

RECKLESSNESS

Q: Critically evaluate the meaning of the term “Recklessness” to describe an aspect of Mens Rea (Guilty Mind) and explain how it is currently applied to offences in the English Law System.

A:

In everyday language, Recklessness means to take an unjustified risk. However, its legal definition is not quite the same. To find out the meaning of Recklessness, careful direction is to be given to the jury. There are two types of Recklessness, which were named after the cases they were defined in: R v Cunningham (1957), which is the *Subjective* version of Recklessness and MPC v Caldwell (1982), which is the *Objective* version of Recklessness.

The dictionary meaning of reckless is to be careless, thoughtless, incautious, heedless, unheeding, regardless, da redevil, madcap, wild, irresponsible, unwise, indiscreet, mindless or negligent. Recklessness is a form of Mens Rea (Guilty Mind).

Mens Rea is the Latin for ‘guilty mind’ and traditionally refers to the state of mind of the person committing the crime. The required Mens Rea varies depending on the offence, but there are three main states of mind which separately or together can constitute the necessary Mens Rea of a criminal offence.

When discussing Mens Rea, we often refer to the difference between *subjective* (Cunningham) and *objective* (Caldwell) tests. Put simply, a *subjective* test involves looking at what the actual defendant was believed to have been thinking, whereas an *objective* test considers what a reasonable person would have thought in the defendant’s position.

The *Subjective* test was used defined in the case of R v Cunningham 1957, which was the case where the defendant broke a gas meter to steal money that was concealed inside it, the gas seeped out into the house next door where Cunningham’s mother was sleeping and became so ill that her life was endangered; consequently, Cunningham was charged under s. 23 of the Offences Against the Person Act 1861 with ‘malicious administering a noxious thing so to endanger life’.

The Court Of Appeal said that ‘maliciously’ meant intentionally or recklessly. They defined recklessness as foreseeing that the kind of harm that in fact occurred might occur, and going ahead anyway. This is called a *subjective* test: the accused must actually have been reckless if he realised there was a risk of the gas escaping and endangering someone, and went ahead anyway. His conviction was in fact quashed because of misdirection at the trial.

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The *Objective* test was used in the case of MPC v Caldwell 1982, this was the case where an ex-employee of a hotel nursed a grudge against its owner. He started a fire at the hotel, which caused some damage and was charged with arson. This offence is defined in the Criminal Damage Act 1971 as requiring either recklessness or intention.

On the fact, there was no intention and, on the issue of recklessness, Lord Diplock stated that the definition of recklessness in Cunningham was too narrow for the Criminal Damage Act 1971. For the Act, he said recklessness should not only include the Cunningham meaning, but also go further. He said that a person is reckless as to whether any property would be destroyed if:

1. he does an act which in fact creates an obvious risk that the property would be destroyed or damaged and
2. when he does the 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.

Thus there are actually two potential ways that Caldwell recklessness can be proved. The first way is very similar to the Cunningham test: 'he does an act which in fact creates . . . a risk . . . and . . . has recognised that there was some risk.' The second way is the important extension to the meaning of recklessness: 'he does an act, which in fact creates . . . an obvious risk . . . and . . . he has not given any thought to there being any such risk.'

But having two tests for the same word causes confusion and is unnecessary. As the law currently stands, concern has been expressed that the higher the Cunningham standard is applied to rape, the lower Caldwell standard is applied to criminal damage. This means that the property is better protected than people.

Other problems with recklessness are that there is a lower threshold for liability. The adoption of Caldwell recklessness means that a Mens Rea generally considered less morally blameworthy than Cunningham recklessness is being applied to some serious offences.

Additionally, there is an overlap with negligence. The Caldwell test has blurred the distinction between recklessness and negligence. Before Caldwell, there was an obvious difference: recklessness meant knowingly taking a risk; negligence traditionally meant unknowingly taking a risk of which you should have been aware. Caldwell clearly comes very close to negligence.

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Furthermore, the lacuna. The case of R v Merrick has been criticised as unrealistic. In practice, replacing electrical equipment often creates a temporary danger, which cannot be avoided, yet technically each time in criminal law the electrician is reckless.