A reckless approach to liability

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Recklessness has long been accepted as an integral part of criminal law. In recent times it has gained increased prominence, and even notoriety, as the House of Lords has sought to greatly expand its ambit. In this article Simon France looks at what this means for New Zealand. It is argued that, despite its antiquity, a consistent place has not yet been found for recklessness. The categorisation of offences recently adopted by the Court of Appeal would seem to provide the ideal opportunity to ensure a consistent approach to this important concept. Its place settled, attention must then be given to accepting a settled meaning. It is argued that, as it has in other areas, New Zealand must take a different direction from that adopted by the House of Lords.

I. INTRODUCTION

The issue of recklessness has gained much notoriety in the criminal law of recent years. Ever since Lord Diplock ruled in *Caldwell*[1] that recklessness should be given its "ordinary meaning", the word has been the subject of a degree of investigation and analysis that would make Interpol reel. In New Zealand the debate has not yet reached its zenith. Lower courts have on occasions grappled with it,[2] but apart from two rather unsatisfactory flirtations[3] our Court of Appeal has thus far avoided it.

The purpose of this article is two-fold. It seems that everyone who has an interest in the criminal law has an opinion on the rights and wrongs of the new recklessness. This author is no exception, and the nascent state of the law in New Zealand on this issue is an encouragement to offer a suggestion as to the approach that should be taken. However, there is an earlier step which is of equal importance but which has not had the consideration it deserves. It is the question of when recklessness will suffice as the basis of culpability. Recklessness is clearly part of an offence when the statute says it is. But there are many occasions when it has been made part of an offence by the courts as they seek to extract from a hopelessly silent offence that chameleon-like concept known as Parliamentary intent. Unfortunately, consistency has not always been the

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1 [1981] 1 E.R. 961.

2 These cases are conveniently listed by Barker J in *Jefferson* v. *Ministry of Agriculture & Fisheries* unreported, M286/85 Rotorua Registry, 12 August 1986.

3 *R.* v. *Howe* [1982] 1 N.Z.L.R. 619; *R.* v. *Harney* [1987] B.C.L. 1343.

hallmark of these attempts. If New Zealand is to continue to develop a rational and just approach to criminal liability, this lack of consistency must be addressed.

II. WHEN RECKLESSNESS WILL SUFFICE

Recklessness can find its way into an offence by one of two means. First, it may be expressly included by Parliament. Examples of this are sections 167(b), 198(2), 293(1) Crimes Act 1961, and sections 11, 13, 24(6) Summary Offences Act 1981. Even more recently, included among the seemingly endless violent offences legislation being introduced, was a new section 198A(1) Crimes Act 1961 which made it an offence to use a firearm against a police officer, knowing or *being reckless* that the victim was a police officer. Where Parliament has included the word or one of its derivatives (e.g. reckless disregard), the only issue is its meaning.[4]

Second, the courts may introduce recklessness into an offence under the rubric of reading mens rea into a section which is otherwise silent as to the fault element required to commit the offence. In 1950 Professor I.D. Campbell wrote: [5]

> The essence of mens rea was an awareness of wrong doing, and its scope was accordingly limited to the state of mind in which the accused either intentionally did the forbidden act or was reckless whether he did it or not.

This inclusion of recklessness as an integral part of mens rea, and as something distinct from negligence, has frequently been affirmed by courts. However it has also been the case that often when it would seem to be the solution to the particular problem before the court, recklessness has been neglected. It is in this area of reading mens rea into a section that inconsistencies as to recklessness appear. Often a gap appears between theory and practice and it is to this issue that the balance of this part of the article is devoted.

A. Express Statements as to Its Role.

Recklessness has appeared on a random basis in statutes for most of this century[6] and in general criminal law principles it seems to have first developed as a species of malice.[7] In New Zealand in 1930 Blair J. noted the distinction between driving recklessly and driving negligently:[8]

> To constitute negligent driving involves only a disregard of a duty created by

4 Discussed in Part III, post.
5 I. D. Campbell "The Resurgence of Mens Rea" [1956] N.Z.L.J. 310, 310.
6 For a discussion of the development of recklessness see E. Griew "Consistency, Communication and Codification: Reflections on Two Mens Rea Words" in P R Glazebrook (ed), *Reshaping Criminal Law* (Stevens and Sons,1978) 60-68.
7 J. Turner (ed) *Kenny's Outlines of Criminal Law* (19 ed 1966) para 158a.
8 *R* v. *Storey* [1931] N.Z.L.R. 417, 470.

> section 171 [Crimes Act 1908]. A negligent driver is remiss in his duty, but a reckless driver is more than merely forgetful or inattentive - he is knowingly disregardful of his duty.

More recently McCarthy J. in *Creedon* observed: [9]

> If one says mens rea is required, one follows a well-trodden route. But mens rea in the strict sense is generally understood to import only intention or recklessness, not negligence.

Then, in the early 1980s, the Court of Appeal delivered its judgment in *Howe*,[10] a case arising out of the Springbok Tour of 1981. Most attention on that case has focussed on the meaning given by the Court to recklessness.[11] However, the process by which recklessness was introduced into the section is of equal importance to the criminal law, and indeed it has repercussions which go far wider than recklessness. The provision in question was section 90 of the Crimes Act 1961 (now repealed) which in general terms dealt with riotously damaging a Crown vehicle. There was no real doubt concerning the issues of riot and deliberate damage. The main question to be answered was whether the accused had to know that the vehicle being damaged belonged to the Crown. Three options could be identified:

(1) As regards the nature of the vehicle the offence could be treated as absolute. All that need be proved was that it was a Crown vehicle. The accused's state of mind is irrelevant.
(2) Negligence could be read into the section - if the accused *ought* to have realised the vehicle belonged to the Crown they would be guilty.
(3) The concept of mens rea could be introduced.

The Court chose the latter option and it is to be commended for doing so. Its decision was based upon the minority view of the High Court of Australia in *Reynhoudt*.[12] The principle to be taken from that case, and now from *Howe*, is that where an offence is one of mens rea, then mens rea in some form should attach to all the elements of that offence. Although appearing mundane on its face, this is a principle of significant application, and one which offers encouragement and a powerful authority to all who hold to the belief that all crimes ought to be offences of mens rea. The offence in *Reynhoudt* provides a striking illustration of the effect of this principle. It concerned the common enough charge of assaulting (or resisting) a police officer in the execution of duty. At issue was whether it was necessary to know that the person assaulted was a police officer acting in the execution of duty. The majority held that mens rea went

9 [1976] 1 N.Z.L.R. 571, 575.
10 Supra n.3.
11 See, for example, K E Dawkins "Criminal Recklessness: Caldwell and Lawrence in New Zealand" (1983) 10 N.Z.U.L.R. 365; D. Sleek "Casenote" (1983) 7 Crim. L.J. 294.
12 (1962)107 C.L.R. 381.

only to the assault; if your victim, unbeknown to you, happened to be a police officer then you were guilty of the more serious offence. The rejection of this approach by our Court of Appeal is to be welcomed. What separates this offence from that of ordinary assault is the fact that the victim is a police officer. This being so, there ought to be some culpability built into that element. Similarly with the offence in *Howe*; if the accused had damaged your car or my car he would not have been guilty of an offence against section 90. What brought him within this more serious damage offence was that the car was a Crown vehicle. In penalty terms the difference between wilful damage (your car or my car) and riotous damage (the Government's car) is 2 years. If our system of law is to be seen as just, such a difference must be reflected in the culpability of the accused, and not turn on factors unknown, and perhaps unable to be known, by an offender.

Having decided that mens rea in some form should be attached to all the elements of section 90, the next step was for the Court to decide what form that mens rea should take. The earlier part of the section required intention, but the Court held that the mens rea to be read into the later elements need not be the same. It noted: [13]

> The degree of blameworthiness that is caught varies with the subject-matter and the wording by which the legislature elects to define the crime, *but the two main heads are intention and recklessness.*

Recklessness as to whether it was a Crown vehicle was therefore held to amount to sufficient culpability. Forgetting for a moment the meaning subsequently given to recklessness, the Court's basic approach is a very significant one. If it is an offence of mens rea, the mens rea extends to all the offence **and** it should be regarded as consisting of intention and recklessness. The approach of the Court, and the statement as to intention and recklessness, mirrors that of McCarthy P. in *Creedon*.[14] It appears to set up a regime under which mens rea should be seen to consist of intention or recklessness.

B. Recklessness Conspicuous by its Absence.

Three Court of Appeal decisions of recent vintage - *Strawbridge*,[15] *Metuariki*,[16] and *Millar*[17] have all touched upon the role of mens rea in the criminal law. Two are subsequent to *Howe*, yet in all of them recklessness has hardly featured. Admittedly in two it seems it would not have been an issue on the facts but, given that the Court opted to go wider and consider questions of mens rea, the absence of talk concerning recklessness is significant.

13 Supra n.3, 623.
14 Supra n.9.
15 [1970] N.Z.L.R. 909.
16 (1986) 2 C.R.N.Z. 116
17 (1986) Unreported, CA134/86.

Millar was charged with driving while disqualified. His defence was that he had misunderstood what was said in relation to the periods of disqualification imposed upon him. In brief, he thought them concurrent when in fact they were cumulative. In this landmark decision the Court of Appeal returned to its earlier judgment in *MacKenzie*[18] and clarified the categories of offence that exist when Parliament has not itself expressly included a fault element. In general terms the three options open to a court are mens rea (true crimes), no fault (public welfare/regulatory offences) and absolute. It is the first of these categories which is of interest here.

The leading judgments of Cooke P. and Richardson J. do not elaborate on what exactly mens rea consists of. However all descriptions of the format of this category refer to "knowledge" being presumed until its absence is put in issue by the accused, or to the accused having an evidential onus concerning absence of guilty knowledge. In this regard the approach is the same as that earlier taken by the Court in *Strawbridge*. There the Court described the mens rea category as turning on the presence or absence of honest belief based on reasonable grounds.[19] The reasonable grounds requirement has now been abandoned,[20] but again one sees the reference only to a criterion of knowledge or belief. It may be that recklessness is thought to be embraced by the concept of "guilty knowledge". Indeed *Howe* would suggest this must be the case. However, if this is so, the failure to actually spell it out is an ellipsis which is not only unhelpful, but also potentially harmful. One example of this may be found in *Metuariki*.

Metuariki was charged with supplying the class A drug psilocybine. He had sold what are known as magic mushrooms to an undercover agent. The mushrooms, which apparently grow in plentiful supply near New Plymouth beaches, contain psilocybine which produces an hallucinogenic effect. Metuariki was acquitted at trial and the Crown appealed, querying whether the trial judge had been correct in directing that the accused could be acquitted if (1) he knew the hallucinatory effect of the mushrooms, (2) he did not know that the substance which produced this effect was psilocybine and (3) he did not know the substance was a controlled drug. The offence of supplying drugs is one for which Parliament has not expressed a fault element. The Court of Appeal confirmed its earlier decision in *Strawbridge* that this offence is a true crime with a fault element of mens rea. The Court then held that Metuariki was entitled to be acquitted if he honestly believed that he could innocently possess the mushrooms. The appeal was dismissed. Notwithstanding the limitations imposed upon the Court by the format of the appeal, it is somewhat surprising that the Court did not address the question of recklessness. Being an offence of mens rea, under the *Howe* principles recklessness ought to be a sufficient mental state. In the context of this case, and giving it for the moment its narrowest meaning, recklessness would consist of realising there was a possibility that the mushrooms, or something in them, were prohibited for sale. The nature of the activities and the venue where the accused sold the mushrooms to an

18 [1983] N.Z.L.R. 78.
19 Supra n.15, 916.
20 *Metuariki*, supra n.16; *Millar*, supra n.17.

undercover officer are not made clear, but it would seem that there existed on the facts a sufficient basis to warrant recklessness being put to the jury.

C. *A Consistent Approach*

Why is it that there seems to be a level of uncertainty and inconsistency in the courts as to when recklessness is a sufficient mental state? It is submitted that there is much strength in the observations of Lord Diplock:[21]

> My Lords, it would I think be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak ... about the conduct of the accused and the state of mind at the time of that conduct, instead of speaking of actus reus and mens rea.

In the context of recklessness, the offending tag is mens rea. What was once a useful description for the fault element of an offence has now become an enemy of analysis. So many states of mind have been included under mens rea that the label no longer has a sensible meaning. Included variously under its name have been states of mind as diverse as intention and inadvertent negligence, and as confusing as objective recklessness and wilful blindness. *Millar* itself is a good example of the confusion these labels can engender. At the lower level there appears to have been a finding that the accused had an honest belief that he was not disqualified, and at the same time a suggestion that the accused had been wilfully blind. These two states of mind are incompatible; someone who believes "X" to be true cannot at the same time be wilfully blind as to the truth of "not-X".

Wilful blindness is perhaps the best illustration of the need to abandon general tags and to clearly define in plain English what we mean in each situation. However one describes wilful blindness, and there is no settled meaning,[22] it is clear that someone who has been wilfully blind has *at the least* been reckless; they have ignored a risk they know to be present so as to avoid the unpleasantness of having their suspicions confirmed. Further, following *Crooks*,[23] it is equally clear that *at the most* they have been reckless. Refusing to turn one's suspicions into certainty is not, and never can be, of itself knowledge. It is a state from which a jury may infer knowledge if it decides that indeed they were more than suspicions. However this remains an inference a jury is free to draw or not draw. If the place and meaning of recklessness were more clearly settled, the continued existence of confusing concepts such as wilful blindness could be abandoned and understanding of the principles of criminal liability greatly increased.

21 *Miller* (1983) 77 Cr.App.Rep. 17,19.

22 See, for example, G. Williams *Textbook of Criminal Law* (2ed, Stevens and Sons 1983) 124-126 and D. Lanham "Wilful Blindness and the Criminal Law" (1985) 11 C.L.J. 261.

23 [1981] 2 N.Z.L.R. 53.

The solution, it is submitted, has already been provided by the Court of Appeal through its efforts in recent years to streamline and clarify the options which are open to courts faced with silent offences. The first of the *Millar* categories, that of "mens rea", should be expressly understood to involve a reading in of "the two main heads of intention and recklessness". Although it is possible to imagine situations where, perhaps because of the drafting of a particular section, only knowledge/intention is read in, this should be seen as an exception. When this approach is superimposed upon the basic *Howe* doctrine that in true crimes the mental element should attach to all the elements of the offence, it is submitted that the final picture will be one of consistency and fairness. It will also be one which not only genuinely reflects that the "New Zealand courts subscribe ... strongly to the conservation of mens rea as a cardinal requirement of the criminal law",[24] but which also enables everyone to know with confidence exactly what that means.

III. WHAT DOES RECKLESSNESS MEAN?

Once the place of recklessness in the criminal law is settled, the next vital step is to define with precision and consistency what the word means. Any such discussion must focus on Lord Diplock's judgment in *Caldwell*. Prior to that case recklessness was generally given a subjective definition; in *Stephenson*[25] it was defined as recognising a risk and running it in circumstances where to do so was unreasonable. Central to that concept was the actual appreciation that the prohibited conduct might arise as a consequence of your action. In *Caldwell* Lord Diplock rejected the narrower subjective definition of the term, holding rather that the word should be given its "ordinary meaning". This he saw as consisting of either the subjective meaning or alternatively a failure to see a risk that you should have seen. The end product is a very much wider concept of culpability. If the reasonable person would have recognised the risk, then your failure to do so is sufficiently culpable to provide the mens rea of a true crime. As I.G. Campbell has noted:[26]

> Lord Diplock has led the House of Lords in recent years in an avowed campaign to abolish the distinction between recklessness and criminal negligence.

It is against this background that the meaning to be given to reckless in New Zealand must be considered. As will be seen, there is no way of avoiding a policy decision. Contextual arguments will work to a limited extent, but ultimately there needs to be a decision of principle as to which road New Zealand will take.

A. Recklessness Expressed in a Statute.

The first way in which the meaning to be given to recklessness will arise in New

24 *Howe*, supra n.3, 623.
25 [1979] 2 All E.R. 1198
26 I.G. Campbell "Recklessness in Intention Murder Under the Australian Codes" (1986) 10 Crim. L.J. 3, 10.

Zealand is where Parliament has expressly included the word in a statute. It seems clear that if one consistent interpretation is to be given to the statutory formulations of the word, then it must be a subjective interpretation. Two similarly worded sections of the Crimes Act 1961 illustrate this. Section 167(b) provides that homicide is murder when "the offender means to cause to the person killed any bodily injury *that is known to the offender to be likely to cause death*, and is reckless whether death ensues or not." Section 293(1) defines wilfully as "causing any event by an act *which he knew would probably cause it*, being reckless whether that event happens or not." Strangely, it is not the word reckless itself, but the preceding emphasised words, that hold the key to the proper interpretation. Of the word "reckless" Dawkins has noted that in these provisions "it is doubtful whether the final clause referring to recklessness contributes any further meaning."[27] This mirrors the view taken by Stuart on similar Canadian provisions.[28] The greater significance in these provisions rests with the specific requirement that the accused must appreciate the risk - "known to the offender to be likely to cause death" and "which he knows would probably cause it". Parliament is here defining what is a culpable state of mind in terms of subjective recklessness.[29] This formulation is repeated elsewhere and it becomes possible to argue as a consequence that when then the word is undefined, e.g. section 24(b) Summary Offences Act, for reasons of consistency it ought to be given a similar definition. Similarly, the most common alternative formulation is "reckless disregard". This too suggests on its face a subjective interpretation. The Concise Oxford's[30] leading definition of disregard is "to pay no attention to". It is arguable that one cannot disregard without first having regarded. One must be aware of something before one can disregard it.

However, the correct interpretation of the express provisions is not beyond dispute. Two High Court decisions have considered the meaning of "reckless disregard" since the *Caldwell* decision and they have reached different results. In *Stephens*,[31] a case decided after *Howe*, Chilwell J. gave the word its subjective meaning, describing that as "the less harsh approach, the one which so far in my view has traditionally applied in New Zealand ...". This he felt should remain the law until the Court of Appeal decided otherwise. On the other hand in *Meikle*,[32] Heron J. upheld a direction that the phrase meant "lacking in thought and consideration, and not applying one's mind to the duty that is required in the circumstances and being careless in relation to it." It is not clear from the facts or the judgment exactly how the judge would have labelled this test but a

27 Supra n.11, 375.

28 D. Stuart *Canadian Criminal Law* (Carswell, 1982) 133-136. In *Harney*, supra n.3, the Court of Appeal confirmed that "reckless" is largely redundant in section 167(b). See also *Dixon* [1979] 1 N.Z.L.R. 641.

29 This test is actually narrower than traditional subjective recklessness which only requires knowledge of any risk, however likely or probable. For a commentary on the test for subjective recklessness suggested by the Court in *Harney*, see S. France [1987] N.Z.L.J. 338.

30 *Concise Oxford Dictionary*, 6th edition.

31 (1983) Unreported, T.91/83 Auckland Registry.

32 (1986) 1 C.R.N.Z. 510.

fair reading would tend to categorise it as objective. What this perhaps illustrates is that although it is possible to argue quite forcefully that the statutory forms of recklessness ought to be given a subjective meaning, it is by no means cut and dried. It is true that in many instances , either by design or by chance, Parliament has adopted a phrase which allows only a subjective approach. If, then, a single approach were thought desirable, the Lord Diplock approach would seem to be foreclosed. However there are also several examples of the word reckless being used in a way that is not coloured by the context. So long as one is willing to accept that the two concepts can co-exist, it will require a policy decision to prevent the adoption of the *Caldwell* definition.

B. Recklessness as Part of Mens Rea.

Whatever lack of certainty exists in relation to express recklessness, the problems are much greater when one considers the area of implied recklessness. In many ways this is surprising because in this context recklessness is being read into a section as part of mens rea. Given that, it might be thought that the word would have a settled meaning. Yet, on the only two occasions since *Caldwell* that the Court of Appeal has considered this matter, it has made it clear that it considers both definitions to be possible.

The first occasion was *Howe*. As already noted the Court of Appeal read recklessness into section 90 Crimes Act 1961 (riotous damage of a Crown vehicle). Having done so, it proceeded to give the word its objective meaning, finding the new *Caldwell* recklessness to be helpful in the context of that section. At the same time, the Court emphasised that this was not to be taken as a general endorsement of objective recklessness. While on occasions it would be useful, that would not always be the case. As a consequence, New Zealand was left somewhat in a state of limbo. An integral part of criminal liability was capable of two definitions, and there were really no clear guidelines as to when each would be employed.

More recently in *Harney*, the Court moved to stabilise the position. It affirmed that the basic position in New Zealand is that mens rea consists of recklessness defined subjectively. At the least a presumption is thereby created. However, the Court would not rule out the possibility of using the alternative definition. In a note on this case the author commented upon the need for clearer guidelines as to when one might expect the objective definition to be used.[33] Here I would like to take rather a stronger line and to argue for the complete rejection of the Lord Diplock approach to recklessness. The path trodden in recent times by the House of Lords in the area of criminal law has been a very controversial one. Their decision in *Smith*[34] required reversal by statute; in the area of intoxication New Zealand and Australia have avoided following their lead; now most recently we have objective recklessness, described by one commentator as a "disaster"[35], and by another, in a case relating *Caldwell* to manslaughter/death by reckless driving, as

33 Supra n.29, 339. The lack of guidelines has recently been noted by Barker J. in *Smith*, (1988) Unreported, A.P. 155/87 Auckland Registry.

34 [1961] A.C. 290.

35 P.R. Glazebrook "Case and Comment" (1984) 43 C.L.J. 1,4.

requiring fairytale reasoning: [36]

> This seems to be saying that Seymour must be treated as if he had done it knowingly, because if he had not done it accidentally, he might have done it on purpose if he had thought of it. Lewis Carroll might have given such a reason, but he, unlike the House of Lords, would have been joking.

What is it about objective recklessness that causes such outrage, and why should New Zealand reject it?

As noted *Caldwell* recklessness involves the imposition of liability in situations of inadvertence. Actual awareness is no longer the benchmark; rather the criterion becomes one of "ought to have been aware". Lord Diplock was first motivated by a desire to simplify the concept. He argued that to require juries to assess whether someone actually foresaw a possibility was to ask them to undertake mental gymnastics. Primarily, however, he believed the two situations were indistinguishable from a moral blameworthiness point of view. There was no real difference between a Caldwell who set fire to a hotel realising it might endanger lives, and a Caldwell who did the act without ever thinking about the safety of the guests. To set the perimeters of the debate, let us remember that if the arguments in the first part of this article are accepted, recklessness will be a sufficient mental state for the commission of most crimes. Let us also acknowledge that both Caldwells are blameworthy, and deserving of substantial penalty. The issue is, are they equally blameworthy? And, if they are not, is the difference one that can be adequately dealt with by different penalties or should they be guilty of different offences?

It is on this blameworthiness point that most objection has been taken to *Caldwell*. Here it is necessary to note that developments since *Caldwell* have made it clear that why someone failed to see an obvious risk that the ordinary person would have seen is not relevant. So in *Eliot* v. *C* [37] a backward 14 year old school girl who did not appreciate the highly inflammable nature of white spirits was held guilty of burning down a shed, even though it was accepted by the Court that she was not capable of appreciating the risk she was taking. Again, in *Bell* the English Court of Appeal observed that while mental illness would explain why someone did not see an obvious risk, it would not excuse it.[38] Arguably, such a gloss on *Caldwell* was not a necessary development, but in *Eliot* the House of Lords refused leave to appeal, thereby seeming to accept the reasoning at the lower level. The effect is that incapacity, whatever its origins, will not excuse the failure to avert to an obvious risk.

The criticisms of *Caldwell* do not take the point of view that negligence is never, or even not on most occasions, culpable. Rather it is that the difference in culpability between the two is of the essence of criminal law and is one that we must reflect not in

36 J. Spencer "Case and Comment" (1983) 42 C.L.J. 187,190.
37 (1983) 77 Crim. App. R. 103.
38 [1984] 3 All E.R. 842, 847.

penalty but in conviction or acquittal. In New Zealand we have thankfully traditionally punished acts on the basis of the intent which accompanies them. Hitting someone is not punished at all if done accidentally. If done deliberately it may be the basis of an assault charge punishable by up to one year in prison; if done with a desire to inflict serious harm it can be punished by up to three years in prison. In all these instances the act and the harm are the same; what is different is the intent which accompanies them. *Caldwell* recklessness would take us away from such distinctions. The person who knew they might kill someone by their act will be guilty of the same offence as the person who stupidly never thought about what was an obvious risk, or worse, was not capable of that level of analysis. In *Seymour*, [39] for example, the accused crushed his de facto spouse between his truck and a car. The defence was that he did not know Iris Burrows was between the two vehicles.[40] Once *Caldwell* was applied to manslaughter this defence became irrelevant, as apparently there was an obvious risk of her being hurt. Yet, as Spencer has observed: [41]

> The gulf which lies between the blameworthiness of the Seymour who deliberately drove his lorry at his mistress knowing that he might crush her and the blameworthiness of the Seymour who negligently crushed her by accident must be obvious to anyone with any sense of morals or justice.

I agree. Both are bad but to equate them is to divorce the criminal law from basic distinctions to which it must cling if it is to retain credibility.

Secondly, objective recklessness has been described by many commentators as being the same as the old concepts of gross or criminal negligence.[42] While anything which limits *Caldwell* is attractive, it is submitted that the validity of such a comparison is not beyond question. In *Caldwell* itself Lord Diplock describes an obvious risk as one which would be obvious to the ordinary prudent individual: [43]

> If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as reckless in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon a due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it.

On its face this is much more akin to a simple negligence test than one of gross negligence which would require "obvious" to be defined in the sense of "could not be

39 [1983] 3 W.L.R. 349.
40 Seymour was willing to plead guilty to any of a number of lesser driving charges; the prosecution rejected this.
41 Spencer, supra n. 36, 188.
42 See, for example, Campbell, supra n.26, 10.
43 Supra n.1, 966.

missed". Seen in this light the potential width of the *Caldwell* definition becomes ominous. For example, the basic wilful damage provision in the Summary Offences Act 1981 develops a very wide scope; simple everyday acts of negligence, something we are all "guilty" of, could suddenly attract the attention of the criminal law if any damage results. The next time you open your car door without looking properly, and as a consequence you damage something, you could find yourself charged with the same offence as the person who deliberately hurls a brick through a shop window. I query whether the former act of negligence should be within the ambit of the criminal law, but if it were to be, it is vital that we distinguish these two situations by more than penalty.

Third, giving recklessness an objective definition would threaten to undo all the categorisation efforts of the Court of Appeal in *Millar* and *MacKenzie*. The question must be asked whether there remains any meaningful difference between categories one (mens rea) and two (no fault). Clearly the burden of proof will be different but what else? The only real possibility would seem to be the area covered by the so-called *Caldwell* loophole. This loophole arguably covers the ground between seeing a risk and running it, and not thinking about a risk at all. The middle ground is the person who does think about the risk and decides it will not eventuate; in other words the honest and unreasonable mistake. To illustrate: let us assume that the risk we are talking about is that of damaging property. Subjective recklessness will cover the person who sees a chance that their conduct may cause such damage but does their act anyway; *Caldwell* recklessness will catch both that and the person who did not think about whether damage might eventuate, even though the possibility was obvious. But what of the person who does address their mind to the possibility and stupidly decides that it will not eventuate, for example because of an exaggerated belief in their own abilities. This person is not within either type of recklessness, but would be at fault within category two.

If this loophole, which clearly exists on the wording of Lord Diplock's test, is upheld as valid, then some distinction will remain between the two categories. The number of people who come within it will be small but it represents a nonetheless important exemption - the thinking but stupid person. However, there are problems with this loophole. First, while it is a partial answer to the contention that the categorisation process will be undone, it goes no further than this and certainly does not cure the other inequities inherent in objective recklessness. Second, and more importantly, its very existence is questionable. Although the opening is there, can it really be thought that courts will accept it? It means that the person who stupidly never thinks about a risk will be guilty whereas the person who does think about it, and stupidly rejects it, will not be.[44] We cannot allow liability, and indeed liberty, to turn upon such illogical distinctions.

Finally, it should be considered whether a watered down version of objective recklessness might not be possible. If one draws back from the excesses of *Eliot v. C*

44 In *Shimmen* [1987] Crim. L.R. 800, the English Divisional Court appears to have accepted the existence of the loophole, although it did not arise on the facts.

and requires capacity to see the risk, then at least one does not face the spectacle of convicting backward children, involuntary drunks, or mentally sub-normal people. However, it is not these situations that represent the real dangers of *Caldwell* recklessness. After all, if presented with that type of accused (and hopefully wise use of prosecutorial discretion will make them rare) courts will normally find a way to overcome the problem. If all else fails, sentencing can solve a dilemma. Rather, the real dangers of *Caldwell* lie in its potential to bring the might of the criminal law into the ordinary situations of life by equating acts of negligence with deliberate wilful acts of malice. Perhaps some acts of negligence ought to be punished by the criminal law, but we must never lose sight of the fact that such acts do not involve consciously dangerous anti-social activity.

In conclusion, I am confident that our Court of Appeal will hold to the traditional subjective meaning. Any court which has steadfastly held to mens rea as a cardinal principle of the criminal law, and which has refused to convict those who lack the necessary intent, no matter how blameworthy they may be for such lack, will surely not adopt a general approach which results in the conviction of those who, through no fault of their own, cannot achieve the standards of that ever present, ever reasonable, and to many of us lesser mortals, ever obnoxious reasonable person.