INTOXICATION AND RECKLESSNESS

I. INTRODUCTION

An issue which periodically falls to be determined by the courts is the question of whether or not intoxication is relevant to an issue of recklessness. The problem arises when the definition of an offence allows proof of recklessness as a sufficient mens rea. The question is then whether evidence of intoxication can be allowed to negative recklessness.

Until the decision of the House of Lords in *R* v *Caldwell*,[1] recklessness had a more or less fixed meaning in common law which distinguished it from the other states of mind. Generally, it would seem to lie somewhere between "negligence" and "intention" and in its natural sense to imply the conscious and unreasonable running of risk. However, the apparent effect of *Caldwell* and its sister case *R* v *Lawrence*[2] (an appeal heard immediately after *Caldwell* and also involving consideration of a meaning of recklessness) has been to extend the meaning of "recklessness' to include inadvertent negligence. If this is a correct view of these cases then, as Professor Glanville Williams has expressed it, "they work a profoundly regrettable change in the criminal law".[3]

We can note, at this point, that the general effect of these two cases is to attach a much firmer objective meaning to the concept of recklessness than it has obviously been given in a series of decisions in the English Court of Appeal.

As far as intoxication is concerned, the effect of *Caldwell* is to declare that nearly all crimes can be committed recklessly and that evidence of voluntary intoxication will not assist to save people charged with these offences from conviction. This is because a jury will simply be instructed that they can find a defendant reckless if he failed to see a risk that he would have seen if sober.[4]

So if, as in *Caldwell*'s case, the defendant got drunk and set fire to a hotel in revenge and then claimed that the thought that he might be endangering the life of other people in the hotel never crossed his mind, because of his intoxication, the Court would say (as it did in *Caldwell*) that he cannot use intoxication as a defence.[5] The route by which one achieves this result is to argue that "reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off is a reckless course of conduct and an integral part of the crime".[6] However, an examination of these cases quickly reveals that the primary ground of justification is not close-reasoned juristic inquiry, but rather an expediency based on public policy which expresses its disapproval at people being able to claim impunity for dangerous acts committed in a state of impaired mental awareness, *a fortiori* when that state has been brought about by the person himself.

On the other hand, the disquiet expressed by a number of commentators and

1 [1981] 2 WLR 509.
2 *Ibid*, 524.
3 *Recklessness Redefined* [1981] *CLJ* 252.
4 *Ibid*, 259.
5 *Cf* ". . . voluntary harm doing, i.e. in the knowledge of at least the risk of that, is quite different from a lack of sensitivity to the risk of injuring others, ot to the need for knowledge of the likelihood of doing that. Thus, it is not logical to assert that, because a person is competent to do an act properly if he thinks about it, therefore he is culpable for doing harm inadvertently. . . . The chief conclusion to be drawn from the above analysis is that action in ignorance of material facts, where no more than negligence is shown, should not incur penal liabilities". Hall, *General Principles of Criminal Law*, New York, 1960, 371–372.
6 *Per* Lord Diplock in *R* v *Caldwell*, *op cit*, 517.

eminent judges centres on the desirability of developing a consistent theory of criminal liability based on sound and coherent principles. The latter are not unconcerned with the question of public policy, but see the formulation and exposition of sound legal rules as vitally important for the proper development of the criminal law.[7]

II. MEANING OF RECKLESSNESS

Essential to the argument of those who have objected to these recent developments in the case law is the concern that whatever the majority in *Caldwell* might say about "reckless" and "recklessness" not being terms of art, they have nevertheless in legal language acquired an established meaning in relation to the principle of "mens rea".[8] The effect of these recent House of Lords decisions, it is argued, has been to radically extend the meaning of "recklessness" to embrace where there was no foresight or where the person had not consciously adverted to the risk. Such a development, it is argued, is contrary to sound legal principle.

However, before considering in more detail the significance of these decisions, it is useful to contemplate the manner in which "recklessness" has traditionally been interpreted and applied by the courts.

Legal theory has always differentiated intention, recklessness and negligence. Where with intention the act is designed to incur harm, with recklessness the actor does not desire it but at least contemplates it as a possibility.[9] Negligence, however, implies inadvertence. That is, the defendant was completely unaware of the dangerousness of his behaviour, even though it may have actually increased the risk of injury occurring. Conduct occurring negligently is not voluntary, and unlike intention it is not ends-directed.

We may say, for convenience, that recklessness lies between the extremes of intention and negligence. With recklessness, the actor is conscious of a forbidden harm. He realises that his conduct increases the risk of the harm occurring and he has decided to take that risk. But, unlike intention, the actor does not seek to attain the harm — rather he believes the harm will *not* occur or he is indifferent whether it does or does not occur. But he has addressed the possibility of harm, the actual risk in his own mind.[10] However, like negligence, recklessness includes an unreasonable increase in the risk of harm and represents the failure to meet standards of due care. But the commonality of unreasonable increase in the risk of harm, implicit in both recklessness and negligence, does not in any way signal the merging of the two concepts for practical purposes.

> Recklessness, no less than intention, includes a distinctive state of awareness. To ascertain whether recklessness existed, we must determine the actor's knowledge of the facts and his estimate of his conduct with reference

7 For example, Prof J. C. Smith argued that the decision in *Caldwell* "sets back the law concerning the mental element in criminal damage, in theory to before 1861, and in practice probably to before Kenny formulated the law in the first edition of his *Outlines of Criminal law* in 1902" (see *Commentary* [1981] *Crim L R* 393.

8 "The law in action compiles its own dictionary. In time, what was originally the common coinage of speech requires a different value in the pocket of the lawyer than when in the layman's purse." *per* Lord Edmund Davies in *R* v *Caldwell*, *op cit*, 518–519.

9 *Cf* "Recklessness as to the prohibited consequences" requires that the actor must have adverted to the possibility of those consequences coming about . . ." D. O'Connor, *Mistake and Ignorance in Criminal Cases* 39 *MLR* 644, at 654.

10 See Hall, *op cit*, n 5, 115.

to the increase of risk. But . . . unless it is determined that the defendant knew he was increasing the risk of harm, it cannot be defensibly held that he acted recklessly.[11]

What is clear from this passage from Hall is that recklessness is only properly so called when the defendant knew he was increasing the risk of harm.[12] Proof of recklessness requires a precision in analysis to distinguish it from negligence which is based on a simply objective standard, namely, failure to observe the due standard of care. On the basis of these criteria, the decision in *Caldwell* is all the more surprising. As Glanville Williams has observed, the "main legal and linguistic innovation in the two cases is the proposition that failing to think is a state of mind".[13] Williams quotes the statement of Lord Diplock in *Caldwell* that recklessness, in ordinary speech, "includes not only deciding to ignore a risk of harmful consequences resulting from one's act that one has recognised is existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought *were* given to the matter, it would be obvious that there was".[14] Apart from the illogicality of this proposition (which, in effect, is saying that absence of mind *is* a state of mind), Williams notes that it could work profound injustice in certain cases. He gives the example of a driver who thoughtlessly swings open a car door and injures a passing cyclist; although he did not intend to cause injury and did not have in mind to run any risk when he opened the car door, on Lord Diplock's analysis he is guilty of reckless behaviour with the greatly extended range of punishment which that classification opens up. There would, of course, in that situation be no question as to the driver's negligence liability, because people are required to exercise due care before doing a dangerous act. However, it is another step altogether to say that failure to think amounts to recklessness.[15]

Traditionally, the courts have had difficulty in differentiating negligence from recklessness. Recklessness is often considered in the case law as though it were simply a different degree of negligence. Hence, judges have talked in terms of "gross negligence" or "culpable negligence" or even "wilful wanton negligence". It may be that this confusion is related to the fact, as Lord Diplock notes in *Caldwell*, that the etymology of "reckless" is based in the notion of carelessness, and that, etymologically speaking, recklessness and carelessness have the same forebears. However, whatever the ancestry of these words, it is pointed out by many commentators that in legal language "recklessness" and "negligence" have become terms of art with very distinct meanings at law.[16] It is absurd to suggest that, because they share the same etymology, there is no distinction to be made in practice between the two concepts since, apart from

11 *Ibid*, 120.

12 It is worth noting that while Hall does not attempt to define recklessness to embrace inadvertent harm-doing he does admit of degrees of recklessness defined as "differences in the degrees of risk that are consciously taken", *ibid*, 116.

13 *Op cit*, n 3, 256.

14 [1981] 2 WLR 515.

15 It is, of course, arguable whether inadvertent risk-taking should be punishable at all. On one view such conduct is voluntary if, under the circumstances, the actor could have realised the risks implicit in his conduct (see Fletcher, *Rethinking Criminal Law*, Boston, 1975, 711). On another view, since such conduct is not "voluntary", the indadvertent party should not be held accountable for it (see Hall, "Negligent Behaviour should be excluded from Penal Liability", 61 *Colum L R* 632, at pp 535–636). The point surely is that, if such conduct is to be held culpable, the proper basis of liability is negligence not recklessness.

16 See Hall, *op cit*, 124–125, and Kenny, *Outlines of Criminal Law*, 18th ed, 33.

any other considerations, recklessness may be and often is an alternative to intention for most crimes, whereas negligence can never be.

A. Lord Diplock's redefinition

Prior to the decision in *Caldwell*, the meaning of "recklessness" was authoritatively settled by the English Court of Criminal Appeal in *R* v *Cunningham*.[17] In that case, Byrne J cited with approval a passage from Kenny's *Outlines of Criminal Law* as providing an accurate statement of the law on what constitutes recklessness. Professor Kenny had said:

> In any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (1) an actual intention to do the particular kind of harm (that was done), or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the particular risk of it)."

Bryne J, in endorsing that view of the law, simply said:

> We think this is an accurate statement of the law. In our opinion, the word 'maliciously' in a statutory crime postulates foresight of consequence.[18]

Guided by this statement of the law, the English Law Commission, in a working paper published 16 June 1970, and entitled "Codification of the Criminal Law: General Principles: The Mental Element in Crime" defined "recklessness" by saying:

> a person is reckless if (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it, having regard to the degree and nature of the risk which he knows to be present.

However, when *Caldwell* is in contemplation, Lord Diplock is seen to take a radical step further than the existing case law and proposed statutory definitions would permit. In effect, what Lord Diplock does, it seems, is to take the definition of "malice", given by Professor Kenny, and to re-interpret it. Instead of permitting the passage in parentheses to qualify the noun "recklessness", as would seem to be the natural exegesis of the passage, Lord Diplock concludes that the parenthetical passage is intended only to define a particular species of the type "recklessness", namely "malice"; and that it is only when "malice" is nominated or implied as the requisite mental state in a statutory definition that foresight of actual harm and foresight of actual risk is required in the definition of an offence. In other words, what Lord Diplock does is to add an additional category to the concept of "recklessness", namely "malice". This, he would argue, is the most serious form of recklessness and the only form involving a requirement for proof of foresight. In consequence, Lord Diplock is able to define the meaning of recklessness to include that kind of conduct where a person acts without giving any thought at all to whether or not there was a risk of harmful consequences deriving from one's act but in circumstances where, if any thought had been given to the matter, the risk would be obvious. Such conduct would ordinarily have come from the definition of "negligence", but now

17 2 All ER 412; [1957] 2 QB 396.
18 [1957] 2 QB 396, at 400.

comes clearly within the category of "recklessness".[19]

III. RECKLESSNESS BY SELF-INDUCED INTOXICATION

Another important but distinct sense in which *Caldwell* has extended the definition of "recklessness" relates specifically to intoxication.

One of the questions of law, set aside for the opinion of the law lords was whether evidence of self-induced intoxication could be relevant to the question of whether the defendant was reckless as to whether the life of another would be endangered within the meaning of s 1(2)(b) of the Criminal Damage Act 1971. *Caldwell*'s defence had been that he had made himself so drunk as to render him oblivious to the risk.

Lord Diplock, in addressing the issue of intoxication, referred to the words of the statutory provision. He noted that if the only mental state capable of constituting the necessary mens rea had been intention, the offence would have been one of specific intent and amenable to the intoxication defence. However, since the relevant inquiry concerned recklessness, self-induced intoxication was irrelevant and no defence.[20] Applying the majority decision in *Majewski*, and particularly the reasoning of Lord Elwyn-Jones, Lord Chancellor, Lord Diplock concluded that reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off, was a reckless course of conduct. Thus the net of "recklessness" is expanded even further to embrace antecedent conduct when, at the time the drinking is embarked upon, it could never have been within the contemplation of the actor that a certain course of proscribed behaviour would ultimately occur.[21] In effect, the active drinking, since few defendants would deliberately set out to get themselves drunk, constitutes an act of recklessness. It was this problem which led the Butler Committee[22] to recommend that a new offence of dangerous intoxication be created to avoid doing irreparable damage to the theory of intoxication defence. Again, the problem led Barwick, CJ, in *R* v *O'Connor*,[23] to comment that "although blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional. For what is blameworthy there should be an appropriate criminal offence. But it is not for judges to create an offence appropriate to the circumstances, it must be for Parliament".[24]

Glanville Williams suggests that there are two important additional results arising directly out of *Majewski* and *Caldwell*. First that all crimes of recklessness except murder will now be held to be crimes of basic intent[25] and secondly, that intoxication is no defence to a crime in which recklessness is sufficient to constitute the necessary mens rea.[26] On Williams' view this means

19 But *cf* "The difference between recklessness and negligence is the difference between advertence and inadvertence; they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence." Kenny, *op cit*, n 16, 34.

20 ". . . self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary mens rea." *Caldwell, op cit*, 517.

21 Such a conception of recklessness is dangerous on account of generality, since it potentially embraces in one "undifferentiated classification" all cases of intoxication resulting from the voluntary consumption of alcohol, while straining to the limits the notion of foreseeability implicit in recklessness.

22 *Report on Mentally Abnormal Offenders*, Cmnd 6244.

23 29 ALR 449.

24 *Ibid*, 466.

25 *Textbook of Criminal Law*, 1978, 431.

26 *Reckless Redefined, op cit*, n 3 at 259.

that evidence of intoxication can now help the defendant only in crimes which depend solely on intention such as attempt. It also has the further effect, in his view, "of getting rid of all the hocus pocus about specific intent and basic intent".[27] However, it appears to leave open the question as to whether murder, which is normally categorised as a specific intent crime, but may also be categorised as a recklessness offence, can still avail itself of the intoxication defence.

The present position in New Zealand, in so far as intoxication and recklessness are concerned, is one of grave uncertainty. However, the New Zealand Court of Appeal has already given a tentative indication of its attitude to the new definition of "recklessness" deriving from *Caldwell* and *Lawrence*. In the decision of *R* v *Howe, Oldenampson and Others*,[28] involving charges of riotous damage of a Crown vehicle arising out of the Springbok Tour protest, the Court appears to affirm the view that recklessness has no separate legal meaning and "although involving more than mere carelessness, it is not limited to deliberate risk-taking but includes failing to give any thought to an obvious and serious risk".[29] The Court then states that, although it is aware of criticism of commentators relating to the recent House of Lords decisions on recklessness it "respectfully finds the speeches of Lord Hailsham and Lord Diplock helpful in relation to the particular subject matter of the section that has to be interpreted in the present case".[30]

IV. CONCLUSION

Although the comments of the Court of Appeal must be treated as obiter in so far as the question of intoxication is concerned, they do indicate the Court of Appeal's readiness to approve the *Caldwell* definition of recklessness with the consequential effects upon intoxication that we have considered. Since most crimes may now have a recklessness element read into them, as is evident from the decision in *Howe and Oldenampson*, and since intoxication is no defence to a charge based on recklessness, the future of the palliative doctrine of intoxication would appear to be in grave peril. The traditional conception of recklessness as involving "the conscious and deliberate taking of an unjustified risk"[31] seems unarguable. To accept the extended definition of recklessness developed in *Caldwell* is to approve a radical departure from the hitherto accepted meaning of recklessness involving major policy considerations. Such an initiative ought properly to be left to the legislature after careful investigation, so that all the implications of such a change can be ascertained.[32]

It may well be, as Professor Caldwell has suggested, that "English decisions are not longer a necessarily reliable guide to development in this country". And since it is clear that the intoxication defence has developed along very different lines in New Zealand from those in England, there seems to be no good reason why New Zealand courts should feel constrained to accept the English approach in so far as recklessness is concerned.

To deal with anomalies created by a developing doctrine of the criminal law

27 *Ibid*, fn 28.
28 [1982] 1 NZLR 618 (CA).
29 *Ibid*, 623.
30 *Ibid*.
31 Garrow and Caldwell, *Criminal Law in New Zealand*, Wellington, 1981, 477.
32 *Ibid*, preface.

by legislative intervention is one thing. To recreate a settled juristic concept in the image of the sentiments of the local community, in order to extend the net of the present law, is another thing altogether. The temptation ought to be strenuously resisted.

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