Shifting Risk: Bail and the Use of Sureties†

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Abstract

The criminal justice system is not immune to risks to its own reputation. While the court has always been responsible for making difficult decisions, the institutional climate may have shifted to a state of hyper-awareness and vigilance in trying to insulate the system from risk. If the 'responsibilisation' of the individual, coupled with the rise of risk governance, has created a culture whereby state actors are reluctant to make difficult decisions, then this shift could have important consequences in the context of bail decisions for accused people detained by the police. This article reviews these consequences in the context of a range of empirical observations on the subject of sureties. Using data from 148 days of bail court observation and 4,085 court case appearances in eight different courts in Ontario, Canada, this article presents evidence that courts regularly ignore the intentions of law makers who created 'judicial interim release'.

Introduction

Not only are those responsible for making decisions about pre-trial release concerned about accused people committing serious offences while on bail, they are probably also concerned about the repercussions this offending may have on the legitimacy and authority of the court as a criminal justice institution. In the context of those released, this risk aversion leads, I believe, to an off-loading of responsibility by those who have the authority to release on bail those who are charged with an offence. Moreover, this leads, I suggest, to more people being detained by the police for a bail hearing, fewer people being released on consent by the Crown Attorney (the prosecutor), and more stringent conditions being placed on those who are released.

Webster, Doob and Myers (this issue) have presented evidence that an increasing proportion of prison space in Canada is being used to hold remand prisoners. Over the past 20 years the rate and proportion of Canadian prisoners who are not sentenced has been slowly increasing, even though the overall imprisonment rate has not changed much and, at least in the past 15 years or so, crime has apparently been decreasing. One factor that might be contributing to this shift is that Canadian courts and criminal justice officials have become risk averse and are thus reluctant to release offenders because of the possibility that

† Some of the findings contained in this article derive from work carried out for the Ministry of the Attorney General, Ontario. I would like to thank that Ministry – and in particular Ken Anthony – for supporting research on the bail process. Obviously, any interpretations of the findings or statements contained in this article are mine and do not necessarily reflect the views of the Ministry of the Attorney General, Ontario, or any of its employees.

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the accused person will commit an offence while on bail.[1] This article will suggest that 'risk aversion' in the bail courts is evident even in cases in which an accused person is released. The suggestion is made that courts, and criminal justice officials, avoid possible responsibility for offending by accused people who are waiting for trial by displacing responsibility onto others – in this case ordinary people in the community who agree to 'guarantee' the good behaviour of an accused person.[2]

After being arrested, an accused person, under Canadian law, must be brought before a justice of the peace or judge to determine whether detention is necessary unless he or she has been released by the police beforehand. Although there is a growing list of exceptions, the rule in law is that the Crown must 'show cause' (s515(1) of the *Canadian Criminal Code*) why the accused should not be released. If the justice is not convinced that the accused should be detained, the accused is to be released. Five types of release are listed in s515(2) starting with the accused 'giving an undertaking with such conditions as the justice directs' (subs(a)). Subsection (c) of the five subsections involves the accused 'entering into a recognizance … with sureties … without the deposit of money'. Perhaps the most important symbolic aspect of this list is that s515(3) states that '[t]he justice shall not make an order under any of the paragraphs 2(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made'. Said differently, there is a presumption in favour of less onerous conditions of release in cases in which release is justified.

This article argues that the formal law bears little resemblance to how the criminal law is practised on a day-to-day basis. Despite enumerated instructions concerning how courts are to approach the release decision of accused persons, the court appears to disregard the legislated (ordered) approach to bail as outlined in the *Criminal Code*. Indeed, it seems courts apply their own interpretations of the Code, interpretations that are consistent with a court's culture of risk aversion. Data, amassed from 148 days of bail court observation and 4085 court case appearances, suggest that courts regularly disregard the formal way in which the 'judicial interim release' provisions are prescribed by law. This article focuses on the use of sureties in Ontario courts – the most onerous form of release available in law short of the deposit of actual 'money or other security' (s515(2)(d) and (e)). It argues that, in many courts, release under the 'supervision' of a surety has come to be considered the standard for securing release. Given the absence of any indication in law that a surety release should be the presumptive form of release, it is argued that this practice is intimately intertwined with the court's risk adverse culture.

Organisational Risk Avoidance

The bail decision involves an assessment of what Power (2004) conceptualises as both primary and secondary risk. Primary risk is risk posed by accused persons if they are released into the community, while secondary risk is the risk to the reputation of the criminal justice system if an accused offends while on bail. Together, these two concerns

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1 See Webster, Doob and Myers (this issue) for further discussion of factors that are contributing to the remand problem

2 This is consistent with what Garland (1996) calls 'responsibilisation' – a practice that involves the government devolving responsibility for crime prevention on to private organisations and citizens. In this context, private citizens are increasingly being called upon to take responsibility for their own personal safety and for general crime prevention, as the state looks to redefine the security it can reasonably be expected to provide.

have created a culture whereby actors are increasingly reluctant to make the decision with respect to release. Hutter and Power (2005:18) suggest that 'risk management routines may have more to do with a certain kind of organisational legitimacy and responsibility framing than with having the organisational capacity to encounter risk inventively and intelligently'. This implies that concern for organisational legitimacy may be the governing force behind bail decision-making, and, as such, is preventing the system from addressing other means of negotiating the risk posed by accused people.

Concerns about the consequences of a decision may generate feelings of unease among criminal justice actors, who may then become reluctant to make decisions for which they are solely responsible for fear of occupational and reputational repercussions. What then happens, according to Power (2004:11), is a displacement of valuable, yet vulnerable, professional judgments in favour of defendable processes. Concern and a hyper-awareness of uncertainty have made risk the modelling ideology of organisations; where a 'good' organisation has come to be equated with a being a good risk manager.

Accountability and Blame-ability

On this argument society has become caught up in what Douglas (1992:15) terms a 'blame system' in which every misfortune is turned into a risk which was potentially preventable, and for which someone is to be found culpable. Implicit in this system is the belief that someone is at fault, somehow negligent and thus blameworthy for every misfortune. There is an expectation of perfect security and an expectation that the government is somehow capable of providing this and it is desirable that they do so. What has developed is a prosecution-seeking, compensation-oriented society, where certain risks are no longer seen as inevitable, but rather are seen as the result of wrongdoings of individuals (Hudson 2003:52).

Despite an exaggerated level of fear, the public tends not to accept the idea that security measures are not, and cannot be infallible. The public does not seem to accept the reality that the correct decision made on the basis of all available evidence may not turn out to be a happy one. This intolerance of imperfection in assessing risk deconstructs defensible decision-making, as the decision is no longer defensible in a culture addicted to the allocation of blame. When precautionary measures and security systems fail the public looks to assign culpability rather than assessing whether the decision was a reasonable one to make. In times of crisis, cues indicative of danger are easily identified in retrospect, but at the time of the decision their significance may not have been immediately evident. 'Thus, the reflexive luxury of the observer looking back at critical events is not available to the organizational participants who must make decisions and who need to decide now which piece of information should alert them of a potential risk event' (Hutter & Power 2005:12). The public, however, especially in the wake of a crisis, is not necessarily sympathetic to this logic.

In a culture of accountability and transparency, it has become progressively more risky to venture any judgment or to take any responsibility for a risky decision. The ensuing disinclination has resulted in avoidance or prolonging of the bail decision-making process. The fear and hyper-defensiveness that makes actors reluctant to make decisions can be understood as a 'defensive orientation towards the need to justify decisions in retrospect' (Power 2004:47). In holding officials accountable for decisions that go wrong, they are more preoccupied with managing their own risk; they have become so focused and absorbed in a

risk minimisation mentality that they are fearful of making a decision. Power contends that 'where this "risk game" is closely bound up with a "blame game" the effect can be highly defensive reactions from organizational participants' (2004:46). In this way the bail decision gets passed farther up the chain of authority.

The consequences of this type of defensive risk management may be catastrophic for professional judgment. Professionals embody 'a culture which accepts and understands that such specialized judgements may turn out in retrospect to be wrong, but which if made consciously and responsibly are not necessarily blameworthy' (Power 2004:47). This professional culture, however, is being deconstructed in an environment that demands accountability. Regardless of the defensibility of a decision, actors, aware that they are being monitored, will prefer to make the more conservative decision to avoid blame. This trend results in a dangerous flight from judgment and creates a culture of defensiveness (Power 2004:14).

Evaluating Risk in the Bail Court

Criminal courts have the ultimate responsibility for determining the guilt or innocence of an accused. This determination is based on a stringent standard of proof; the court must be convinced, beyond a reasonable doubt, of the guilt of an accused in order to find him or her guilty. The bail court, however, does not and cannot operate on this standard, since its decisions involve preventive detention based on an assessment of future risk, not the determination of past behaviour. The bail court is in the business of estimating and weighing risks. In this assessment, the court must determine if the accused poses an inappropriate risk such that they cannot be released back into the community. What is more, the admissibility of evidence submitted to the bail court, as dictated by s518(1)(e), is assessed on the basis of whether or not it is considered to be 'credible and trustworthy'. This lower standard of proof is designed to ensure the bail hearing proceeds as expeditiously as possible. The necessary informality that flows from this need for expediency means that the prosecution does not bear the same burden of proof when arguing for the detention of an accused. As the 'trier of risk' rather than the 'trier of fact', the court only has to be satisfied, according to established case law, that on the 'balance of probability' the accused will fail to return to court or commit another offence, to justify their detention.[3]

Hannah-Moffat and O'Malley (2007:17) suggest that the prediction of risk has shifted away from focusing on specific individuals to targeting entire categories of individuals who share 'risk factors'. What is interesting about this shift is that actuarial techniques of risk assessment are not used in the bail court. There are no objective predictive instruments available for routine cases such as there are for release decisions made by parole boards. Instead, assessments of risk are based almost entirely on personal, subjective judgments of an accused's risk. The only semi-structured measures that are used are the accused's criminal record and the number of times, if any, the accused has 'failed to comply' with previous court orders or has 'failed to appear' for court hearings. The other factors that may possibly influence the bail decision are subjective interpretations and assignments of cultural meaning to a variety of personal factors such as employment, housing, income, neighbourhood, immigration status, age and the availability of a suitable surety. Although

[3] A third justification for refusing to release an accused person – that releasing the accused will bring the administration of justice into disrepute – is only rarely raised in court. Typically the two grounds listed above are the focus of the decision.

these variables can only be subjectively assessed, they are used in a manner that suggests they are objective criteria with predictive capabilities. Said differently, an assertion might be made about an accused person's immigration status as if it was 'known' or 'well established' that something flowed from a particular immigration status. It should be noted that formal risk assessments are often used not so much because they are capable of creating accurate predictions but to ensure that the decision is defensible if something should go wrong (Rose 1997:18).

Valverde (1999:190) suggests that a government's involvement and intervention, through ideas around risk, is more likely to occur in situations where statistics are not readily available. Risk language facilitates an extension of judicial involvement because, 'while "actual harm" requires empirical proof, virtually anything can be considered under the category of "risk"'. The bail decision is not one in which the probable risk an accused presents is quantified. Instead, the assessment is based on perceptions of potential 'riskiness'. As techniques of uncertainty, judicial evaluations are necessarily speculative estimations of a possibility rather than an objectively calculated probability. This vagueness lends considerable scope to factors considered in the risk assessment; when coupled with the more relaxed evidentiary standards of admissibility, most evaluations, even the most subjective interpretations, are considered relevant at the bail hearing.

The Law on the Books

Until 1972, Canada had what is best described as a 'cash bail' system (see Friedland 1965 for an empirical analysis of the operation of bail at that time). A number of amendments to the *Criminal Code* introduced by the *Bail Reform Act* in 1972 suggest the guiding philosophy of the Act was to be changed to one aimed at encouraging the release of accused into the community pending trial. Promoted as a rights protecting reform, this Act bestowed vast powers of release upon police officers, a power designed with the goal of avoiding a continuation of unnecessary arrests and detention. The Act also created new forms of release for courts, so as to encourage and facilitate an increased use of release orders. It also placed the onus of justifying detention on the Crown, restricted the use of cash deposits and stipulated criteria for the determination of release, which included a new secondary ground 'in the public interest', intended to prevent further offending (Trotter 1999:12). Together, these amendments were hoped to rectify the inefficiency and unfairness that characterised the former bail system. However, within four years of its implementation, a number of 'housekeeping' amendments were integrated into the newly formulated Act. Of primary interest and concern was the shifting of the onus, in relation to certain offences, from the Crown justifying why detention is necessary to the accused justifying why he or she should be released. These 'reverse onus' provisions started with charges for offences allegedly committed while the accused was on bail pending the hearing of other charges, but since then the list of situations in which the accused must justify release has become considerably longer (Trotter 1999:13).

Hence the importance, symbolically (and one would presume practically), of the original legislation is that it represented a shift from a presumption of detention to a presumption of release. The overall provision would suggest that 'bail' decisions are governed by an underlying presumption that the accused should be released from custody into the community until trial (*Criminal Code* s515(1)). This means that, absent exceptional circumstances surrounding the offence and the offender, the police officer and subsequently the court is to presume the accused should be released on bail pending their trial, unless the

Crown can show just cause why the detention of the accused is justified. This, Trotter (1999:245) asserts, mandates a 'ladder' approach to the decision about the appropriate form a release order should take. Each possible form of release is to be considered and ruled out in turn, until the court comes to the least onerous form of release that would be appropriate in the circumstances, while being mindful of the necessity of exercising restraint in the use of detention and imposing conditions of release. The mandated ladder approach is consistent with the notion of a presumption of release. Trotter (1999:245) does suggest, however, that the ladder approach does not appear to be absolute. Indeed, it appears to be inapplicable in cases where the accused is required to demonstrate why release is justified. In these cases it would appear to be the responsibility of the accused to demonstrate why the most onerous form of release should not be imposed.

Sureties

One of the more onerous conditions is the requirement that the accused be released under the control of a surety. The theory behind sureties is interesting in itself. A surety is someone who indicates a willingness to pay the court a specified amount of money if the accused person fails to appear in court or violates a condition of their release. Historically, the role of the surety was to relieve the jail of its responsibility for ensuring the accused appeared in court. The state's responsibility for custody and control of accused persons was effectively transferred to an independent third party. Over time, however, the obligations of the surety have been extended and intensified with the introduction of additional conditions of release. While the surety is still charged with ensuring the accused's attendance in court (primary grounds), sureties are also expected to ensure the accused does not commit any further criminal offences and that the accused complies with the conditions placed on their release by the court (secondary grounds), as well as refraining from interfering with the administration of justice. Sureties are thus charged with a quasi-policing function. They are jailors in the community in that they are expected to monitor accused persons' actions, make sure that accused persons comply with the conditions of their release, and that they are present for all of their court appearances. In other words, the surety takes on an onerous responsibility – and a responsibility in which a failure can, potentially, cost an identifiable amount of money.[4] In effect, a surety's undertaking removes from the state the sole obligation to supervise accused. It is worth noting that the use of sureties is so institutionalised in most courts that they were routinely suggested both by the Crown and the defence as potential conditions of release.

Since s515(2) stipulates a ladder approach should be used to select the appropriate type of release, an accused should be released without conditions, without a monetary component and without a surety unless the Crown shows cause as to why a more onerous type of release is warranted (Trotter 1999:244-245). However, rather than being an exceptional requirement, having a surety in order to secure release has become common practice in some Ontario courts, a convention that was, arguably, not envisioned by the legislation and is almost certainly not consistent with it.

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[4] Unfortunately, there are no data on how often sureties are, in fact, required to pay the amount promised if an accused violates a condition of release. The belief in Ontario is that in most cases the province does not attempt to recover the surety amount, though some jurisdictions use this process more than others. What we do know is the 'estreatment process' is discretionary, whereby the judge can decide to award only a small portion of the money promised by a surety.

Methodology

Data from 148 days of court observation, conducted in eight different Ontario courthouses and concentrated in southern Ontario, are used as the basis for this study. These courts were selected primarily as a result of the needs of an Ontario government project interested in understanding the operation of the court along with the proximity of the court to the researcher. The initial court was observed in April 2006 and the final court observation was conducted in December 2008. Both Court 1 and 2 were initially observed for 20 days each. Both of these courts have since been revisited for subsequent observational periods of five consecutive days. All observations were made by me with the exception of Court 3 which was the subject of a coordinated study by another researcher. Data from this court (based on 39 days of observations) have been made available to me. All other courts were observed for five days. Over the course of 148 days of court observation, 4085 cases were observed. The number of cases observed varied between courts and by day from 2 to 75 cases, with a mean of 30 cases observed each day. The large range is attributable to some extent to the organisation of bail courts in each jurisdiction. In some locations, bail is centralised in one location. In other locations multiple courts are run. As can be seen in Table 1, the most common outcome on a given day for a case was that a decision was not made in bail court (the last of the 'outcomes' listed in Table 1). This non-decision with respect to bail generally took the form of an adjournment request, which almost invariably across courts came from the defence.[5]

Table 1: Outcome of Case on the Date Observed

	Released with the consent of the Crown	Contested release (after a show cause hearing)	Detention order (contested or not)	Other (no decision made with respect to bail or various other relatively rare case outcomes)	Total (number of cases seen in which the outcome was known)
Court 1	14.7% (128)	3.7% (32)	10.2% (89)	71.4% (622)	100% (871)
Court 2	12.5% (216)	2.4% (41)	5.6% (97)	79.5% (1369)	100% (1723)
Court 3	19.6% (148)	2.8% (21)	2.4% (18)	75.2% (566)	100% (753)
Court 4	15.8% (23)	2.7% (4)	6.2% (9)	75.3% (110)	100% (146)
Court 5	15.5% (22)	3.5% (5)	5.6% (8)	75.4% (107)	100% (142)
Court 6	10.5% (20)	4.2% (8)	4.7% (9)	80.5% (153)	100% (190)
Court 7	20.9% (29)	1.4% (2)	5.0% (7)	72.7% (101)	100% (139)
Court 8	22.5% (11)	12.2% (6)	8.2% (4)	57.1% (28)	100% (49)

[5] See Webster, Doob and Myers (this issue) for further discussion of this issue.

It is worth noting that most releases were with the consent of the Crown rather than as a result of a contested hearing. The uncontested nature of bail hearings is consistent with the uncontested nature of the outcome of criminal cases more generally. What is notable, however, about these 'consent releases' is the frequency with which sureties were made responsible for the good behaviour of the accused.

'Is Your Surety Present?'

There are two different types of bail hearings with two different decision-makers. In a consent release, the Crown recommends the release of the accused to the court and the justice of the peace generally accepts, without challenge, the Crown's judgment on the type of release required. However, in a 'show cause' hearing, the decision to release the accused and the form this release will take rests solely with the justice of the peace. As is demonstrated below, both decision-makers regularly require sureties for release.

Notwithstanding the codified ladder approach to the release decision, some bail courts in Ontario seem to skip over the first two rungs on the ladder, going directly to a surety release, apparently without considering each individual form of release in turn. Sureties, it would appear, have become the norm in many Ontario courts. As Webster, Doob and Myers (this issue) have noted, accused persons in Ontario are becoming more likely to be detained for a bail hearing (rather than released by the police) with the proportion of cases with bail hearings increasing from about 39% to about 50% in a six year period. Although detailed information about the conditions of release across the province do not exist, we can see in Table 2 that, in the vast majority of cases, the Crown or the court requires a surety for the accused to secure a release order.

Accused in court were routinely asked if they had a surety present in court and if they did not, the legal aid lawyer in the court (known as 'duty counsel') would typically attempt to contact someone on their behalf. This appeared to be done independent of the nature of the case. It was not unusual for accused who were hoping to be released on consent by the Crown or who wanted to have a full 'show cause' hearing to be counselled by duty counsel that it was in their best interests to delay the proceedings in order for them to secure and have present an appropriate surety.

Table 2 clearly indicates that in most cases in which the Crown consented to the release of the accused from custody, a surety, suitable to the court, was required. An alternative to a surety in some courts was for an accused to be supervised by a 'bail supervision' program (offered by a not-for-profit organisation). It is clear that sureties have become the norm, rather than the exception, in most courts. Though there appears to be relative consistency amongst the courts observed in terms of the proportion of cases in which a surety is required, Court 3 stands in stark contrast. In this court, sureties are rarely required for a consent release. There is no obvious reason for this difference (in terms of the nature of cases, etc.). It would appear that in this court, the expectation that sureties are required simply does not exist.

Table 2: Was a Surety Required for a Release as a Result of Consent by the Crown?

	Yes	No – Release under super-vision of bail program	No (release without a surety on their own recognizance)	Not known, or, in the case of those already on bail – 'same' (unspecified) conditions	Total (number of cases –with a release on Crown's consent as the outcome)
Court 1	60.6% (77)	11.0% (14)	11.8% (15)	16.5% (21)	100% (127)
Court 2	63.6% (140)	12.3% (27)	14.1% (31)	10.0% (22)	100% (220)
Court 3	23.2% (36)	12.3% (19)	52.9% (82)	11.6% (17)	100% (154)
Court 4	69.6% (16)	8.7% (2)	13.0% (2)	8.7% (2)	100% (23)
Court 5	61.9% (13)	4.8% (1)	33.3% (7)	--	100% (21)
Court 6	70.0% (14)	5.0% (1)	15.0% (3)	10.0% (2)	100% (20)
Court 7	89.7% (26)	--	10.3% (3)	--	100% (29)
Court 8	60.0% (6)	--	40.0% (4)	--	100% (10)

The Crown's inquiry regarding the availability of a surety (which was often observed) suggests that the Crown might be willing to consent to the release of the accused if they have an appropriate surety willing to take them into their care. Indeed, it was not unusual for the Crown to insist the surety be physically present in court so that the Crown could personally assess the surety. Since there are justices of the peace available to interview and approve sureties outside of court once bail conditions have been set, bail can be determined in the absence of a surety. However, it appears to be standard practice for courts to want the surety to be physically present in the courtroom so they can be assessed and approved of in court. This practice seems to have grown out of the desire of Crowns and justices of the peace to have the surety present to hear and be fully aware of the allegations and the conditions of release.

As can be seen in Table 3, in a non-trivial number of cases where the Crown is consenting to the release of the accused, the surety is called forward to give evidence. While this is sometimes done informally in court, in most cases sureties are asked to give sworn testimony on their assets, relationship with the accused, knowledge of the allegations and plan of supervision. Admittedly, this is done in some cases so the surety can be named, thus doing away with the necessity to be re-interviewed by a justice of the peace.

Table 3: Was a Surety Interviewed in Court for a Release Consented to by the Crown?

	Yes	No	Total
Court 1	20.8% (16)	79.2% (61)	100% (77)
Court 2	11.4% (16)	88.6% (124)	100% (140)
Court 3	Unavailable	Unavailable	Unavailable
Court 4	93.8% (15)	6.2% (1)	100% (16)
Court 5	46.2% (6)	53.8% (7)	100% (13)
Court 6	100% (14)	--	100% (14)
Court 7	65.4% (17)	34.6% (9)	100% (26)
Court 8	33.3% (2)	66.7% (4)	100% (6)

In those cases in which an accused's release is contested and there is a full 'show cause' bail hearing, in all eight courts an even higher proportion of cases required a surety for release. It is noteworthy that, despite Court 3 rarely requiring a surety for a consent release, in most cases in which there was a 'show cause' hearing a surety was required (Table 4).

Table 4: Was a Surety Required for a Release Contested by the Crown after a Show Cause Hearing?

	Yes	No – Release under supervision of bail program	No (release without a surety)	Total (number of cases –with a release after a show cause hearing)
Court 1	87.5% (49)	8.9% (5)	3.6% (2)	100% (56)
Court 2	80.5% (62)	18.2% (14)	1.3% (1)	100% (77)
Court 3	67.7% (21)	12.9% (4)	19.4% (6)	100% (31)
Court 4	100% (10)	--	--	100% (10)
Court 5	62.5% (5)	12.5% (1)	25.0% (2)	100% (8)
Court 6	90.0% (9)	--	10.0% (1)	100% (10)
Court 7	100% (6)	--	--	100% (6)
Court 8	63.6% (7)	27.3% (3)	9.1% (1)	100% (11)

As indicated in Table 5, in nearly all of the cases in which a surety was required, the surety took the stand to give evidence during the hearing. This is not surprising since it is through the surety's testimony that defence counsel introduces to the court the plan of release and supervision for the accused. The surety's testimony typically made up most of defence counsel's evidence. It is also through this evidence that the Crown tests the character of the surety, the surety's relationship with the accused and level of supervision that the surety is able to provide.

Table 5: Was a Surety Interviewed in Court during the Show Cause Hearing?

	Yes	No	Total
Court 1	83.7% (41)	16.3% (8)	100% (49)
Court 2	88.7% (55)	11.3% (7)	100% (62)
Court 3	100% (21)	--	100% (21)
Court 4	90.0% (9)	10.0% (1)	100% (10)
Court 5	100% (5)	--	100% (5)
Court 6	100% (9)	--	100% (9)
Court 7	100% (6)	--	100% (6)
Court 8	85.7% (6)	14.3% (1)	100% (7)

Court Efficiency and Sureties

Under s516(1) of the *Criminal Code*, a justice may, before or at any time during the course of any proceedings, and upon application by the Crown or the accused, adjourn the proceedings and remand the accused in custody. The Crown is permitted to request an adjournment of the bail hearing for the purposes of making further inquiries or obtaining further documents pertaining to the accused and the alleged offence. In addition, the accused can request and be granted an adjournment for the purposes of retaining counsel, procuring a surety and for formulating a release plan. All bail adjournments, by law, however, cannot exceed three clear days unless the accused consents to it being longer (s516(1)).

Most requests for an adjournment of the bail proceedings come from the defence.[6] As can be seen below in Table 6, adjournments are regularly requested for the purposes of securing a suitable surety. In addition to the cases that were adjourned for the explicit purpose of locating a surety, adjournments for a 'show cause' hearing are often requested because the accused is not ready to proceed in the absence of their counsel or surety. The non-trivial number of cases adjourned with 'no reason given' to the court is also noteworthy. It is quite likely that a number of these adjournments are for the purposes of arranging a surety's attendance in court.

[6] See Webster, Doob and Myers (this issue) for further discussion of this issue.

Table 6: Reason Provided to the Court for the Adjournment Request

	Surety related	For a show cause hearing	Other Stated Reasons	No reason provided to the court/unknown reason	Total (number of cases adjourned to another day)
Court 1	15.7% (64)	1.2% (5)	60.0% (244)	23.1% (94)	100% (407)
Court 2	16.8% (175)	1.9% (20)	54.7% (570)	26.6% (277)	100% (1042)
Court 3	4.0% (20)	23.7% (118)	49.8% (248)	22.5% (112)	100% (498)
Court 4	18.8% (15)	8.8% (7)	47.5% (38)	25.0% (20)	100% (80)
Court 5	25.9% (22)	14.1% (12)	47.1% (40)	12.9% (11)	100% (85)
Court 6	29.2% (19)	--	53.8% (35)	16.9% (11)	100% (65)
Court 7	22.1% (15)	7.4% (5)	58.8% (40)	11.8% (8)	100% (68)
Court 8	20.0% (5)	36.0% (9)	36.0% (9)	8.0% (2)	100% (25)

Sureties must not only have sufficient assets and commit to an intensive level of supervision, they must be seen as being of strong moral character and demonstrate a solid relationship of trust and respect with and for the accused. Procuring a suitable surety, consequently, takes the concerted effort of both the accused and private or duty counsel, and it often takes considerable time to locate a person who is both suitable to the court and willing and able to take on this responsibility. This is further complicated by the apparent requirement or practice in some courts that sureties be present in court prior to court starting and must remain in court until their case is reached. This means that cases are often held down until later in the day or adjourned to another day for the accused to locate a suitable surety. The case may also be delayed until a date can be found when both counsel and the surety are able to be present for the consent release or show cause hearing.

'How Much Can You Afford?'

Sureties are required to promise the court a sum of money in the event the accused fails to comply with their conditions. This financial promise is meant to act as an incentive to the surety to ensure the accused returns to court, complies with their conditions of release and does not re-offend while at large in the community. Should the surety fail in his or her responsibility to supervise the accused and fail to report non-compliance to the police, they stand to lose the money they promised the court. Practice suggests that sureties should be evaluated in terms of their character, the nature of their relationship with the accused, along with their ability to supervise and control the accused and not so much on their financial

assets.[7] Accordingly, the value of the required bail is supposed to be set in relation to their means, not the alleged offence of the accused (King 1971:51, 59; Koza & Doob 1975a:259; 1975b). While this may be the way the law has been formally interpreted, it appears that the financial ability of a surety remains a primary consideration in deciding the surety's suitability to act in a supervisory capacity, a practice reminiscent of Canada's former cash bail system.[8] This would, then, effectively discriminate against people without well-to-do friends or family. However, it would appear that caution must be exercised in setting the quantum of bail; under s11(e) of the *Canadian Charter of Rights and Freedoms*, accused have the right to reasonable bail and not to be denied bail without just cause. Should bail be set at a level that is not available to a proposed surety, it is tantamount to a detention order, which is arguably a violation of the *Charter*.

As can be seen in Tables 7 and 8 below, sureties are required to promise considerable assets in their commitment to the court. There does, however, appear to be considerable variability between the courts in terms of the amounts required. In a number of courts, approximately 50% of consent release cases required more than $1000 to be promised on behalf of the accused.

Table 7: Amount Surety Required to Promise the Court for a Consent Release

	$1000 or less	$1001 to $5000	$5001 to $10 000	$10 001 or more	Total (number consent releases in which the amount of bail was known)
Court 1	59.6% (62)	33.7% (35)	3.8% (4)	2.9% (3)	100% (104)
Court 2	54.3% (108)	40.2% (80)	3.0% (6)	2.5% (5)	100% (199)
Court 3	86.3% (101)	12.8% (15)	0.9% (1)	--	100% (117)
Court 4	47.6% (10)	52.4% (11)	--	--	100% (21)
Court 5	42.9% (9)	42.9% (9)	14.3% (3)	--	100% (21)
Court 6	33.3% (6)	55.6% (10)	--	11.1% (2)	100% (18)
Court 7	13.8% (4)	51.7% (15)	20.7% (6)	13.8% (4)	100% (29)
Court 8	30.0% (3)	60.0% (6)	10.0% (1)	--	100% (10)

[7] Though the Criminal Code does not enumerate criteria, Trotter (1999) suggests a wide range of factors have always been considered relevant to ascertaining the suitability of a surety. The following are categorically excluded from acting as a surety: accomplices, counsel for the accused, persons in custody or awaiting trial on a criminal offence, infants, someone who is already acting as a surety for someone else and non-residences of the province. While having a criminal record is considered indicative of moral character and will often preclude an individual from acting as a surety, this alone does not automatically disqualify a surety. In these cases the court considers both the type of conviction(s) on the proposed surety's record and how long ago the offence(s) occurred.

[8] See Friedland (1965), Bottomley (1970), King (1971).

The amounts required by the court are generally higher for 'show cause' hearings than for consent releases. This makes intuitive sense, given it is more likely that those cases which are perceived as presenting a higher risk of absconding or of misbehaviour will have show cause hearings. Court 3, however, continues to be an anomaly in its practices around bail, where 71% of 'show cause' cases require a promise of $1000 or less.

Table 8: Amount Surety Required to Promise the Court after a Show Cause Hearing

	$1000 or less	$1001 to $5000	$5001 to $10 000	$10 001 or more	Total (number releases after a show in which the amount of bail was known)
Court 1	33.3% (11)	39.4% (13)	21.2% (7)	6.1% (2)	100% (33)
Court 2	29.3% (12)	31.7% (13)	17.1% (7)	22.0% (9)	100% (41)
Court 3	70.6% (12)	23.5% (4)	5.9% (1)	--	100% (17)
Court 4	25.0% (1)	75.0% (3)	--	--	100% (4)
Court 5	50.0% (3)	33.3% (2)	16.7% (1)	--	100% (6)
Court 6	37.5% (3)	62.5% (5)	--	--	100% (8)
Court 7	--	50.0% (1)	--	50.0% (1)	100% (2)
Court 8	57.1% (4)	42.9% (3)	--	--	100% (7)

Note: Because 'show cause' hearings are relatively rare, these numbers, especially for Courts 4-8, are based on relatively small numbers of cases.

Conditions of Release

To be released, accused persons must consent to the conditions imposed on them by the court. In this way, an accused's 'liberty is truly conditional'; should the accused object to any of the conditions, he or she will be detained (Trotter 1999:240). Sureties must also be made aware of the conditions, as it is their role to ensure 'their' accused's compliance. This can be an onerous responsibility for sureties as it is not unusual for the accused to be subject to multiple conditions and even to be required to reside with their surety. As indicated in Tables 9 and 10 below, nearly all consent releases and in virtually all releases following a 'show cause' hearing conditions were attached to the accused's release.

Table 9: Were Conditions Required for a Release Consented to by the Crown?

	Yes	No	Released on the Same Bail as in a Prior Pending Case (conditions not read out in court)	Total (number of consent releases in which the number of conditions attached were known)
Court 1	88.3% (106)	4.2% (5)	7.5% (9)	100% (120)
Court 2	91.6% (196)	0.9% (2)	7.5% (16)	100% (214)
Court 3	91.3% (136)	0.7% (1)	8.1% (12)	100% (149)
Court 4	91.3% (21)	--	8.7% (2)	100% (23)
Court 5	100% (21)	--	--	100% (21)
Court 6	90.0% (18)	--	10.0% (2)	100% (20)
Court 7	96.6% (28)	3.4% (1)	--	100% (29)
Court 8	100% (10)	--	--	100% (10)

Table 10: Were Conditions Required for a Release Contested by the Crown? (After a Show Cause Hearing)

	Yes	No	Released on the Same Bail (conditions not read out in court)	Total (number of show cause hearings)
Court 1	100% (33)	--	--	100% (33)
Court 2	97.6% (41)	2.4% (1)	--	100% (42)
Court 3	100% (21)	--	--	100% (21)
Court 4	100% (4)	--	--	100% (4)
Court 5	100% (6)	--	--	100% (6)
Court 6	100% (8)	--	--	100% (8)
Court 7	100% (2)	--	--	100% (2)
Court 8	100% (7)	--	--	100% (7)

Although the *Criminal Code* guides justices to exercise restraint in the ascertainment of an accused's suitability for release and the imposition of conditions, as depicted below in Tables 11 and 12, a considerable number of conditions are being placed on accused person's

liberty. Indeed, in consent release cases, across almost all the courts 50% of accused have more than five conditions placed on their release. This percentage balloons for accused released after a show cause hearing. These conditions have a considerable impact on the quality of life of both the accused and their surety. Furthermore, given the chronic backlog of cases in the criminal courts, accused are subject to these conditions for significant periods of time (Trotter 1999:240).

Table 11: Number of Conditions Imposed on a Release Consented to by the Crown

	5 or fewer	6 to 10	More than 10	Total (number of consent releases where the number of conditions was known)
Court 1	46.2% (49)	53.8% (57)	--	100% (106)
Court 2	43.4% (85)	47.4% (93)	9.2% (18)	100% (196)
Court 3	45.9% (61)	45.9% (61)	8.3% (11)	100% (133)
Court 4	23.8% (5)	66.7% (14)	9.5% (2)	100% (21)
Court 5	19.0% (4)	42.9% (9)	38.1% (8)	100% (21)
Court 6	44.4% (8)	44.4% (8)	11.1% (2)	100% (18)
Court 7	25.0% (7)	37.5% (10)	39.3% (11)	100% (28)
Court 8	40.0% (4)	50.0% (5)	10.0% (1)	100% (10)

Table 12: Number of Conditions Imposed on a Release Contested by the Crown (After a Show Cause Hearing)

	5 or fewer	6 to 10	More than 10	Total (number of show cause hearings where the number of conditions was known)
Court 1	15.2% (5)	63.6% (21)	21.2% (7)	100% (33)
Court 2	7.3% (3)	61.0% (25)	31.7% (13)	100% (41)
Court 3	4.8% (1)	76.2% (16)	19.0% (4)	100% (21)
Court 4	--	50.0% (2)	50.0% (2)	100% (4)
Court 5	16.7% (1)	--	83.3% (5)	100% (6)
Court 6	50.0% (4)	37.5% (3)	12.5% (1)	100% (8)
Court 7	50.0% (1)	--	50.0% (1)	100% (2)
Court 8	14.3% (1)	71.4% (5)	14.3% (1)	100% (7)

Although the 'crime control' logic of the conditions typically could be discerned, in many cases the conditions appeared to be somewhat broader than one might conclude related directly to the concerns about release (that is, appearing in court and avoiding committing serious offences). For example, in one case of theft under $5000, the accused was charged with taking $223 worth of items from a Highland Farms store (a supermarket chain in Ontario). The accused was released on a $2500 surety bail with the following conditions: keep the peace and be of good behavior; attend court as required (both of these are statutory conditions); do not enter the geographic region except for the purposes of attending court; reside at an addressed approved of by the surety; do not attend any Highland Farms stores in the province of Ontario; and do not communicate directly or indirectly with the co-accused in this matter. The prohibition placed on the accused not to enter the region is particularly interesting since the region has a population of over 1.1 million people and is 1242 square kilometres in size. Furthermore, it is hard to see the relevance of banning the accused from all Highland Farms stores in the province, while allowing him to visit any of the other hundreds of supermarkets.

In another case involving a charge of simple assault, the accused was released on a $15,000 surety bail (the accused was required to produce two suitable sureties who were each required to promise $7500) and was required to comply with the following conditions: keep the peace and be of good behavior; attend court as required (both of these are statutory conditions); reside with one of the sureties; be under 'house arrest' 24 hours a day and do not leave the house except in the company of one or more of the sureties; be amenable to the rules and discipline of the home; do not communicate directly or indirectly with the victim; do not be within 100 metres of the victim's address; do not purchase, possess, or consume any alcohol; do not purchase, possess or consume any non-medically prescribed drugs; do not possess any weapons as defined by the *Criminal Code*; do not possess or apply for a firearms acquisition certificate; and see a doctor for a mental health and substance abuse assessment. Though the family and police had some concerns about the accused's mental health, he was not under the influence of alcohol or drugs at the time of the alleged offence. What is especially interesting was that the court was putting 'assessment' conditions on him and controls (house arrest and putting the accused under complete control of the sureties by requiring him to follow the rules and discipline of his family (his sureties)). Once again, the 'crime control' logic is fairly clear; while in the home or with a surety, he would be unlikely to assault anyone. But given that the accused's trial would be, given the average, at least 6 months away, the opportunities for 'offending' (by breaking one of these 'control' conditions) would be numerous.

Notwithstanding the reality that the vast majority of conditions placed on accused are simple restrictions on their lives (e.g., not to visit a shopping mall where the offence is alleged to have taken place, not to associate with certain named people or those with criminal records, to stay within certain geographic boundaries), as Trotter (1999:438) points out, all conditions of bail in Canada are susceptible to criminal sanctions if they are violated. If accused persons fail to comply with conditions, they may be rearrested, charged with 'failing to comply with a court order', and put in a reverse onus position at the bail hearing, making it more difficult for them to be granted future release. Moreover, their surety may wish to be relieved of their responsibility, given the risk they face if the accused fails to comply.

Shifting Risk: Excessive Caution and the Defensible Decision

The bail processes generally, and the use of sureties in particular, are consistent with what Power (2004) says about the management of operational and reputational risk. While the bail decision involves a personal risk assessment of the accused, it also involves an assessment of the risk posed to the criminal justice system. The new risk management exacerbates the process and creates a culture of defensiveness, leaving actors reluctant to make decisions out of a fear they will be held accountable. By outsourcing control of the accused to a private controller − the surety − the organisation is relieved of much of the risk to its reputation. Thus instead of the state absorbing the risk associated with releasing an accused, it is looking to 'responsibilise' individuals for the care, custody and supervision of accused people in the community pending trial. This risk aversion and offloading of responsibility has manifested itself in more people being detained by the police for a bail hearing, more releases being contested by the Crown and more stringent conditions being placed on those who are released. It seems likely that a major function of sureties is not, in fact, simply to enforce conditions, but rather to reduce the responsibility of justices and the Crown if the accused violates conditions of release.

Despite the time consuming nature of bail hearings, prosecutors, perhaps in large part to avoid the potential negative consequences of release, tend to oppose the release of most accused. Even in those cases where they consent to the release of the accused, the Crown will typically require a surety. In so doing, prosecutors are shielding themselves from criticism for making the 'wrong' release decision and absolving themselves of responsibility by passing the release decision onto the justice of the peace. As the final arbiter, the justice often imposes strict conditions of release and requires strong sureties, to respond to potential concerns about the riskiness of accused and their suitability for release. Absent any legislated presumption that a surety is required for release, this requirement seems to be a function of the individual court's culture and court actors' fear of being the one to make a risky decision, as it is assumed that the safest decision is to require a surety for release.

Hannah-Moffat and O'Malley (2007:11) term this neo-liberal notion of responsibilisation 'individualisation', whereby individuals are being made increasingly responsible for managing risks that the state once took care of. Risk, then, is being returned to those the state used to protect through an assurance of security. Rose (1997:4) contends that through the notion of risk, care and custody have become inextricably linked to the community. Sureties, in this framework, can be seen as being forced to take over the state's function. Furthermore, the system has come to accept that regulation is more effective and acceptable if it works with private control systems.

The bail risk assessment is focused solely on the individual's risk; it is looking at the risk the individual poses to the system and its image. This has resulted in the creation of internal control mechanisms; policy directives that guide behaviour and dictate expectations.

The orientation of the Crown prosecutor is, perhaps, best illustrated by quoting from the publicly available[9] Crown Policy Manual's section on bail hearings:

> In exercising discretion in this area, Crown counsel has the task of weighing conflicting interests. While all of the factors [listed earlier in the document] must be accorded serious

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9 <www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/BailHearings.pdf> accessed 4 June 2009.

> consideration, given the potential for tragedy at the bail hearing stage of the process, protection of the public including victims must be the primary concern in any bail decision made by Crown counsel.
>
> The May/Iles, Hadley and Yeo Inquests arose out of situations where accused persons were released on bail and subsequently committed murder/suicide. In the course of these inquests, issues surrounding bail hearings, including the conduct of Crown counsel and the exercise of Crown discretion, came under careful scrutiny.
>
> …
>
> Crown counsel should seek the detention of the accused where either the circumstances of the accused or the allegations raise serious concerns about risk of harm to the public or to specific people in the event that the accused is released. Crown counsel should not consent to the release of an accused where there are serious safety concerns unless the Crown is satisfied that terms of release address those concerns.

To understand the full message of this document (dated 21 March 2005) one should consider the three inquests mentioned in the second paragraph. The first related to a homicide that took place in March 1996; the second a homicide that took place in June 2000; and the third relates to a murder that took place in August 1991. The message to a worried prosecutor is clear: these are events that are remembered for a long time. The risks mentioned in the third paragraph that is quoted above are easily avoidable either through opposing release or in requiring conditions in which the risk is shifted to another person – in this case, the surety.

Thus it has become standard in some courts to require a surety in almost all cases in order for a release order to be fashioned. It is suspected that the demand for surety supervision is increasing, which can be understood as an intensification of strategies of process to give the impression of manageability and to avoid blame. In requiring a surety, the court is able to manage the risk and is provided with an assurance of risk minimisation. The release decision is defensible because the accused is being released into the custody of a surety who is responsible for monitoring and supervising the accused. The surety functions as an insurance strategy; sureties minimise the risk posed by the accused and insulate the court and the prosecutor from criticism and culpability.

It seems that a heightened awareness of the risk of harm an accused poses to the community, a perception amplified by the media's intervention and interpretation of the situation, has made criminal justice professionals increasingly nervous about making release decisions. Hutter and Power (2005:13) suggest sensationalised events such as those mentioned in the Crown Manual tend to amplify risk frameworks, which leads to substantive institutional consequences. When widely publicised, these shocking events galvanise fear and rouse public officials' anxiety about releasing accused persons into the community pending trial. This nervousness has been articulated through a general aversion to being the person to make the release decision.

Though the *Bail Reform Act* came into effect (in 1972) before the rise of neo-liberalism in Canada, its objectives can be conceptualised as neo-liberal in their orientation. The legislation signals the state's interest in withdrawing from the governing and control of individuals through the presumption of release. The prevailing risk mentality (and specifically the aversion to risk), however, appears to have usurped the legislated intent of the Act. Instead of the state withdrawing, it seems to be increasing the magnitude and scale of its control over individuals, a fact demonstrated by the rising number of people being held in remand. That being said, while more people are being held and the bail process is taking longer, there seems to be an increase in the use of sureties, the most onerous form of

release short of a cash deposit. Releasing an accused into the custody of a surety is indicative of efforts to 'responsibilise' individuals by having them take over the control that would otherwise have been exercised by the state. Despite the appearance of increased intervention, the state is looking to responsibilise individuals and off-load the responsibility of regulating and surveilling accused in the community onto private citizens.

Rose (1997:3) argues that since we are bad at making accurate and reliable predications about future behaviour, we are erring on the side of excessive caution. This hyper-vigilance and concern leads to overly cautious decision making and intrusive interventions into people's lives for the sake of pursuing an unattainable assurance of safety. In the quest for security, the managing of the potentially risky has become the cornerstone of risk reduction strategies. In such a world, calculations of what may happen tomorrow inform all decisions made today. In this way, risk thinking in the context of bail is not merely an option, it is an obligation. Rose (1997:9) suggests imperfect predictions of risk are conceptualised as a failure of the assessment and management of risky people and jeopardise the safety of the community. In this context it is understandable that risks to the community are prioritised over the rights of accused to reasonable bail. The imperative of risk minimisation heightens the fear of making an inaccurate prediction and putting the public at risk. This translates into an increased use of remand detention as each actor shies away from making the release decision and increases the use of ordinary citizens to reduce institutional risk related to those who are released.

Conclusion

There is an overwhelming tendency for a culture of risk management to exacerbate process (Power 2004:13). The assessment of primary risk, the risk the individual poses to the community, is the legitimate, legislated function of the bail court. Secondary risk management, however, appears to have contaminated the bail process. The fixation with managing risks posed to the criminal justice system and the over-cautiousness of criminal justice professionals has significantly impacted the efficient and proper functioning of the bail court. In being concerned about the risk to their reputation, each actor along the process has become increasingly uneasy about making the bail decision. This reluctance has increased the number of bail appearances it takes to process a case, which has resulted in an appreciable increase in the remand population.

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