

Goodbye and good riddance to Objective Recklessness.

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James Caldwell had grievance against the owner of the hotel where he worked. So one night he got very drunk and set fire to the hotel. Caldwell was indicted upon two counts of arson. The second count was laid under section 1 (1) of the Criminal Damage Act 1971-arson destroying property belonging to another. The first and more serious count was laid under section 1 (2) of the 1971- arson endangering life. Caldwell pleaded guilty to the second count but pleaded not-guilty to the first on the ground that he had been so drunk at the time the fire was set that the thought there might be people in the hotel never crossed his mind. Caldwell was convicted after the trial judge had directed the jury that voluntary intoxication was not a defence to the first count and was sentenced to three years imprisonment. The Court of Appeal quashed the conviction and the prosecution appealed to the House of Lords. Although the appeal was dismissed Lord Diplock took the opportunity of defining recklessness as follows:

“In my opinion, a person charged with an offence under section 1(1) was 'reckless as to whether ... property would be destroyed or damaged' if (i) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (ii) when he does that act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it” *R v Caldwell* [1982] AC 341 at 354.

This model direction (in points (i) and (ii)) recognised two forms of recklessness in the law of crime. First there was the recognition of an obvious (or unreasonable) risk created by an act but nonetheless taking the risk. This is known as subjective recklessness (sometimes called Cunningham recklessness) because it involves magistrates or a jury reaching the conclusion that the defendant was aware of the risk he was taking. This part of the direction was not controversial as this form of recklessness was recognised to be part of the law of crime in *R v Cunningham* [1957] 2 QB 396 CCA and was accepted as applicable to offences under the 1971 Act in *R v Stephenson* [1979] QB 695 CA where Stephenson had lit a fire in a haystack to keep warm. His arson conviction was quashed on the ground that due to his schizophrenia he was incapable of assessing the damage risks, which would be apparent to a capable person, when a fire is lit in a haystack.

The second form of recklessness recognised in the direction was controversial. It amounted to the failure give thought to an obvious risk created by an act. This is known as objective reckless (sometimes called Caldwell recklessness) because a defendant could be held to be reckless even though he had not given thought to the risk and thus was not aware of it. The defendant would be liable because the direction requires no thought being given to an obvious risk i.e. a risk that would be apparent to reasonable and capable people (the objective element).

An obvious risk is an unjustified risk that is a great departure from the standards expected by reasonable people. It is right that the requirement of an obvious risk should have applied to this second form of recklessness as the culpability consisted in failing to advert to the obvious –a risk which would have been obvious to the

reasonable and capable adult. This was just in respect of capable defendants especially those who fail to recognise an obvious risk due to voluntary intoxication. The problem was that objective recklessness was over-inclusive as it included both the capable and the incapable and in respect of the latter takes no account of their incapacity.

For example in *Elliott v C* [1983] 1 WLR 939 DC the defendant was a 14-year old girl of low intelligence who had entered a shed in the early morning, found white spirit there and poured it on to the carpet on the floor of the shed and threw two lighted matches on to the spirit. The second match ignited, a fire immediately flared up out of control and the defendant left the shed, which was destroyed. When interviewed later that day by the police she said she did not know why she had set fire to the shed but "just felt like it." She was charged with arson. At her trial the magistrates felt themselves bound to follow Lord Diplock's model direction and found that while the defendant realised that the contents of the bottle containing white spirit were possibly inflammable she had not given any thought to how explosively it would burn and become out of her control, thereby destroying the shed and its contents. They also found that it was implicit in the model direction that a defendant should only be held to have acted recklessly where the risk would have been obvious to him if he had given any thought to the matter. It was apparent that the risk would not have been obvious to the defendant in *Elliott* even if she had given thought to the matter. Accordingly the magistrates dismissed the information and the prosecution appealed by case stated on a point of law.

The prosecutor's appeal was allowed because Gildwell J accepted (at 945-947) the submission that:

"if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular defendant gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it."

Goff LJ felt obliged to agree because he was bound by the doctrine of precedent and therefore had to follow Diplock's direction, which contained no qualification to allow for a defendant's incapacity. Thus objective recklessness was the application of *entirely objective* standard of recklessness and this could lead to injustice as in *Elliott v C* and if the defendant in *Stephenson* had been charged after 1982 he would have been convicted. The policy behind Lord Diplock's extension of the law of recklessness is part of a constant theme in the law of crime that intoxication is no excuse for crime. But as has been showed that extension failed to be qualified to take into a defendant's incapacity which arises due to no fault of his own. This was the issue faced by the House of Lords in *R v Gemmell and Richards* [2003] UKHL 50.

Before discussing this landmark decision it should be noted that the potential for injustice arising from objective recklessness has already been accepted by the House of Lords and the Court of Appeal so that the application of this form of recklessness had been limited to criminal damage (*Caldwell*) and attempted criminal damage (*Att-Gen's Ref (No 3 of 1992)* [1994] Crim L R 348 CA. This means that in respect of other crimes that can be committed recklessly it is subjective recklessness that is applied.

In *R v Gemmell and Richards* the defendants, two boys then aged 11 and 12 respectively, went camping. In the early hours they entered the back yard of the Co-op shop in Newport Pagnell. The boys found bundles of newspaper, which they opened up to read. They then lit some of the newspapers with a lighter they had with them. Each of the boys then threw some lit newspaper under a large plastic wheelie-bin and left the yard without putting out the burning papers. The wheelie-bin caught fire and the fire spread to a second bin and then to the shop and adjoining buildings, causing £1 million pounds worth of damage. The defendants were charged with arson contrary to section 1(1) and (3) of the 1971 Act. The defendants' case was that they expected the newspapers to burn out on the concrete floor. It was accepted that neither of the boys was aware that there was any risk of the fire spreading in the way that it did. The defendants were convicted because they were reckless in that they had not given thought to obvious risk. The Court of Appeal upheld the conviction because it found itself to be bound by *Caldwell* stating that "it is for the House of Lords to decide whether the time has come to revisit the *Caldwell* test." The court did however certify a point of law of public importance to be answered:

"Can a defendant properly be convicted under section 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk but, by reason of his age and/or personal characteristics, the risk would not have been obvious to him, even if he had thought about it?"

The House of Lord's answer to this point was a unanimous no. There were five law lords sitting and they all agreed or concurred with the leading opinion given by Lord Bingham. His Lordship gave four reasons for allowing the appeal. First to be convicted of serious crime defendants should have subjective *mens rea*. "It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication...) one genuinely does not perceive the risk" (at [32]). Second Diplock's direction was capable of leading to obvious unfairness. Third objective recklessness had received strong professional and academic criticism. Fourth Diplock's direction was a misinterpretation of the meaning the term "reckless" in the 1971 Act in that there was no evidence that Parliament intended it should have an objective meaning.

It was suggested to his Lordship that a "subjective tail" be added to objective recklessness in that it should only apply to capable defendants who had they thought about the obvious risk would have been aware of it. This was an *obiter* suggestion in an earlier House of Lords decision in *R v Reid* [1991] Crim L R 269. His Lordship rejected this suggestion because it would over complicate the task of the jury. "It was one thing to decide whether a defendant could be believed when he said that the thought of a given risk never crossed his mind. It was another, and much more speculative task to decide whether the risk would have been obvious to him if the thought had crossed his mind." (at [38]).

His Lordship took the opportunity to define recklessness in respect of criminal damage by referring to and agreeing with the definition contained in clause 18 (c) of

the Bill annexed to the Law Commission Report A Criminal Code for England and Wales (Law Com No 177, April 1989). The clause states:

"A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is in the circumstances known to him, unreasonable to take the risk"

This represents a return to the law before *Caldwell* and thus for a defendant to be reckless in respect of criminal damage a jury must be satisfied that he had foreseen an obvious or unreasonable risk and yet had gone on to take that risk. Such a definition of reckless will catch capable defendants but not those who lack capacity due to age or mental disorder. This is a just decision and is another decision of the House of Lords confirming that subjective *mens rea* is required for serious crime. The same conclusion was reached in respect of sexual offences in *B v DPP* [1999] Crim L R 403 HL and *R v K* [2001] Crim L R 993 HL. These decisions represent part of the judicial response to curtail the executive's inexorable requirement that the criminal justice process move to the right when dealing with crime.

And finally what about the capable defendant who maintains that he gave no thought to an obvious risk of criminal damage because of voluntary intoxication by alcohol or dangerous drugs? Will he get off scot-free because of this decision? The answer is no because the rule in *DPP v Majewski* [1977] AC 443 HL applies and thus when such a defendant is charged with reckless criminal damage (an offence of basic intent) a presumption of recklessness arises.