Recklessness

This article will initially define mens rea recklessness, using leading case judgments to distinguish objective and subjective recklessness within English criminal law. This will be followed by a concise explanation of the reasons used to judge those cases, concluding with discussion and consideration of the choice made by the House of Lords to reject the Caldwell meaning in lieu of the one adopted in R v G.

Two distinct legal elements are used when a person is accused of committing a criminal offence; the actus reus observes the actions performed by the defendant, while the mens rea is only concerned with the mental element or the state of mind possessed during the act. With the exception of strict liability offences these elements are evaluated and calculated in order to reach fair and just verdicts. There are several sub-elements to a mens rea including intention, recklessness, negligence, knowledge and belief, however for the purpose of this article we shall focus on recklessness.

Recklessness can be legally defined as a person taking an unjustifiable risk that as a result, causes serious harm or even death. Confirming recklessness has proven confusing, largely because the factor of risk needs to be firmly demonstrated before any defendant can be deemed reckless. In R v Cunningham the court felt that in order to establish recklessness two things needed to be considered: (i) That the defendant was aware there was a risk that their conduct would cause a particular result, and (ii) that the risk was an unreasonable one to take.

This method became the subjective or Cunningham recklessness test, until the complex nature of R v Caldwell instigated a parliamentary reformulation, which instead required that (i) the defendants were aware of a risk, and (ii) there was an obvious and serious risk and that they had failed to consider, whether or not the risk was there. This objective test became the subject of controversy because it placed culpability upon people without consideration of mitigating factors, however it was not until R v G that the courts were faced with a potential injustice sufficient enough for the House of Lords to rescind the Caldwell recklessness test.

In order to understand why this decision was made, it is necessary to look at all three case judgments in more detail.

R v Cunningham

The judge in Cunningham applied the subjective test to conclude that knowing there was an unreasonable risk, the defendant continued to maliciously cause criminal damage and endanger life. The term ‘maliciously’ was used in conjunction with recklessness, thereby suggesting that the mens rea of this particular crime was of evil intent and designed to inflict considerable harm.

Byrne J reinforced this verdict when saying that although there was a stop tap within two feet of the meter, the appellant did not turn off the gas, whereupon a very considerable volume of gas escaped before seeping through the wall of the cellar and partially asphyxiating a Mrs Wade, who was asleep in her bedroom next door, and thus her life was endangered.

R v Caldwell

On this occasion the indiscriminate nature of the Caldwell recklessness defence had enabled the offender to ‘opt out’ of a criminal act under the contention that they had failed to appreciate the risk attached to their actions. This was exactly what the defendant attempted but failed to do when Lord Diplock explained that:

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1 R v Caldwell [1982] AC 341 (AC) 354.
2 [2004] AC 1 1034.
3 [1957] 2 QB 396.
5 Note that Hyam v DPP makes a stronger argument for possession of ‘malicious’ intent.
“[M]ens rea is by definition a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the defence; it cannot be the mental state of some non-existent hypothetical person.”

And so with drunkenness used as a defence against arson, the Court of Appeal eventually quashed the notion that voluntary intoxication relinquished the accused from reckless behaviour through reliance upon *R v Majewski*, and so passed due sentence.

**R v G**

In *R v G* section two of the *Caldwell* recklessness test determined liability for aggravated criminal damage, which forced the House of Lords to return to the *Cunningham* reckless test to avoid sentencing two young boys as if they were adults, while this decision was validated by Steyn LJ, who wrote that:

> “Recognising the special characteristics of children...goes some way towards reducing the scope of section 1 of the 1971 Act for producing unjust results which are inherent in the objective mould into which the *Caldwell* analysis forced recklessness.”

And so as can be appreciated in these three varying matters, the material facts of the case and capacity of the individual are very separate elements, yet a hasty oversight in judgment can soon become the focus of due criticism.

The first of the four reasons given in *R v G* when reaching the judgment in the House of Lords was that proof of culpable *mens rea* required the perception of risk, whereas an accusation of stupidity or lack of imagination did not, however it is this kind of conclusion that raises questions where people of limited capacity face criminal damage charges when inadvertent action or omission is likely the true cause.

The fact that in this case the boys were of an age that could excuse such an oversight demonstrates that more consideration is warranted when dealing with cases of a delicate constitution, while this line of thinking is supported in many respects by *R v Stephenson*, whose appeal was successful on grounds that without full jury consideration, conviction for arson without professional examination of schizophrenia could not be deemed reasonable.

The second reason observed that the purpose of the jury was to uphold fairness when deciding a case, while the previously regrettable decision taken by Maher J suggested that charging two young boys under s.1(1) of the Criminal Damage Act 1971 at high court level would have been immoral and unjust, however viewed from this stance, trial judges are evidently not exempt from misdirection and likewise jurors are required to assist in the fruition of justice by avoiding passivity.

The third reason noted how any decision that attracted reasoned and outspoken criticism from leading law scholars ought to have been given proper attention and serious consideration, while highbrow concerns such as those echoed by Professor John Smith, Lord Edmund-Davies and Professor Glanville Williams clearly underpin the value of judicial review, and without such scrutiny criminal law reform would no doubt be scarce.

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8 *R v G* [2004] AC 1 1034 [54].
10 [1979] 2 All ER 1198.
The fourth and final reason explained how the majority interpretation of ‘recklessly’ was a misinterpretation that offended principle and invited injustice, and that if this were not the case there would be no argument for reform, however this offence had been shown to be true, and so the need to correct the interpretation was overwhelming.

When evaluating all three cases it is reasonable to comment that unless a jury can be certain that intention and recklessness have been fully distinguished, there is too great a temptation for a defence lawyer, judge or jury to question how convictions should stand, and yet contrastingly if the courts were to rely solely upon subjective testing in criminal damage cases it would prove almost impossible to consistently determine the mind-set of the accused.

It is also important to note that \textit{R v Lawrence}^{14} and \textit{R v Murphy}^{15} should be given consideration when establishing intention to act recklessly, particularly when objective evidence is much easier to establish in the absence of required \textit{mens rea}. This reinforces the need to alternate between both \textit{Cunningham} and \textit{Caldwell} recklessness in order to remove uncertainty as illustrated by Cath Crosby who wrote that:

\begin{quote}
“[B]ecause it is recognised that a definition of recklessness that is too subjective can allow those who are blameworthy to avoid criminal liability. Alternatively a test that is too objective can lead to injustice without being capacity based. It is submitted that a synthesis of the two approaches is required.”\textsuperscript{16}
\end{quote}

In conclusion it is shown that evidence that supports intention to cause damage and endanger life is sometimes unavailable or difficult to ascertain, which is why objective testing is without doubt as much a prerequisite for determining recklessness as the jurisprudence of a judge and jury, while refinement of criminal law doctrine can only exist when definitions provoke analysis.

This translates that benchmark cases such as \textit{R v G} currently serve themselves well as predictors of behavioural complexity, while it is left only to say that although there will always be a narrow margin for error when clarifying recklessness, it would seem agreeable that \textit{Cunningham} and \textit{Caldwell} are still needed for the foreseeable future.

\textsuperscript{14} [1982] AC 510.

\textsuperscript{15} [1980] QB 434.

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