



# CREaTE

Canterbury Research and Theses Environment

Canterbury Christ Church University's repository of research outputs

<http://create.canterbury.ac.uk>

Please cite this publication as follows:

Heaton, R., Bryant, R. and Tong, S. (2018) Operational risk, omissions and liability in policing. *The Police Journal*. ISSN 0032-258X.

Link to official URL (if available):

<https://doi.org/10.1177/0032258X18777915>

This version is made available in accordance with publishers' policies. All material made available by CReaTE is protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law.

Contact: [create.library@canterbury.ac.uk](mailto:create.library@canterbury.ac.uk)



## Operational Risk, Omissions and Liability in Policing

Robert Heaton , Robin Bryant and Stephen Tong

School of Law, Criminal Justice and Computing, Canterbury Christ

Church University, Canterbury, Kent, UK

### Introduction

In 2014, Professor Jerome Hoffman and practicing emergency physician Hemal Kanzaria revealed in the British Medical Journal, that the U.S. medical liability system was estimated to cost 55.6 billion US dollars annually. An equally remarkable revelation was that of this sum, only 18 per cent comprised the direct costs of legal action and insurance. The remaining 82 per cent was accounted for by the costs of defensive medicine, in which low-probability diagnostic tests were commissioned, together with excessive onward referrals and prescriptions for drugs. These attempts to mitigate risk and avoid legal action met with little success. The probability during a career of facing a lawsuit was estimated at 99 per cent in the highest risk, and 75 per cent in the lowest risk specialities.

Apparent sins of omission in the form of missed diagnoses were punished far more frequently than any other type of error. Physicians were expected to take personal responsibility for any ‘mistake’, which had been effectively redefined as ‘the outcome was less than ideal’. This fed a ‘quixotic quest for certainty’ and the pretension that medicine was based upon perfected science. The authors suggested that culture change was required of the medical profession and of the public, including the establishment of acceptable miss rates (Hoffman and Kanzaria, 2014).

This article contends that the UK police service is being drawn into a broadly similar position, with minimal public or professional debate. It aims to foster such debate by identifying an unplanned yet profound realignment of the policing mission, together with some of the consequences which have become apparent. The suggestion is made that in the last decade, there has been an important shift in policing priorities from crime-fighting, to public protection of ever-widening scope. Fuelled by legislation and public intolerance, omissions to act in order to prevent harm have become more significant, highlighted in the findings of a succession of critical public inquiry reports (eg Bichard, 2004; Home Office, 2003). Individual officers have seen a rise in the number of ‘neglect of duty’

discipline cases brought against them (IPCC, 2005, 2016a). Moreover, the common law offence of ‘misconduct in public office’, after lying dormant for two hundred years, has been ‘rediscovered’ and is being applied with increasing frequency.

In common with the US medical world, the police service in England and Wales deals with large volumes of low-probability, high impact risk on a daily basis (College of Policing, 2015). The psychology of hindsight means that negative outcomes appear to be far more foreseeable after an event, than they were beforehand (Kahneman, 2012: 203-204). In respect of perceived omissions, officers are increasingly liable to the threat of ‘catch-all’ sanctions (Law Commission, 2016: 5) and police forces to significant reputational damage. The potential consequences are increased risk aversion and opportunity losses, as resources are diverted into unattainable attempts to eliminate the possibility of high-profile ‘failures’ (Heaton, 2010).

After a discussion on risk and uncertainty in policing, this article considers a brief case study of firearms licensing, to highlight a practical example of the inherent difficulties when the police service attempts to manage risk. Next, the way in which risk is viewed by the College of Policing, the Crown Prosecution Service (CPS), Her Majesty’s Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS) and the Independent Police Complaints Commission (IPCC), is discussed. Policies are found to be unhelpful to the making of consistent decisions and provide no guidance to mitigate the effects of hindsight. A significant discrepancy is identified in the ways in which the police and the CPS interpret the consequences and potential culpability of risk-based decisions. The conclusion is drawn that although public expectations will remain unchanged in the short term, it should be possible for police, policymakers and scrutiny bodies to reach an informed consensual view of risk-based decisions in policing, and how alleged omissions should be viewed.

### Social Change and the Police-Public Relationship

The increasing significance of risk and public protection in UK policing is underpinned by long-term social and cultural factors. The growth of intolerance towards violence in much of the Western world, has been reinforced by a ‘rights revolution’ such as in ‘health and safety’, human rights and anti-

discrimination legislation (Haslam, 2016: 13). This sensitisation of society towards victimhood has been enhanced by ‘concept creep’. In a study of six types of negative experiences, Haslam found that all had been redefined over time, in order to expand the reach of each. For example: abuse now includes emotional effects, bullying embraces exclusion, and discrimination includes the effects of unconscious prejudice (Haslam, 2016: 10-11). Haslam suggests that although there are benefits to what is essentially a civilising process, there are also disadvantages. These include the perception of opposing forces of ‘virtuous but impotent victimhood’ on one hand, and ‘typecast moral villains’ on the other (Haslam, 2016: 1,14).

According to Furedi, the three decades since the 1980s have seen the demise of social solidarity, the rise of individualism and a ‘wider mood of cultural suspicion of expertise and professional authority’ (Furedi, 2006: 15-16). Together with the effects of ‘concept creep’, the collective sense of personal vulnerability has been heightened, to give 21<sup>st</sup> century Western societies a uniquely low threshold for experiencing harm. Those affected by negative experiences, such as victims of crime, do not overcome their condition, but instead have an almost permanent identity conferred upon them. Sufferers are considered to be ‘survivors’ or ‘in recovery’. Furthermore, the increasing presumption of human weakness has been paralleled by a similar concept creep in vulnerability. The term ‘vulnerable group’ did not exist until the 1980s, but now includes the poor, the elderly, mentally ill, disabled, ethnic minorities and all children (Furedi, 2016: 36). In respect of public attitudes, Furedi echoes Hoffman and Kanzaria’s concerns about risk (Hoffman and Kanzaria, 2014), concluding that: ‘the principal driver of the re-emergence of intolerance as a moral virtue is Western culture’s aversion to engaging with uncertainty’ (Furedi, 2011).

Other studies have reached similar conclusions and suggest that the culture of vulnerability may have gone further than necessary to support those in society who are in a disadvantaged state. For example, a study of reactions to five terrorism incidents found that governments and commentators tend to characterise public reaction as being one of fear, anxiety and panic. In fact, very little initial panic was evident and longer-term responses were proportionate to the risk (Sheppard et al., 2006). Elsewhere, a study of British prisoners of war (POWs) captured in the First and Second World Wars found that in

their aftermaths, reference to trauma had been discouraged, being viewed as counterproductive to a return to the peacetime world (Jones and Wessely 2010: 181). The default expectation was of resilience. In contrast, contemporary culture emphasised vulnerability in such circumstances, which carried a significant likelihood of a formal post-traumatic stress disorder diagnosis. The authors concluded that there had been a pendulum swing wherein the ‘trauma experienced by POWs during the First and Second World Wars may have been understated, while the resilience and resourcefulness of those imprisoned today may also be under-appreciated’ (Jones and Wessely, 2010: 183).

### The Rise of the Protection Agenda

Socio-cultural ascendancy of individualism and sensitisation towards victimhood was mirrored in legislation. The police had historically been primarily responsible for the enforcement of prohibitive offences such as theft and assault. Increasingly, they found themselves with positive obligations to prevent harm. For example, the Codes of Practice of the Police and Criminal Evidence Act 1984 imposed a plethora of requirements in relation to the care of those taken into police custody. The Police (Health and Safety) Act 1997 brought officers within the ambit of the wider Health and Safety at Work Act 1974, giving them responsibility to take reasonable measures to protect themselves and each other. A year later, the Human Rights Act 1998 adopted the 1953 European Convention on Human Rights in the UK, giving the police a ‘duty of care’ towards those they came into contact. This brought their longstanding but limited ‘duty of care’ under English tort law into far sharper relief. Further to the imposition of these obligations, civil claims were encouraged by the Access to Justice Act 1999, which encouraged ‘no win, no fee’ deals by raising the level of fees recoverable by the winning side.

The first decade of the twenty first century saw further pressure upon the police to move towards a public protection role, following the publication of a succession of highly critical public inquiry reports. The Laming Report into the death of Victoria Climbié (Home Office, 2003) followed by the Bichard Inquiry into the Soham child murders (Bichard, 2004) excoriated the police and other agencies, for failures to intervene in cases of serious crimes against children. The phrases ‘opportunities were missed’, ‘more could have been done’ and ‘lack of professional curiosity’ became

routine elements of scrutiny body and media reports, for example to prevent the deaths of Peter Connolly in Tottenham (The Guardian, 2010), Maria Stubbings in Essex (IPCC, 2013) and Keanu Williams in Birmingham (The Guardian, 2013), and to prosecute Lord Janner (BBC, 2016). Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS, formerly HMIC) now explicitly inspects police forces in terms of their effectiveness at 'protecting from harm those who are vulnerable' and expects forces to assess potential victims' level of risk and need (HMIC, 2015a: 7).

This period also saw significant changes in the national crime landscape. Whilst property crime fell, fear of crime rose (Crawford, 2003: 140; Home Office, 2008: 10). This public perception was reinforced by terrorism which rose high on the policing agenda following the '9/11' atrocity in 2001, and remained there following a prolonged succession of attacks in London and elsewhere in Europe. In addition, child protection work spiralled (HMIC, 2015b: 10). Meanwhile, the explosion of internet use brought fresh pressures in the form of threats to well-being, particularly that of children, and the facilitation of crime, especially fraud (Maguire and Dowling, 2013).

### Service Failures and the Significance of Omissions

A natural consequence of the rising protection agenda, was intolerance towards perceived failures involving public services. This particularly affected the police, who deal routinely with large volumes of 'risk' business such as actual and potential violence, acute mental health problems and missing people. Sanctions for police officers include disciplinary and criminal action. The use of both forms increased markedly in parallel with expectations of protection and allegations of failures to protect.

In disciplinary terms, allegations of omission would normally be recorded as neglect of duty. From its inception to its replacement by the Independent Office for Police Conduct (IOPC) in January 2018, the Independent Police Complaints Commission (IPCC) recorded an increase in claims of 'neglect of duty' of 252 per cent, from 6459 in 2004-5 (IPCC, 2005) to 22796 in 2015-16 (IPCC, 2016a). In 2004-5, 'neglect of duty' ranked third in category of complaint (18.6% of all complaints), behind 'oppressive behaviour' and 'incivility'. In 2015-16, it was by far the single greatest category of

complaint, comprising 35.4% of all complaints. Of equal significance is the ‘discovery’ by the Crown Prosecution Service (CPS) of the common law offence of ‘misconduct in public office’, which had lain largely dormant since the late eighteenth century. The offence is defined as:

A public officer acting as such, wilfully neglects to perform his duty and/or wilfully misconducts himself, to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification (Attorney General, 2003)

The Law Commission started to examine the offence in January 2016, to help to determine whether it (or an amended version) should be put onto a statutory basis. Statistics supplied to the Commission by the Crown Prosecution Service and the Ministry of Justice revealed the recent growth in prosecutions for ‘misconduct in public office’, from two in 2005 to 135 in 2014 (Law Commission, 2016: 5).

The proportion of police officers in these prosecutions is unclear, but a reasonable assumption is that officers’ exposure to criminal sanctions has increased significantly. The specific inclusion of ‘neglect’ in the offence is accompanied by the phrase ‘abuse of the public’s trust’, in the context of decreased public tolerance of negative outcomes. Together with an increasingly punitive sanctions regime, the rise in prosecutions raises the question of whether the officers have become open to a ‘catch all’ criminal offence in respect of alleged omissions, sparked by victims and their representatives and fuelled by skewed media headlines. A parallel concern is whether the reputational damage to forces by judicial inquiries on the basis of omissions is also justifiable. The nature of risk in policing is central to these questions, determining the extent to which forces and individual officers are exposed to the consequences of alleged omissions and the degree to which they might be able to reduce such exposure. The potential effects of hindsight upon the decisions of scrutiny bodies are equally pertinent, and are considered later in this article.

### Risk and Uncertainty in Policing

A broad theoretical perspective on risk is provided by Ericson and Haggerty (1997: 39), who argue that ‘.....risk is a construct of insurance technology. It turns people, their environments into myriad

categories and identities that will make them more manageable. It makes up people and their organisations according to its own internally referential systems of rationality, rather than in terms of extrinsic moral questions and issues.’ It is these corporate approaches for ‘broader business mentalities’, ‘cost-benefit’ and ‘future-orientated’ risk approaches that are readily adopted by ‘state security agencies’ (Johnston and Shearing, 2003: 16-17). In the criminal justice sphere, Garland (2001: 12) articulates the approach to risk as ‘Today, there is a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk. Protecting the public has become the dominant theme of penal policy’.

Policing, traditionally a craft-based activity reliant on intuition and learning through experience, has been highly affected by the use of discretion and common sense approaches to problem solving. While the use of scientific enquiry techniques and empirical research are important tools to inform decision making on the ground, the ‘fast and frugal’ forms of risk assessment made by officers in situ are still pivotal to police practices. Such informal ‘discretion’ based approaches create anxieties about consistency of quality of practice, and loss of control of legitimate attempts to reduce public risk. In response, the College of Policing and its predecessor bodies created a myriad of operational policing guidance with the intention to reduce risk, perceived service failure and criticism. Heaton (2010) pointed out that the voluminous nature of such guidance made it difficult to implement on a day to day basis, creating potentially risk averse behaviour which could impose considerable opportunity costs in the face of limited resources.

The article will now consider the factors which determine the nature and extent of risk in operational policing. The interaction of these factors creates complexities including paradoxes, which hinder the accurate assessment of risk and its ‘designing out’ by means of comprehensive or inflexible policies. Assessing ‘risk’ appears to be a ubiquitous undertaking, from the sphere of medicine alluded to at the beginning of this article to commercial banking (Phythian, 2012). In some contexts ‘risk’ per se is not necessarily considered a ‘bad thing’; for example, higher risk investment portfolios are sometimes associated with higher potential rewards. In policing however the emphasis is on managing, addressing and minimising risk. At the outset, one of the problems encountered when discussing risk



in policing is the plethora of terms employed and the ambiguities and lack of clarity. In the professional policing and intelligence analysis literature one encounters variously terms such as ‘hazard’, ‘harm’, ‘impact’, ‘threat’, and ‘vulnerabilities’ often used in conjunction one with the other and sometimes interchangeably. For example, the UK’s College of Policing guidance on armed deployment explains that a ‘threat assessment refers to the analysis of potential or actual harm to people, the probability of it occurring and the consequences or impact should it occur’ (College of Policing, 2014).

There is an unmistakable air of naive positivism surrounding discussions on risk-based decision making. This is an arena which is subject of complex and developing academic debate, for example around the use of mental short cuts to assist in decision making. Gary Klein identifies three ‘communities’ of researchers with differing perspectives. The Naturalistic Decision Making (NDM) community values personal experience, which allows intuitive knowledge to be gained from the formation of patterns. This accumulated expertise can make fine discriminations between circumstances and adapt to complex and dynamic situations. Decisions can be made rapidly without the need to formally compare options (Klein, 2015: 164-165). The Heuristics and Biases (H&B) perspective is more negative, seeing intuition as a pervasive source of bias and error. For example, ‘availability bias’ means that the probabilities of dramatic events which can be readily brought to mind, are consistently over-estimated (Kahneman, 2012: 129-136; Sutherland, 2009: 15-18). Finally, the Fast and Frugal Heuristics (FFH) community views heuristics as a basis for intuitive decision-making. Cues are consciously taken from knowledge and experience as the basis for action, which can be rapid and almost as effective as making laborious choices between alternatives (Klein, 2015: 164). According to Klein, the H&B approach is overly narrow, denying the advantages of experts over novices and being over-reliant on research with novice participants. However, it can be valid in chaotic and unpredictable environments, where there is limited opportunity to learn from feedback. In contrast, NDM is most reliable where it reflects repeated experience and reliable feedback (Klein, 2015: 165).

Such refinements of consideration are not reflected in police decision making processes. Some authorities even go as far as to promote the use of simple formulae that impose some kind of mathematical association between the elements that contribute to risk. For example, total risk scores in policing are sometimes calculated using a formula such as ‘risk = likelihood x impact’ (e.g. Police and Crime Commissioner for Essex, 2012) or by use of a ‘risk matrix’. There are a number of obvious advantages in using these apparently ‘scientific’ methods, not least of which are the simplicity and clarity of the risk assessment process, and the prioritisation of workloads. However, there are significant problems with the employment of numerical scales for assessing risk factors and combining them by multiplication and/or addition. One unavoidable technical problem is that when we quantify risk in a simple numerical manner using integers (whole numbers) we are treating nominal variables as if they were scale. Put another way, how appropriate is it to consider that a risk with a score of 3 carries three times the risk of a score of 1? Rarely is any rationale offered concerning why a linear scale has been used rather than, say a logarithmic one. The problem is further compounded by the common practice of multiplying likelihood by impact scores. This assumes that the risk factors are independent of each other, otherwise a conditional Bayesian probability would be more appropriate. For many risks encountered in policing, it is highly unlikely that the factors are statistically independent.

More fundamentally, an implicit assumption is that risk is always susceptible to some kind of objective assessment. The police carry responsibility for managing risk by virtue of their supposed ability to do so. The volume of all risk in relation to policing resources and the extent to which it is possible to evaluate an individual risk accurately at the time that it becomes apparent, are key factors in determining the nature of intervention. These factors are discussed with the assistance of some estimates of the quantitative demand upon policing, and are illustrated in the context of a case study of firearms licensing.

Perhaps one of least publicly understood aspects of policing, is its scale. In 2015, the College of Policing reported that the service in England and Wales dealt annually with about 3.7 million crimes and 19.6 million incidents. In respect of protective work, there were about 280,000 missing person reports and 390,000 mental health incidents. A sample of ten forces averaged 1000 child protection referrals per force. About 1.2 million people are arrested each year (more than the entire population of Birmingham), many of whom are suffering from drug or alcohol abuse, or have acute physical or mental health problems (College of Policing, 2015). A HMIC report revealed that in 2015, about 350,000 domestic abuse cases were reported (HMIC 2015b: 10). This list is far from exhaustive, excluding for example spontaneous encounters between police and public. It serves nonetheless to illustrate that the burden of risk shouldered by the police is vast. The assessment of risk in relation to individual incidents is equally difficult to pin down, but, where measureable, somewhat paradoxically is normally smaller than is widely perceived. The death of a person with whom an officer has recently come into contact, is perhaps the type of incident which is most personally impactful, measureable and liable to further consequences. The psychological 'availability effect' means that such outcomes can be readily envisaged in relation to some types of incident (Kahneman, 2011: 138-140; Sutherland, 2007: 11-24). Combined with cultural sensitisation towards vulnerability, risks are repeatedly and significantly overestimated.

For example, according to the IPCC there are about 15 to 20 deaths per year, in or following police custody (IPCC, 2016b: 4). This represents a risk approaching 1 in 100,000 for any individual, or one person across an entire police force, about every three years. Custody areas are relatively safe places but there is a gulf between apparent risk and objective risk. In the absence of hindsight, identification of those very few cases of genuine, as opposed to apparent high risk, is extremely difficult.

This point applies throughout policing. The 100 or so domestic abuse-related deaths per year amount to odds of 1 in 3500 of reported abuse cases. A victim with potential risk of death of 1 in 1000 would potentially qualify as high risk, whilst one with a risk of 1 in 5000 might count as a low risk. Yet applying even sophisticated risk factor scoring systems is unlikely to be able to successfully distinguish between a 1 in 1000, and a 1 in 5000 risk unless they are very carefully applied and

interpreted within a context of professional judgement. Despite the plethora of risk, it is also diffuse and hard to pin down with any degree of certainty. The implication is that most risk assessment in policing remains at best a quasi-scientific one, heavily informed and influenced by public expectation.

Policing is perhaps more than any other occupation, beset by ‘HILP’ – high impact, low probability risk. The risks associated with HILP events are notoriously difficult to deal with and there are no ready answers. Quasi-scientific processes such as risk matrices are at best illustrative and at worst a misleading form of false reassurance. Instead, it is probably better to use a combination of addressing obvious sources of risk, particularly through cross-cutting measures, together with reliance on officers’ learned experience. For example, in relation to reducing deaths in custody, it may be more effective to increase the frequency of cell welfare visits, rather than construct elaborate policies in attempts to identify and intercept very low-probability events.

This point is further illustrated by considering firearms licensing in a police service in south east England. Almost 1.9 million guns are legally held in England and Wales. National systems of licencing the ownership and use of firearms and shotguns are in place in the UK, with much of the responsibility for decision-making residing with local police forces although governed by law, together with Home Office and College of Policing guidance. The College has published ‘Authorised Professional Practice’ (APP) which offers ‘direction’ to forces to enable ‘effective and consistent firearms licensing’. In terms of risk assessment, the APP encourages forces to ensure that ‘all decisions are [...] primarily based on reducing risk to public safety through preventing foreseeable or avoidable harm’ (College of Policing, 2016).

The UK has one of the lowest rates of homicide by firearm in the world and ‘gun crime’, despite recent increases, remains at relatively low levels (UNODC, 2013). Although there have been few mass (‘spree’) killings in the UK using firearms, three such incidents that have occurred in recent years at Hungerford in 1987, Dunblane in 1996 and Cumbria in 2010. All were committed by individuals holding legitimate shotgun and/or firearm certificates. There are good reasons why police forces wish to maintain high levels of vigilance and professionalism in the granting of shotgun and firearm Certificates but also to look at ways in which risks can be minimised.

In 2015-16, the Canterbury Centre for Policing Research worked with a number of police forces with the aim of improving risk assessment for firearms licencing. The research involved interviews of decision-makers, together with the analysis of data on 730 licence holders who had either been refused a shotgun or firearm Certificate, or had been the subject of a licence revocation or had voluntarily surrendered their Certificate(s) (Bryant et al., 2016). The data consisted of a stratified random sample of files spanning the years 1992 – 2016. Semi-structured interviews were also conducted with Firearms Enquiry Officers and their supervisors, during which ‘dummy’ firearms application forms and associated scenarios were used to analyse the forms of reasoning employed when assessing risk. In terms of the data, an analysis of the reasons why licenses were refused in the first instance, or certificates were revoked, suggested some potentially important conclusions. For example, the statistical analytical technique Latent Cluster Analysis (Collins and Lanza, 2010) highlighted an unexpected risk association between ‘driving offences’, ‘alcohol abuse’ and ‘violence’ as factors likely to lead to a refusal. Similarly, for revocation, this methodology found a link between ‘mental health’ and the ‘security of a firearm’ as risk factors likely to lead to revocation of a licence (Bryant et al., 2016).

It was found that decision-making with firearms licencing has many of the characteristics of a so-called ‘wicked problem’ (Rittel and Webber, 1973: 155). Each application for a Certificate is unique and often novel, the police deal with uncertain, incomplete and sometimes contradictory information, there are few clearly ‘right’ and ‘wrong’ answers and there is a binary outcome at stake, namely to licence or not. Assessing risk, in the sense of estimating the likelihood of an individual posing a threat in the future, is a challenging undertaking, made particularly difficult in the context of firearms licensing by the ambiguities inherent in the law and in national policy. The ‘wicked problem’ that police forces confront on a daily basis has no straightforward solution. There is no simple association between specific measureable risk factors now or in the past, and subsequent threats in the future. For example, there is no evidence in the literature of a clear association between mental illness and violent behaviour. The clear majority of people with mental health issues do not act violently, with or without a weapon; there is little evidence in the literature of any causal links between mental illness and

violent behaviour (see, for example Short et al., 2012). Hence any automated ‘screening’ of applicants that uses mental health as a risk factor will inevitably lead not only to high numbers of false positives (those judged to pose a threat, but do not) but also to a number of false negatives (those without mental illness who do constitute a threat).

‘Algorithms’ derived from data analysis are increasingly being used in clinical settings such as medicine to support decision-making. Whilst there is potential for the use of algorithms in risk assessment in shotgun and firearms licencing, the police force was advised by researchers that an enhanced form of structured professional judgement should continue to form the basis for risk assessment and decision-making for shotgun and firearms licencing (Recommendations 3, 6-8, Bryant et al., 2016). Further, it was discovered that the current approach to evaluating risk could be more closely aligned with the specific threats posed (Recommendation 4, Bryant et al., 2016).

In summary, the unpredictability of human behaviour makes risk assessment in policing, extremely difficult. The risk of a dire outcome to an occurrence may appear to be very high, but in relation to all such incidents is objectively low. In general, the consequences of a delayed response or even a non-response are limited. This paradox raises the question of how relatively rare but very negative outcomes are likely to be treated when arbitrated upon by a non-involved party, in hindsight.

### Omissions and Hindsight

Policing involves myriad interactions between police and the public, who may behave in ways of greater or lesser predictability. Whether a policing omission should amount or not to personal culpability, depends in substantial measure upon the extent to which an adverse consequence was foreseeable.

Judicial and disciplinary decisions are inevitably taken after an event. Where an offence or breach of discipline by omission is alleged, the predictability of that event is frequently in issue. Current CPS guidance in relation to misconduct in public office, states that it should be ‘likely, which can probably be taken at the very least to be reasonably foreseeable’ (Crown Prosecution Service, 2017a). This judgement will be made with hindsight, a notoriously consistent and pernicious source of bias.

Psychologists have found that in order to make sense of the world, people construct mental linear narratives which link events. This process sometimes confers a spurious dependency of one event upon the previous one, known as the 'narrative fallacy' (Taleb, 2007). The possibility of alternative chains of events is systematically underestimated and people are consistently overconfident about their interpretations.

Daniel Kahneman gives the example of a group of students, who were asked their opinion of a U.S. city's decision not to spend a considerable sum on river flood defences. Of the group, 24 per cent disagreed with the decision. A second group of students was given the same scenario. They were also told that since the decision, the city had flooded causing major damage. However, they should not let this knowledge affect their assessment of the original decision. Of this second group, 56 per cent believed that the money should have been spent (Kahneman, 2012: 203-204). The conclusion was clear, and has been consistently confirmed by further studies (eg Kahneman, 2012: 200-203; Sutherland, 2009: 172-174). Judgements of decisions are invariably more critical when made with hindsight, even when those considering the evidence have been specifically instructed not to allow it to affect them. Events appear to have been 'waiting to happen'. In this example, hindsight turned a minority of critics into a majority, with clear implications for the decisions of court and tribunals. Moreover, the results of Kahneman's scenario were those of an academic exercise. A real flood would be accompanied by graphic media images of damage to property and traumatised victims, together with questions about why a foreseeable and preventable disaster was allowed to happen. In such circumstances, a small majority of critics might be amplified into an overwhelming one, leaving the makers of the original, apparently reasonable decision in a deeply unenviable position.

Hindsight bias may affect not only decision-makers, but also the organisation or individual who is subject of the allegation. They may agree that in the cold light of day, an omission seems to have been unreasonable. The probability of a 'false guilty plea' might also be compounded by the impossibility of recreating the pressures and uncertainties at the time, which may have involved making judgements in relation to several simultaneous events.

#### Risk and Misconduct - the Stances of Official Bodies

The narrative thus far has identified that the UK police service has accepted tacit responsibility for an increasing burden of public risk in response to legal requirements, shifting societal expectations and the findings of reviews in the wake of tragic events. Omissions in the form of failures to intervene and prevent negative outcomes, have become more significant in relation to accountability processes. However, the volume of apparent risk in operational policing is very high and identification of those circumstances where intervention is necessary can be extremely difficult. Retrospective judgements about the selection and adequacy of interventions are likely to be affected by the nature of the outcomes of events.

A variety of public bodies including the courts have responsibilities for the oversight of operational policing, including the assessment of actions taken in response to incidents. Their ability to do so may be subtly yet profoundly affected by their understanding of the nature of risk in policing and the influence of hindsight on perceptions. The following section summarises the policies of some well-established bodies which play an active and continuous role in the oversight of standards of policing. These include the College of Policing, the Crown Prosecution Service, the Independent Office for Police Conduct (formerly the Independent Police Complaints Commission) and Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services.

### **College of Policing**

The police service's formal view of risk is laid out in the College of Policing's 'Statement of Risk Principles' (College of Policing, 2013). This attempts to balance the need for reasonable public protection, with the reality that risk-based decisions will from time to time have negative outcomes. 'Principle 4' makes the point that 'Harm can never be prevented. Risk decisions should therefore be judged by the quality of decision making, not by the outcome'. Although individual statements in the document seem to be realistic, they produce apparent contradictions when juxtaposed, reflecting paradoxes in this complex subject matter.

For example, the document states that 'A person can be killed crossing the road but this does not – and should not – stop people from crossing roads. If the potentially serious outcome is unlikely to



happen, then it can be a wise risk to take.’ (College of Policing, 2013: Principle 3). However, the same Principle also makes the point that ‘The rigour of operational decision making must be proportionate to the seriousness of the risks involved and be supported by appropriate, considered and robust systems’. This guidance makes no mention of the frequency of the incident or the probability of a negative outcome. Taken at face value, the statements appear to indicate that police should allow individuals to cross the road, but only after thorough consideration and probably accompanied by a written audit trail.

Overall, the guidance given to disciplinary decision makers remains unclear in the face of high impact, low probability events. The sheer number of such events makes unrealistic, the expectation of rigorously thought-through and recorded decisions on all occasions. Many operational decisions are made either fleetingly or in the case of unforeseen events, not at all. They may be made under rival pressures and on occasion, accompanied by a brief mental resolve to revisit the problem at the next opportunity. In these circumstances, it is unclear whether omissions and quasi-omissions should be treated neutrally or as unreasonable decisions, although the difference could profoundly affect the outcomes of disciplinary and judicial processes.

### **Crown Prosecution Service**

Other bodies have made little attempt to find a formula to arbitrate upon the intricacies and paradoxes of risk-based decisions. When considering the prosecution of officers for failure to afford protection, the Crown Prosecution Service (CPS) has no guidance, other than the marginal-case view that heroic acts will be treated sympathetically (CPS, 2017b). More specifically and in relation to misconduct in public office, the police view that judgements should be made upon the quality of decision-making rather than the outcome, is contradicted. CPS guidance makes it clear that the consequences of neglect or misconduct are relevant when making prosecution decisions, stating that:

The likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected:

"It will normally be necessary to consider the likely consequences of the breach in deciding

whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively ...will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer". (Attorney General's Reference No 3 of 2003). (CPS, 2017a).

### **Independent Office for Police Conduct**

The Independent Office for Police Conduct (IOPC) replaced its predecessor, the Independent Police Complaints Commission (IPCC), in January 2018. In 2011, the IPCC produced a 'simple understandable position' statement in relation to the policing of risk. This summarised the Commission's position on a single page, the remainder of the document being devoted to case studies. It gave priority to police accountability and stated that '...in assessing decision making we will focus on whether the decision was reasonable and proportionate in all the circumstances' (IPCC, 2011). In avoiding the prescription of detailed principles, the IPCC negated the possibility of self-contradiction but did little to inform its own decision-makers or the police service, of what stance might be expected in difficult circumstances such as HILP incidents.

### **Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS)**

Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS, formerly HMIC) aims to improve policing by means of promoting compliance with perceived good practice in relation to particular aspects of policing. In 2010, the Chief Inspector raised concerns about the distortion of police resource use as a consequence of rising risk aversion, stating that: 'it affects officer behaviours; for example, officers now feel the need to escort drunk people home just in case they later come to some harm'. He concluded that a 'fudged, over-elastic view of what the police service could achieve had grown up in recent years' (Police Review, 2010: 10).

Approaching a decade later, similar comments could reasonably still be made. However, it is perhaps also the case that HMIC is inadvertently fuelling these trends. In a national inspection of child protection, the quality of police work in relation to 576 cases were considered. Of these, 177 were

judged to be of a 'good' standard whilst 179 were considered to be 'adequate' and 220 were 'inadequate' (HMIC 2015c: 10). Many strands of improvement were identified. Some required the police to do 'more' work, such as detailed investigations, whilst others required 'better' work such as the reduction of delays (HMIC 2015c: 12). Overall the report found that risk to children was under-recognised and under-estimated (HMIC 2015b: 77). Elsewhere the report made indirect acknowledgement of its resource implications, stating that: 'HMIC, along with police forces, would also benefit from a better understanding of the costs of police practices as weighed against their impact. A joint inspectorate approach may be necessary to take this work forward' (HMIC 2015c: 80).

A more recent HMIC report into child protection in the Metropolitan Police criticised the force, for 'serious failings' which 'put children at risk'. Three quarters of the 374 case files examined were found to be inadequate, whilst 38 were considered so deficient, that they were referred back to the Met to deal with perceived continued risk. According to HMIC, the force needed to give greater priority to child protection and in particular, provide dedicated leadership at a senior level (HMIC, 2016). Yet when the 38 cases were re-examined, not one was found where a child had suffered harm or an offender could be arrested, highlighting the gulf between apparent risk and identifiable harm (Metropolitan Police, 2016).

### Discussion and Conclusion

Over the last decade, the police service in England and Wales has been drawn by societal expectations, judicial inquiry reports and legislation into the adoption of increasingly heavy responsibility for public risk. The US medical world gives an example of the possible scale of financial and opportunity costs. Although arguably extreme, it suggests that in the absence of intervention, the process could go a good deal further than at present. There have already been significant consequences for individual officers and for police forces, particularly in respect of alleged omissions.

A marked rise in disciplinary exposure in respect of ‘neglect of duty’ allegations against officers, has been accompanied by increased readiness of the CPS to bring criminal proceedings for ‘misconduct in public office’. In the absence of evidence of a more negligent service, this appears to be a reflection of raised intolerance of negative outcomes, interpreted as ‘failures’. It is difficult to assess the ‘fairness’ of this more retributive regime, in any objective sense. Undated guidance by the Director of Public Prosecutions on the role of public opinion in sentencing, stated that ‘Although informed public opinion can properly be weighed in the balance, there is no place for populist punitiveness’ (Ministry of Justice, 2017).

The police and scrutiny bodies have adopted a range of policy approaches to alleged neglect, from the College of Policing’s inclusion of sometimes contradictory detail, to the IPCC’s broader assurance of reasonableness. These policies share the problem that it remains unclear in difficult circumstances such as an omission in relation to a high-impact, low-probability outcome, as to what the disciplinary or prosecution decision might be. Moreover, the policies of all of these organisations prefer the existence of proportionality between the quality of the decision-making process, and the impact of an event’s outcome. This stance tends to privilege a formal audited decision, such as in relation to a pre-planned operation, over one which was made more rapidly or one not made at all, where the necessity for it was not identified. It is not surprising if in these combined circumstances, the default position of decision-makers is to revert to the primary aims of their organisation: in the case of IPCC; transparent police accountability and in the case of the CPS; to prosecute where it is in the public interest to do so. The difficulty with this position is the unpredictability of which low-probability, high-impact adverse outcomes will come to fruition. This means that those cases which become the subject of scrutiny, may be uncomfortably close to being random. Moreover, the influence of hindsight is likely to make them appear to decision-makers to be the foreseeable consequences of negligence. Police, IPCC, CPS and HMIC policies have nothing to say about dealing with the effects of hindsight; nor does the interim Law Commission report on misconduct in public office, which is dominated by legal discussion.

In conclusion, the prospects for police work to incur substantial opportunity costs in attempts to mitigate public risk, are very high. The prospects for altering short-term public perceptions, or those of the media and pressure groups, are dim in the extreme. A more realistic aim would be to achieve a common understanding with scrutiny bodies about a limited number of key facets of dealing with public risk. These might include the reduction of the hindsight effect, the significance of consequences in cases of alleged omission, and the effects of resource constraints upon investigations. The adoption of joint policies on risk informed by evidence, provide the best prospect for policing risk together with the other demands upon the service.

### Bibliography

Attorney General (2003) Attorney General's Reference No. 3 of 2003 [2004] EWA 868. Available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2004/868.html> (accessed 18 October 2017).

BBC (2016) Lord Janner: Chances missed to prosecute, inquiry finds. Available at: <http://www.bbc.co.uk/news/uk-35352809> (accessed 16 February 2017).

Bichard M (2004) Bichard Inquiry Report. London: Home Office.

Bryant R, Blackburn B, Hewitt M and Falade M (2016) *Risk Management in relation to Firearms Licensing*. Report for the Metropolitan Police. Available at: <http://create.canterbury.ac.uk/16078/1/FET%20final%20report%20%28Redacted%29.pdf> (accessed 28 March 2018).

College of Policing (2013) Risk. Available at: <https://www.app.college.police.uk/app-content/risk-2/risk/> (accessed 21 February 2017).

College of Policing (2014) Armed policing Armed deployment. Available at: <https://www.app.college.police.uk/app-content/armed-policing/armed-deployment/#assess-threat-and-risk-and-develop-a-working-strategy> (accessed 21 February 2017).

College of Policing (2015) College of Policing Analysis: Estimating Demand on the Police Service. Available at: <http://www.college.police.uk/News/College-news/Pages/First-analysis-of-national-demand.aspx> (accessed 21 February 2017).

College of Policing (2016) Firearms Licensing. Available at: <http://www.app.college.police.uk/app-content/major-investigation-and-public-protection/firearms-licensing/?s=firearms+licensing> (accessed 21 February 2017).

Collins L and Lanza S (2010) *Latent Class and Latent Transition Analysis*. Wiley Series in Probability and Statistics. Chichester, UK: John Wiley and Sons Ltd.

Crawford A (2003) The Pattern of Policing in the UK: Policing Beyond the Police. In Newburn T (ed), *Handbook of Policing*. Cullompton: Willan, pp.136-168.

Crown Prosecution Service (2017a) Legal Guidance: Misconduct in Public Office. Available at: [http://www.cps.gov.uk/legal/l\\_to\\_o/misconduct\\_in\\_public\\_office/](http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/) (accessed 21 February 2017).

Crown Prosecution Service (2017b) Heroic Acts by Police Officers and Firefighters. Available at: [http://cps.gov.uk/legal/h\\_to\\_k/heroic\\_acts\\_by\\_police\\_officers\\_and\\_firefighters/index.html](http://cps.gov.uk/legal/h_to_k/heroic_acts_by_police_officers_and_firefighters/index.html) (accessed 21 February 2017).

Ericson RV and Haggerty KD (1997) *Policing the Risk Society*. Toronto: University of Toronto Press.

Furedi F (2006) The End of Professional Dominance. *Society* 43(6): 14-18.

Furedi F (2011) On Tolerance, the Ethos of Intolerance and Intellectual Courage. Available at: <http://www.frankfuredi.com/site/article/448/> 7 April 2011 (accessed 7 February 2017).

Furedi F (2016) The Cultural Underpinning of Concept Creep. *Psychological Inquiry*, 27(1): 34-39.

Garland D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Haslam N (2016) Concept Creep: Psychology's Expanding Concepts of Harm and Pathology. *Psychological Inquiry*, 27(1): 1-16.

Heaton R (2010) We Could be Criticised! Policing and Risk Aversion. *Policing*, 5(1): 75-86.

HMIC (2015a) PEEL: Police effectiveness 2015 (vulnerability) A national overview. Available at: <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/police-effectiveness-vulnerability-2015.pdf> (accessed 20 February 2017).

HMIC (2015b) Increasingly everyone's business: A progress report on the police response to domestic abuse. London: Her Majesty's Inspectorate of Constabulary.

HMIC (2015c) In Harm's Way: The Role of the Police in Keeping Children Safe. London: Her Majesty's Inspectorate of Constabulary.

HMIC (2016) Metropolitan Police Service – National Child Protection Inspection. London: Her Majesty's Inspectorate of Constabulary.

Hoffman J and Kanzaria HK (2014) Intolerance of error and culture of blame drive medical excess. *British Medical Journal* 349:g5702.

Home Office (2003) Victoria Climbié Inquiry: Report of an Inquiry by Lord Laming. London: Stationery Office.

Home Office (2008) From the Neighbourhood to the National: Policing our Communities Together. London: Home Office.

IPCC (2005) Police Complaints: Statistics for England and Wales 2004-2005. London: Independent Police Complaints Commission.

IPCC (2011) IPCC Position Statement: Risk in Police Decision Making and Accountability in Operational Policing. London: Independent Police Complaints Commission.

IPCC (2013) Maria Stubbings (Deceased) Investigation concerning the actions of Essex Police in 2008. London: Independent Police Complaints Commission.

IPCC (2016a) Police Complaints: Statistics for England and Wales 2015-2016. London: Independent Police Complaints Commission.

IPCC (2016b) Deaths During or Following Police Contact: Statistics for England and Wales 2015/16. London: Independent Police Complaints Commission.

Johnston L and Shearing C (2003) *Governing Security: Explorations in Policing & Justice*. London: Routledge.

Jones E and Wessely S (2010) British Prisoners of War: From Resilience to Psychological Vulnerability: Reality or Perception. *Twentieth Century British History* 21 (2): 163-183.

Kahneman D (2012) *Thinking, Fast and Slow*. St Ives: Penguin.

Klein G (2015) A Naturalistic Decision Making Perspective on Studying Intuitive Decision Making. *Journal of Applied Research in Memory and Cognition* (4): 164-168.

Law Commission (2016) Misconduct in Public Office Issues Paper 1: The Current Law. Available at: [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/01/misconduct\\_in\\_public\\_office\\_issues-1.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/01/misconduct_in_public_office_issues-1.pdf) (accessed 31 October 2017).

Maguire M and Dowling S (2013) Cyber Crime: A Review of the Evidence. Research Report 75. London: Home Office.

Metropolitan Police (2016) Met Response to HMIC report about child protection. Available at: <http://news.met.police.uk/news/met-response-to-hmic-report-about-child-protection-201323> (accessed 23 February 2017).

Ministry of Justice (2017) Public Opinion and the Punishment of Crime. Available at: <http://www.doj.gov.hk/eng/archive/pdf/art0902e.pdf> (accessed 28 February 2017).

Phythian M (2012) Policing Uncertainty: Intelligence, Security and Risk. *Intelligence and National Security* 27(2): 187-205.

Police and Crime Commissioner for Essex (2012) Risk Management Handbook. Available at: <http://www.essex.pcc.police.uk/wp->



[content/uploads/2015/08/20121122GovernancePoliciesPCCRiskManagementHandbookV1.01.pdf](#)

(accessed 20 February 2017).

Police Review (2010) Beat Bobbies feel the burden of three 'Eiffel Towers' of Paper. *Police Review*, 9 July, 10.

Rittel H and Webber M (1973) Dilemmas in a General Theory of Planning. *Policy Sciences* (4): 155-169.

Sheppard B, Ruben GJ, Wardman JK and Wessely S (2006) Terrorism and Dispelling the Myth of a Panic Prone Public. *Journal of Public Health Policy* 27(3): 219-245.

Short V, Lennox C, Stevenson C, Senior J and Shaw J (2012) Mental Illness, Personality Disorder and Violence: A Scoping Review. Available from:

<http://www.ohrn.nhs.uk/OHRNResearch/MIviolence.pdf> (accessed 4 October 2017).

Sutherland S (2007) *Irrationality*. London: Pinter and Martin.

Taleb NN (2007) *The Black Swan: The Impact of the Highly Improbable*. New York: Random House.

The Guardian (2010) Baby P's death could and should have been prevented, report says. 26 October.

Available at: <https://www.theguardian.com/society/2010/oct/26/baby-p-death-should-have-been-prevented> (accessed 16 February 2017).

The Guardian (2013) Professionals failed to prevent toddler Keanu Williams' death, report finds. 3

October 2013. Available at: <https://www.theguardian.com/society/2013/oct/03/professionals-failed-keanu-williams-rebecca-shuttleworth> (accessed 28 February 2017).

UNODC (2013) Global Study on Homicide. Available at: <http://www.unodc.org/gsh/en/data.html>

(accessed 18 October 2017).