SONAR, the Stable 2000 or the Acute 2000. Nor is there direct statistical or numerical translation of SONAR scores into specific reoffence rates.

8. The PCV-R received the following comment:

> [43] Mr Riley sounded a note of caution. He said that it must not be assumed that an absence of psychopathy is a protective factor. The absence of psychopathy means that there is one significant risk factor which does not apply but it does not mean that, because an offender is not psychopathic, he or she is safe. In the New Zealand context, the Department of Corrections' experience at special treatment units for men who offend sexually against children is that the rate of psychopathy in that group of sex offenders is relatively low.

9. The summary of best practice in risk assessment is set out in Para's

50-55:

[50] As can be seen from the above review, **there are well-validated actuarial measures that can help distinguish between higher and lower risk offenders.** This is especially the case with those measures that more clearly address the risk presented by specific subgroups of offenders such as child molesters. **The ASRS is one such measure.** Findings based on static actuarial measures such as ASRS by definition cannot, however, detect changes in risks over time. Such measures are now augmented by standardised approaches to assessing dynamic risk factors through measures such as SONAR.

[51] **The utility of tools such as ASRS and SONAR is only realised when they are properly administered, scored and integrated with other relevant information known to relate to the risk of reoffending.** Other known risk factors identified in the research as empirically associated with increased rates of sexual recidivism should be reported on, including sexual deviance and level of psychopathy. The factors, other than those contained in the actuarial measures, used to formulate a clinical assessment of risk and the effect they are said to have must be identified explicitly. Further, it is recognised that risk is contingent on a variety of factors that are difficult or impossible to predict with certainty. Risk assessments should state as clearly as possible the recognisable contingencies that will influence the degree of risk present. A risk assessment report should also specify as clearly as possible the likely victims and the likely severity of harm of subsequent offences.

[52] **Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk.** This should draw upon a variety of different sources of information in an attempt to identify risk factors within an aetiological (causative) framework. This recognises that risk is contingent upon factors that are both environmental and inherent in the individual. Such an approach also helps avoid the shortcomings of a mechanical and potentially formulaic assessment of risk, one that is overly reliant on static historical factors and potentially insensitive to features of the individual that change with time and context. In our view, s 107I(2) in any event requires an individualised assessment.

[53] The results of a properly conducted risk assessment must be effectively communicated to the Court. Adequate training in this is required. **When reporting the findings of a risk assessment, comparative categorical labels such as high, moderate or low risk should be qualified by probability statements that give corresponding reoffence rates for groups of similar offenders and the numbers of offenders in each category should be specified (see the tables at paras [25] and [28] above). Any category or label, such as low, medium or high, should be used consistently in any report.**

[54] This summary of best practice relies heavily on Dr Vess' evidence. Dr Vess' assessment of best practice was, however, accepted by Mr Riley.

[**Bold added**]

10. The Court was rightly disturbed by the non application of best practice:

> [62] It turned out, when we heard the further evidence on 30 November 2006, that the problems with what had occurred in the District Court were even more fundamental than appeared to be the case after the July hearing. The Judge had relied on evidence that it is now conceded fell far short of best practice. Indeed, Mr Riley accepted that the original health assessor's application of the ASRS and the SONAR was not expert in this particular case. It is disturbing that this should be the case. Judges should be able to rely on evidence from the Corrections Department meeting best practice standards. In this case the problems with the original health assessor's report mean that no reliance can be placed on that report.

What is best practice?

11. In *Rameka v New Zealand*,[2] a challenge to preventive detention based partially on risk assessment resulted in a minority finding in relation to Mr Rameka risk of a 20% risk of reoffending.

12.

13. The approach to this 20% risk is fundamentally wrong, psychiatric estimates are only 50% accurate, the categorisation, as a 20% risk of reoffending can never reach a standard of "*substantial risk*." This substantial minority including some of the world's pre-eminent jurists adopted it wholeheartedly:[3]

> **Individual Opinion of Committee members Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo and Mr. Hipólito Solari Yrigoyen (dissenting in part)**
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> In stating, in paragraph 7.2 of its decision, that Mr. Harris' detention is based on the State party's law and is not arbitrary, the Committee proceeds by assertion and not by demonstration.
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> In our view, the arbitrariness of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence. The science underlying the assessment in question is unsound. **How can anyone seriously assert that there is a "20% likelihood" that a person will re-offend?**

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2 *Rameka, Harris and Tarawa v New Zealand,* CCPR/C/79/D/1090/2002(2003)

3 I was delighted that Mr Bagwati, the ex Chief Justice of India and Ms Chanet a Judge of the French Court of Cassation were included in this minority, Whilst the later two are no longer on the HRC, given the majority–minority split at 7-6, I have invited the HRC to reconsider *Remaka* in *Dean v New Zealand* .

To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.

[**Bold added**]

14. We should ask ourselves how one can ever quantify with any satisfaction the risk of dangerousness. Are we not punishing on the basis of modern day clairvoyancy?

15. The issue of dangerousness is still a live issue there are some useful advances in the last two years in Western Australia, See *Director of Public Prosecutions (WA) -V- GTR*:[4]

Conclusion on psychiatric opinions and reports under s 7(3)(a), (b)

109. In ***Director of Public Prosecutions (WA) v Mangolamara*** [2007] WASC 71; 169 A Crim R 379, Hasluck J conducted, with respect, a very comprehensive review of the DSO Act and its requirements. In particular, Hasluck J set out issues that concerned expert evidence and particularly the use of risk assessment tools before concluding:

> In the end, bearing in mind that the rules of evidence reflect a form of wisdom based on logic and experience, **I am of the view, for the reasons I have referred to, that little weight should be given to those parts of the reports concerning the assessment tools. In my view, the evidence in question does not conform to long-established rules concerning expert evidence.** The research data and methods underlying the assessment tools are assumed to be correct but this has not been established by the evidence. It has not been made clear to me whether the context for which the categories of assessment reflected in the relevant texts or manuals were devised is that of treatment and intervention or that of sentencing. Dr Pascu acknowledged under cross-examination that the assessment tools are directed not to the commission of serious sexual offences but to sexual re-offending of any kind (t/s 60). She acknowledged also that the database used for the mathematical model upon which Static-99 was based related to untreated English and Canadian sex offenders released back into the community on an unsupervised basis (t/s 68).
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> Moreover, having regard to the admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities, I harbour grave reservations as to whether a person of the respondent's background can be easily fitted within the categories of appraisal presently allowed for by the assessment tools. ([165], [166])

110. Similar issues arise in the present case, although of course the evidence is different. Both psychiatrists use a variety of tools to support their assessment.

111. The qualifications and limitations on the use of predictive models in the evidence speak for themselves. These limitations are

[4] [2007] WASC 318 Paras109-111, and 130—131,]

supported by the published literature to which I have referred. For reasons similar to those expressed in ***Mangolamara***, **I cannot attribute significant weight to the expert psychiatric opinions as to risk. I accept that the use of one or more predictive models, with or without a clinical interview and appraisal, may be helpful in determining a counselling regime or a management strategy for an offender.** In such cases there has already been a determination of guilt and a sentence has been imposed. Little prediction is required by the sentencing judge. Within that context there is usefulness in the models to aid the offender's rehabilitation, to customise a course of treatment or therapy, and to plan for the offender's release to the community…

130. The court has to be satisfied to a high degree of probability that there is an unacceptable risk that the person would commit a serious offence if not subject to an order.

131. The two concepts do not sit well together. The concept of 'unacceptable risk' is a conclusion. The concept of 'probability' is used in law to determine the likelihood of certain facts being correct. Probability is easily applied to the evaluation of evidence. It does not sit so easily with the formation of a conclusion. Nevertheless, despite the difficulties, that is what Parliament requires judges to do.

[**Bold added**]

16. Is not the granting or withholding or an ESO order becoming an arbitrary State process based on psychological guesswork? This obviously needs further thought. For example the Scottish Risk Management Authority (who endorse structured clinical judgment) states:[5]

> 6. The increasing importance of risk assessment methodologies at each stage in the criminal justice system is now evident. We therefore looked specifically at ways of improving the application of risk assessment techniques, particularly through improved information flows and through common standards. For example, we considered how risk assessments may be utilised in assessing the suitability of an individual for a particular personal change programme, or for parole. We endorse fully the MacLean Committee's view that:
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> > "the role of risk assessment in sentencing, management and release needs to be more clearly acknowledged, and the different types of risk assessment and management need to be better integrated."
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> 7. Despite an increasing emphasis on developing skills and expertise in risk assessment on the part of many of the key agencies, there has been relatively little focus on the critical and related issue of risk management. Risk assessment is only one part of the wider process

[5] ***Reducing the Risk*** *Improving the response to sex offending, The Report of the Expert Panel on Sex Offending:* http://www.scotland.gov.uk/Publications/2001/06/9284/File-1 (accessed 11 February 2009)

> of risk management which encompasses the whole range of actions agencies might take to deal with the type and severity of assessed risk in each case. Agencies charged with responsibility for dealing with sex offenders, particularly those working with offenders in the community, would be assisted in this task by guidance on core risk management principles and examples of best practice.

17. We seem a long way away from the Scottish Risk Management Authority whose functions are[6]

> – The first function will be policy and research in the fields of risk assessment and risk management. This role will be broadly defined and will allow the RMA to take a strategic long-term approach to defining how services across Scotland should develop.
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> – The second will be setting specific standards for risk assessments and risk management techniques. The remit in relation to standards setting will take in all offenders posing a risk of harm to others, with a particular emphasis on the high risk group.
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> – The third function will be operational risk management of a significantly smaller group of serious violent and sexual offenders.
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> This group will be initially limited to those offenders sentenced to an Order for Lifelong Restriction (on which see further, paragraphs 37 to 39 and Chapter Two).

18. The rise of the psychologist in his field and the lesser role of the psychiatrist, may or may not have anything do the with the possible ethical dilemma's of doctors providing risk assessments. One can but wonder however why psychologists ethics should differ that much form their psychiatric brethren, is not the interest of the person assessed the paramount interest, rather than society's need for an assessment?. There is a wealth of literature available on these interests which cannot be addressed in this short paper.

19. Prof Haag in his Feb 2006 article *Ethical Dilemmas Faced by Correctional Psychologists in Ca*nada:[7]

> How does one get genuinely voluntary consent in a penal environment that is geared toward rewarding compliance with correctional planning and punishing noncompliance (a set up remarkably similar to involuntary behavioral therapy to begin with; Brodsky, 1973) A serious inquiry might be made as to whether the institutional context itself hampers free and voluntary informed consent (Brodsky, 1980). There are real incentives for offenders to receive favorable psychological services and comparable inverse consequences for failing to participate. This places the onus on correctional psychologists to ensure that consent to psychological services is informed and, to the

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6 Criminal Justice Serious Violent and Sexual Offenders, Scottish Executive, The Stationery Office Bookshop, http://www.scotland.gov.uk/Publications/2001/06/9262/File-1 (accessed 11 February 2009)

7 Andrew M. Haag, Criminal Justice and Behavior Vol. 33 No. 1, February 2006, 93-109

greatest degree possible, voluntary. Special effort ought to be made to ensure that the offender actually wants to receive psychological services by explicitly asking an affected offender questions pertaining to their actual desire to participate in psychological activities. Moreover, if it is found that the offender does not want services in the genuine sense of the word but still insists on providing consent, it is important to exercise caution in service delivery with such offenders.[8]

20. Prof Haag also says:

> *Informed consent for psychological treatment and vulnerable populations.*
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> Informed consent for psychological treatments and assessments in corrections should be constantly monitored and documented (Corey et al., 1998; Evans, 1997; Kitchener & Anderson, 2000).
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> Correctional psychologists disproportionately come into contact with people in society who are vulnerable and issues arise from this vulnerability (Kitchener & Anderson, 2000). As there is a power difference between the correctional psychologist and the person receiving the services, caution needs to be taken to ensure no advantage is taken of any recipients (Kitchener & Anderson, 2000). This implies vigilance from correctional psychologists at all times during and after psychological services[9] …
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> Recently, the issue of refusal of services was addressed in the Federal Court of Canada in a case where a psychologist chose to perform a risk assessment on an offender without that offender's consent (*Inmate Welfare Committee, William Head Institution v. Canada*, 2003). Ultimately, the court decided that the psychologist was justified in performing such an assessment as it was deemed to be in society's best interest. Moreover, the Alberta College of Psychologists shared the opinion of the court on this matter by indicating that "risk assessments are not psychological services provided for the benefit of the offender . . . they are for the benefit of the community" (D. Truscott, personal communication, October 2003).
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> However, the fundamental question on this topic remains: Is it ethical (as opposed to permissible) to make a formal psychological statement of risk about someone who does not wish to have a statement of risk made about them? From this base perspective, **it appears almost inde- fensible to ethically perform a risk assessment that has not been ordered by the courts or another legal authority on anyone who does not wish to be a part of an assessment.** As such an action would represent disrespect for the dignity of persons and could be conceivably based on inaccurate information, it would hence be inconsistent with the CPA ethics code.
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> Another variation of the above issue is the question of whether a correctional psychologist can meaningfully contribute any information

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8 ibid, p99
9 ibid, p100-1

> to decision makers that could assist with a case without interviewing a person.
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> …However, if a psychologist were to be asked to provide a specific psychological opinion on a particular offender without having reviewed his or her files and interviewed him or her, it would not be ethically acceptable.

21. What of course does come with the rise of this professionalism is responsibility. We should never forget that psychiatric power can be misused See *Palmer and Taylor*[10] who reported that between January 1940 and September 1942, '*in what might be seen as a trial run for the 'final solution', 70,723 mental patients were gassed. The patients were chosen from lists of those whose lives were not considered 'worth living' that were drawn up by nine leading professors of psychiatry and thirty-nine top physicians*.

22. Risk assessment is clearly a dangerous business.

Conclusion

23. Risk assessment is not a science; some would call it a bogus science. Individual assessment is clearly needed and better control on the type of risk instruments used, and it uses by the judiciary is needed.

24. Whether psychological assessment reaches the standard of scientific assessment needed to reach forensic evidence rather than assessment for treatment is a vexed question, which will not go away.

TONY ELLIS
BARRISTER

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[10] Palmer Reg Orovwuje and Prof A.J W. Taylor, Ch 9, *MENTAL HEALTH CONSUMERS, SOCIAL JUSTICE AND THE HISTORICAL ANTECEDENTS OF OPPRESSION*, pp8-*9* In— *Justice As A Basic Human Need,* Ed, Prof Taylor, Nova Books, 2006 Fn 7 Porter (2002, pp. 186/7)