

# **DANGEROUSNESS**

## **INTRODUCTION**

### **The Test for Determining Dangerousness**

D is dangerous under the Criminal Justice Act 2003 if:

“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.”

Criminal Justice Act, s. 225(1)(b); s. 226(1)(b); s. 227(1)(b); s. 228(1)(b).

This test remains the same for all offenders, regardless of their age, and regardless of whether a life sentence, an IPP or an extended sentence is under consideration.

### **Relevant Factors in Determining Dangerousness**

The procedure for deciding dangerousness under the Act in respect of a D under 18 and/or a D without any previous specified previous convictions is (s. 229(2)):

“If at the time when that offence was committed the offender had not been convicted . . . of any [specified] offence or was aged under 18, the court in making the assessment [into dangerousness] –

- (a) *must* take into account all such information as is available to it about the nature and circumstances of the offence,
- (b) *may* take into account any information which is before it about any pattern of behaviour of which the offence forms part, and
- (c) *may* take into account any information about the offender which is before it.”

In other words, the court must take into account everything the prosecution say, but can ignore anything the Probation service and the defence say.

### **The Assumption of Dangerousness for Adult Ds with Previous Convictions**

The procedure for a D over 18 who does have a previous specified offence is as follows (s. 229(3)):

“If at the time when that offence was committed the offender was aged 18 or over and had been convicted . . . . of one or more [specified] offences, the court *must* assume that he [is dangerous] unless, after taking into account –

- (a) all such information as is available to it about the nature and circumstances of each of the offences,
- (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and
- (c) any information about the offender which is before it,

the court considers that it would be unreasonable to conclude that there is such a risk.”

## **THE TEST FOR DETERMINING DANGEROUSNESS**

By and large, the authorities, of which there are many, have done their best to limit this draconian aspect of the regime.

### **Definitions**

#### ***‘Significant’***

Although ‘significant’ is not defined in the Act, *Lang* [2005] EWCA Crim 2864 says it means ‘more than merely possible, noteworthy, or of considerable amount or importance’.

These things can’t really be measured, but perhaps they equate to the Probation Service’s ‘Medium Risk’ or above. It might be worth arguing that *Lang*’s definition is as high as Probation’s Medium-High risk factor.

It does appear, though, that Rose LJ strongly dislikes these provisions, and is defining ‘significant’ as highly as he possible could.

#### ***‘Risk’***

Following *Xhelollari* [2007] EWCA Crim 2052, an IPP should not necessarily be imposed on a first conviction for rape where there is only speculation or mere apprehension, rather than actual evidence, of some risk of harm from future offending.

#### ***‘Serious Harm’***

Serious harm (i.e. death or serious personal injury) can include psychological as well as physical harm (s. 224(3)). For a while it was thought that the Court of Appeal was reluctant to find appellants dangerous when only psychological harm was envisaged (on the basis that it was ‘less probative’ than physical harm), but cold water was

recently thrown on this idea: *De Cabral; Rouse* [2007] EWCA Crim 2265, which stated clearly that *Shaffi* [2006] EWCA Crim 418 was specific to its facts, and not a guideline case.

### ***‘Members of the Public’***

The risk must be to the public, although ‘the public’ can extend to small groups such as the police, prison officers, and individual people, for example any future partner that D might have, or even one particular person that D has a particular problem with.

### **Lang and Johnson**

In *Lang*, it was held that D is to be found dangerous only if there are *two* significant risks:

1. The [future] risk of D coming any further specified offences; *and*
2. A significant [future] risk of serious harm to members of the public caused by D’s commission of such offences.

*Johnson* [2006] EWCA Crim 2486 makes it clear that in determining whether D is dangerous, the court should only consider *future* risk, not punishment for previous offences. This opinion does not sit particularly easily with the assumption of dangerousness under s. 229(3).

A significant risk may arise even if the current offence doesn’t cause any serious damage at all.

For example, V, who has an unusually robust nature, suffers hardly any injury or psychological trauma from an armed robbery. But this is not determinative of the situation.

*Lang* further restricts the Act’s severity in 3 ways:

1. It cannot have been Parliament's intention to require IPPs to be imposed for relatively minor offences. Even though this statement will hopefully bring an end to IPPs with a minimum 28 day tariff, it does not logically make sense, bearing in mind the fact that only *future* risk of serious harm caused by D is to be considered in assessing dangerousness.
2. Foreseen serious specified offences will not necessarily result in serious harm.

One example is that held in *Terrell* [2007] EWCA Crim 3079, where it was decided that IPPs are not suitable for offences of making indecent images, as the link between downloading the images and the harm required for a finding of dangerousness was too remote. A SOPO was appropriate in the circumstances, as the threshold for imposing one was lower than the threshold for a finding of dangerousness.

3. Foreseen non-serious specified offences are unlikely to cause a significant risk of serious harm. See *Myles* [2007] EWCA Crim 3375, where the Court held that repetitive low-level violence does not of itself give rise to a finding of dangerousness. M was a serial flasher who committed the more serious offence of putting his hand down the pants of an 8 year old girl. There was no real evidence of anything close to 'serious psychological harm' in the current offence. See also *Walsh* [2007] EWCA Crim 3127 and *Isa* [2005] EWCA Crim 3330: low-level sexual offending without serious harm did not of itself give rise to a serious risk of harm in the future.

## **RELEVANT FACTORS IN DETERMINING DANGEROUSNESS**

When considering dangerousness, the following matters are important:

### **The Nature and Circumstances of the Offence**

The nature and circumstances of the instant offence are clearly relevant. The Act says they *must* be taken into consideration.

Of themselves, they can indicate dangerousness.

It is of the utmost importance, therefore, to ensure that bases of plea are tightly drafted so as to exclude as much damaging material as possible.

### ***Newtons***

You must not use *Newtons* for the sole reason of finding that D has committed other offences which he denies and with which he has never been convicted.

For example, a domestic ABH: the wife says D has hit her many times before; D denies it. It would be wrong to have a *Newton* to decide whether he has indeed hit her before.

It is likely that *Newtons* will become more common where IPPs are at stake, because it will often be worth risking your credit in order to remove serious aggravating features which will, if found, lead to your client being found dangerous.

### **The Defendant's Pattern of Behaviour and Personal Circumstances**

The Act itself says we *may* take into account any pattern of behaviour of which the current offence is a part, and we *may* take into account any information about D.

This is odd – one may think that information about the offender would be at the forefront of the sentencing process, especially when we are dealing with the risk of *him* causing serious harm by committing further specified offences.

### ***Pre-Sentence Reports***

This information is found in a number of materials, most commonly a PSR.

Under s. 156 of the CJA 2003, the court *must* obtain and consider a PSR before sentencing under the dangerousness provisions, unless the court considers it unnecessary to do so. In nearly every case, a PSR is sought.

The Probation Service do have specific training in dangerousness, not that you would always realise this from the number of mistakes they can make.

The court is not bound by the recommendations of the PSR, although there is a statutory obligation to consider it. If the judge is considering departing from the PSR, he should give counsel the opportunity to address him on the point: *Lang*.

If D is under 18 at time of sentence, the court can *only* conclude that a PSR is unnecessary if there is already in existence a previous PSR in relation to a previous offence which the court can consider.

As rule of thumb, normally it is sensible to ask for an adjournment for a PSR.

It is extremely important that the Probation Service are made aware of any ‘previous convictions’ which the Defendant disputes and which have not been formally proved. The Probation Service often increase the risk of re-offending and the risk of harm on the basis of convictions, cautions and other information (such as call-outs from the Domestic Violence Unit or information from MAPPA or Social Services). If D does not accept these, it might be worth, as his solicitors, informing them of this in writing before the sentencing date. This was the problem in *Weeks* [2007] EWCA Crim 3311, where the Court of Appeal quashed an IPP because the PSR’s approach to the risk of harm was clearly affected by disputed facts which she assumed to be true.

What happens if the writer of the PSR makes an assessment of dangerousness with which you disagree? The Court of Appeal doesn't like probation being cross-examined in court. Make your submissions to the court: *S and Others* [2005] EWCA Crim 3616 (though see *Weeks*).

The probation service's use of analytic tools to determine whether an offender is dangerous or not is perfectly permissible, according to the Court of Appeal: *Boswell* [2007] EWCA Crim 1587. Contrast the more personalised approach which went wrong in *Weeks*.

As the Probation Service's views are so important, it can often help to serve on them any character references or other documents in advance of the PSR interview, in the hope that this will soften their view of your client, rather than waiting until the day of sentence.

### ***Medical Reports***

Medical reports are dealt with in s. 157: if D is or appears to be mentally disordered then the court must get a medical report or consider one, unless it feels that obtaining one is unnecessary.

Section 157 is expressed to be without prejudice to s. 156, therefore a PSR can be obtained at the same time as the medical report.

*Lang*: just as the court must consider obtaining a PSR, it must consider a medical report, although it is not bound to actually get one.

### ***Other Relevant Materials***

Other materials come into play depending on the individual case.

1. D's socio-economic history, attitudes, drug and alcohol abuse, mental health etc. For example, just because D abuses alcohol, that does not of itself make him dangerous.

Evidence of D's inadequacy, suggestibility or vulnerability might make for powerful mitigation, but might also make it more likely that he is found to be dangerous: *Johnson*.

2. D's age is important. In *Lang*, Rose LJ said the court must be particularly rigorous before deciding that a youth is a danger, because of the capacity of the young to mature and change. For particularly young offenders, IPPs might not be appropriate even if they are dangerous under the test.

This is an extremely useful case when dealing with the sentencing of youths.

### ***Previous Convictions***

Previous convictions are particularly important, as the court *must* ordinarily consider them in deciding whether D is dangerous, since they must be treated as aggravating features to the present offence, if it is reasonable to do so (s. 143(2)).

The dates, facts, and frequency of the previous convictions are relevant, as are the levels of sentences imposed for them.

The previous to be taken into account need not themselves be specified offences, or even similar to current offences. Therefore, one cannot argue that all non-specified offences are irrelevant: *Johnson*.

The courts have been keen to stress that just as having form does not make you dangerous, not having form does not stop you from being dangerous.

The convictions should be proved by a certificate of conviction from the relevant courts (s. 232).

Unproven allegations may not be used against D, nor can disputed previous convictions: *Johnson*.

The Prosecution should have to hand the details of D's previous convictions, otherwise the Court might adjourn sentence, or be forced to accept D's version of events.

### **Temporary Circumstances**

By 'temporary circumstances' I mean aspects of D's situation which will not always be so important to the issue of future offending or which are amenable to treatment (such as alcoholics or drug addicts who have dealt with their problems while on remand).

It is always worth advising a client who might be found dangerous to seek as many courses in prison or in the community as possible so as to minimise the risk of that factor (such as a serious crack habit) still being 'live' when he is due to be sentenced. Since the dangerousness assessment focuses on future risk, if D, who only ever offends while on crack, can show he is now clean, he stands a greater chance of getting a determinate sentence.

Courses like anger management while on remand might not always be appropriate, due to the danger of D prejudicing his prospects at trial by making admissions to Probation.

The next step is to consider alternatives to an IPP or extended sentence. Might not a sexual offences prevention order prove just as effective as an IPP in reducing the future risk of re-offending? Even if D is not dangerous, he can be made subject of a SOPO, for which the test is less stringent.

Unpalatable as it sounds, it makes sense to submit that if a SOPO (Sexual Offences Act 2003, ss. 104-113) were made, this could reduce the risk that D might otherwise present, to the extent that if the SOPO was imposed, he should no longer be considered dangerous.

However, in *Attorney General's Reference (No. 134 of 2006)* [2007] EWCA Crim 309, the trial judge decided that D was not dangerous, simply because he was willing to go to sexual offenders' treatment program. The Court of Appeal held that just because a D is prepared to go on a course, that is immaterial to the assessment of dangerousness, because one can only speculate as to whether he will successfully complete it. This seems a little harsh; I would have thought that willingness to go on a course must be relevant to whether he is dangerous.

Other possible alternatives to IPPs or extended sentences include:

- (i) Violent Offences Prevention Orders (if and when they come into force).
- (ii) ASBOs (Crime and Disorder Act 1998, s. 1C).
- (iii) Football Banning Orders (Football Spectators Act 1989, s. 14A).
- (iv) Restraining Orders (Protection from Harassment Act 1997, s. 5).
- (v) Exclusion from Licensed Premises (Licensed Premises (Exclusion of Certain Persons) Act 1980, s. 1).
- (vi) Disqualification from working with Children or Vulnerable Adults (Criminal Justice and Court Services Act 2000, ss. 26-31).
- (vii) Hospital and Restriction Orders (Mental Health Act 1983, ss. 1ff; s. 43).

## **THE ASSUMPTION OF DANGEROUSNESS**

The principle purpose of the assumption appears to be an attempt by Parliament to prevent the viciousness of this regime from being watered down by the courts, as had happened with the old automatic life sentences for two serious violent or sexual offences.

Under s. 229(3), the court *must* consider D is dangerous if:

- 1 D committed the specified offence when 18 or over;
- 2 D had been previously convicted of *any* specified offence; and
- 3 it is not unreasonable to make the assumption, based on the nature of the present offence, D's pattern of behaviour and his characteristics.

It is irrelevant if the previous offence was of a different type from the current one, as long as both were specified.

For instance, D has a previous conviction for an assault with intent to resist arrest., which he committed 5 years before he got the present conviction for voyeurism. No matter how ridiculous it might be, the court must consider him to be dangerous.

Previous cautions, or arrests, or suspicions of committing previous offences do not qualify to trigger the assumption.

However, the Court in *Lang*, applied by *Johnson*, effectively did away with the notion of the assumption.

Rose LJ: "In our judgment, when ss. 229 and 224 are read together, unless the information about offences, pattern of behaviour and the offender show a significant risk of serious harm from further offences, it will usually be unreasonable to conclude that the assumption applies."

In other words, the court should invoke the assumption that D is dangerous if you have already decided he was dangerous anyway after following the usual procedure (information about the offence, pattern of behaviour and the offender).

Each case is, then, to be taken on its own merits, basically paying little more than lip-service to the assumption.

It is unlikely that Parliament will revisit these sections, due to the crisis of overcrowding in the prison system.

However, there are some judges who are only too happy to apply the assumption anyway, despite the guidance from the Court of Appeal, which is all too rarely cited before them.

Moreover, the Court of Appeal is often reluctant to criticise a judge for making the assumption, unless it was wholly unreasonable or unlawful for him to do so. For example, *Mahmood* [2007] EWCA Crim 3304, in which M, who had many relevant previous convictions, had beaten his drug addiction and was receiving treatment for his severe mental health problems.

In these circumstances, what can we do to try to mitigate the severity of the assumption?

One possible situation, which arises quite often, is where D, who currently has no specified previous convictions, is facing trial for, say, a s. 18 in the Crown Court and a racially aggravated s. 4A in the magistrates' court. It might well be that the only way to avoid the assumption being applied is to frantically adjourn the magistrates' court trial until after the conclusion of the Crown Court trial, because if he is convicted of the latter after he inevitably goes down in the magistrates' court, the assumption automatically applies.

JAMES WING  
The Chambers of John Coffey QC  
3 Temple Gardens  
London  
EC4Y 9AU

27<sup>th</sup> March 2008