The Use of Risk Assessments in Judicial Decision-Making

by Liberty Aldrich*

Questions concerning the use of risk assessment tools in domestic violence cases have been circulating for several decades. Dr. Campbell's Danger Assessment was—and continues to be—a major milestone in the response to the perpetration of domestic violence, helping both survivors and those assisting them to identify and respond to the threat of lethal violence. Since then, many tools have been designed. In some jurisdictions, these assessments are being used in both the criminal and civil justice response systems. In others, their use is much more circumscribed.

For those leading the drive to implement risk screening, the research is compelling. Multiple studies have supported the validity of actuarial risk assessments and have shown that attention to risk may reduce the incidence of future violence and death. At this point, it seems clear that victims may suffer additional harm if system responses fail to identify highly lethal cases and respond accordingly. But many questions still remain: What is the relationship between risk assessment, statutory and evidentiary frameworks, the presumption of innocence, and victim confidentiality? How do we balance individualized responses with data-driven knowledge? Will these tools be used to deny or grant inappropriate orders? Both advocates for victims and defendants have legitimate concerns.

These persistent questions about where, when, and how risk-related information can be introduced in legal proceedings are coming of age, as the articles in this issue by Julie Saffren and Jamie Balson demonstrate. Saffren reviews and considers the implications of the **Pettingill** decision from Kentucky (**Pettingill v. Pettingill**, 480 S.W.3d 920 (Ky. Sup. Ct. 2015). In this recent landmark case, the Kentucky Supreme Court upheld the trial court's decision granting a protection order which relied in part on the judge's knowledge of lethality factors.

The Kentucky Supreme Court held that the trial court had appropriately employed knowledge of domestic violence risk factors to inform its judgment as to whether the facts indicated the likelihood of a recurrence of domestic violence.

In contrast, Balson's article highlights a different judicial view of risk assessment in the context of domestic violence. In the course of her discussion on the use of assessments in the prosecution of domestic violence incidents, she reviews several court decisions that consider how and when this information can be introduced. Her article reveals that not all courts hold favorable views of risk assessment in the context of domestic violence. For example, Arizona case law (**State v. Ketchner**, 339 P.3d 645 (Ariz. 2014)) limits a prosecutor's ability to utilize the information in a lethality assessment and serves as a warning to the prosecution to proceed with caution when attempting to admit such evidence. Saffren's and Balson's articles reveal that while comparatively few decisions have tackled important questions about how risk-related information can be introduced in legal proceedings in the domestic violence context, this body of case law is growing.

Decisions allowing evidence of risk predictors have been more common in other, non-domestic violence related contexts. Many of these decisions allow the use of non-actuarial information during criminal proceedings and are cause for concern. See, for instance, **Jurek v. Texas**, 428 U.S. 262 (1976), which upheld the use of testimony to predict future dangerousness as a basis for a sentence to death.

More recent court decisions focus on the admissibility of predictors based on validated tools and are more limited in scope. In **Malenchik v. Indiana**, 928 N.E.2d 564 (Ind. 2010), for example, the Indiana Supreme Court upheld the use of a validated risk assessment score during sentencing but stressed that it was doing so because the court relied on numerous factors in making its decision. In **Wisconsin v. Loomis**, 872 N.W.2d 670 (Wisc. 2015), the Wisconsin Supreme Court recently certified two interesting questions for review concerning the use of a risk assessment and introduction of risk factors by a prosecutor during trial. In granting review, the Wisconsin court expressed concern about the use of a score from a proprietary tool that is not transparent or subject to review.

Although the cases described by Saffren and Balson, as well as those mentioned above, involve different screening instruments, it seems that a consistent theme is emerging. Tools are simply that—one factor that may be used only for particular purposes. It is unlikely that civil and criminal courts will uphold the use of risk assessment during the "fact finding" process. Each state or locality must follow the specific statutory and evidentiary rules of that jurisdiction and case type in making the required findings of fact *before* using a tool to inform the appropriate sentence, terms and conditions, or modifications. Additionally, even at sentencing, risk scores may not be determinative.

The **Pettingill** case that is discussed in Julie Saffren's article, in particular, provides a guidepost. As Saffren explains, the trial court did not rely on the risk information as though it were evidence in order to make the required statutory finding that abuse had occurred. Instead, the judge used his knowledge about lethality factors to inform his analysis of whether future abuse may occur (as was required in this jurisdiction) and to consider the appropriate terms of the order as allowed by the statute. That is, the judge made the finding that DV had occurred based on the evidence he had heard, and once he believed that the abuse had happened, he used his judicial knowledge on lethality factors to make the finding that the abuse might occur again. Thus, Kentucky uses a two-part standard, and the judge's knowledge on lethality

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informed his analysis on the *likelihood* of future abuse as well as what *types* of protection orders should be made.

One point bears reiterating. Courts must stick to statutory requirements. Risk tools are not evidence, and they should not be used either to grant or deny protective orders or determine guilt or innocence. But a judge's knowledge of risk factors and use of bench tools about risk can help with the decisions that accompany DV findings.

In keeping with this framework, the Center for Court Innovation, a nonprofit organization headquartered in New York which seeks to help create a more effective and humane justice system, has developed a guide for courts interested in developing a tool that starts with an examination of their statutory requirements. Additionally, as printed on the tool itself, it is meant to operate in context with assistance from advocates and others. For those interested in learning more about this guide, developed with support from the State Justice Institute, contact *info@courtinnovation.org*.

The hard work of correctly implementing these tools will continue by jurisdiction and case type, including criminal, civil protection, child custody, and access proceedings. Advocates' perspectives and experiences will be critical to making sure that these tools are used to enhance safety for survivors and their children rather than as a means of triaging cases by busy courts. As the article in this issue by Jill Messing and Jackie Campbell points out, we have made tremendous progress. Domestic violence risk assessments can help reduce lethality and are a critical piece of the puzzle in any coordinated response. Saffren's and Balson's articles provide important grounding to ensure that we are doing so within an appropriate legal context as we move forward. ■