Gross Negligence and Recklessness

In imposing criminal liability for a failure to recognise the risks, obvious to a reasonable person, there are at least two factors:

the level of risk involved
The seriousness of the potential harm

Only where the possible harm is more serious and the risk is more obvious, do we distinguish recklessness from carelessness and impose liability. In assessing this, other issues may come in:

The social utility of the action

Thus, the surgeon who performs a necessary but dangerous operation may realise that there is a high probability of serious harm or even death but we do not blame him or her if the operation fails - we balance the risks that are undoubtedly being taken against the social utility of the activity. We regard skilled surgical care as socially useful and do not regard the surgeon who kills a patient as reckless whereas a player of 'Russian Roulette' would certainly be so, despite the odds of 6 -1 against, since that is an action of no social value whatsoever.

At this point, I am using the terms, 'reckless' and grossly negligent' as synonymous but the former term has had an uncertain history. It can be regarded as simply 'gross negligence' involving a major deviation from the standards of the reasonable man, not a state of mind at all. Alternatively it can be limited to those cases where the defendant subjectively recognises the possibility of harm, subjectively appreciates the risk but goes ahead anyway - in other words, instead of gross negligence, it involves the conscious running of an unjustifiable risk and as such is foresight.

In Cunningham (1957), the defendant tore a gas meter off the wall of an unoccupied house in order the steal the money. The gas was left gushing out and it seeped into the neighbouring house where it was breathed in by the victim who was nearly gassed. The defendant was charged under s.23 Offences Against the Person Act 1861, which involves maliciously administering a noxious thing so as to endanger life. The trial judge directed the jury that malice was the equivalent to wicked and the Court of Appeal quashed the conviction - maliciously means intentionally or recklessly and the latter word required proof that the defendant had had some foresight of the risk and yet had still deliberately gone ahead.

This was supported in Stephenson (1979) where the accused, a tramp, went to sleep in a haystack. Being somewhat cold, he decided to light a fire and caused some 3500 of damage. There was medical evidence that the defendant was schizophrenic and that this involved a reduced ability to appreciate or foresee risks to that possessed by a normal person. The trial judge directed the jury that the defendant was reckless if he 'closed his mind to an obvious risk' but the Court of Appeal quashed the conviction with Lord Lane firstly looking at the recommendations of the Law Commission:

...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.

It looked in 1980 if the word 'reckless' would be interpreted subjectively - did the defendant advert to the risk and carries on regardless AND was the risk an unreasonable one in all the circumstances? If we think back to Hart's formulation, this is more generous to the defendant - all Hart required was proof that the defendant had the capacity to appreciate the risk. Stephenson required proof that the defendant actually appreciated the risk.

However, in 1981, this settled state of the law was thrown into some confusion by the House of Lords. In Caldwell (1981) the accused had done some work for the owner of as hotel but had then quarrelled with him. He got drunk and then had set fire to the hotel in revenge. He was charged with two offences - the first under s.1 (1) Criminal Damage Act 1971 - criminal damage - but also under s.1 (2) of the same act which is criminal damage with the additional element of 'intentionally or recklessly endangering life'. Caldwell pleaded guilty to the lesser charge of criminal damage but not guilty under s.1 (2) - the defence was that he was so drunk that he had not thought about the danger to life at all. The trial judge directed the jury that drunkenness was no defence - the Court of Appeal allowed the appeal and that left the House of Lords to decide on the meaning of recklessness and the relevance of drunkenness.

Now the general rule about drunkenness is that if you are so drunk so that you do not form the intent necessary, then you are entitled to be acquitted. However, the rule in Majewski (1976) goes on to say that this only applies to offences involving specific intent and not to those requiring basic intent. The distinction between basic and specific intention is most peculiar - suffice it to say that in offences against the person, murder and GBH are crimes of specific intent whereas most other forms of assault are crimes of basic intent. Where a defendant accused of assault seeks to show that he was drunk and had no intention, he cannot adduce evidence of drunkenness.

If recklessness is a variety of subjective foresight, then under Majewski the defendant should be acquitted, as the intoxication raised a doubt as to whether the accused foresaw any risk to life. But if recklessness involved a more objective, gross negligence test, evidence of drunkenness would be irrelevant. In a majority judgment, Lord Diplock (with Lords Keith and Roskill concurring) considered and rejected the Cunningham approach and the suggestion that the Criminal Damage Act of 1971 was in fact drafted with that very decision in mind. He argued that in popular speech there is no distinction between the person who recognises a risk and goes on nevertheless and the person who never addresses his mind to the obvious risk at all. The law, said Diplock, should not perpetuate 'fine and impracticable distinctions'. Reckless was a word in ordinary speech and means not only taking foreseen and unnecessary risks but also the failure to see such risks:
There must be an obvious risk, depending on the circumstances in which the defendant acted. This is a risk, which would be obvious to the reasonable person - Sangha (1988)
Once the obvious risk is proved, it matters not whether the accused realised that there was a risk and decided to take it or whether he never realised that there was a risk at all - either way the defendant is liable.

Only if the defendant adverted to the possibility of risk but decided that there was no risk, might there be an avenue of escape.

There is a powerful dissent from Edmund-Davies and Wilberforce, arguing that recklessness might be an everyday term but it is also a legal term, defined in countless cases as well as by reform committees. The statute was in fact drafted by the Law Commission who clearly had the Cunningham decision in mind - indeed quite recently the Law Commission have produced a proposal for the codification of the whole of the criminal law in which recklessness is still defined in this sense.

Precedent and reason might have been on the side of the dissentients but the Caldwell test of recklessness was upheld by the House of Lords in Lawrence where the accused was charged with causing death by dangerous driving contrary to s.1 Road Traffic Act 1972 - he had been driving a motor cycle at speeds between 60-80 mph in a town street when he knocked over and killed a pedestrian crossing the road. The major judgment is again delivered by Diplock. These two decisions took the 1980s critics' award for judicial disaster - some of the kinder comments have been 'pathetically inadequate', 'slap-happy' and 'profoundly regrettable'. In essence, Diplock's rationale was founded firstly on the premise that there is no difference in moral culpability between the defendant who adverts to a risk and the one that does not. Secondly, he suggested that it was not a practicable distinction for use in a jury trial. The answer to the first seems to be that moral philosophy clearly draws a distinction between the deliberate risk-taker and the person who fails to appreciate that there is any risk. You will recall that Hart, in arguing for liability for negligence, drew the distinction between those capable of observing certain standards and those who did not possess that capacity. If you do not differentiate, then the schizoid tramp or the inadequate, backward child is judged by the same standards as the prudent individual.
This point is illustrated in Elliott v. C (1983) where the accused was a 14-yr old girl in a remedial class at school. She had gone out with an older girl, hoping to spend the night at her house. Unable to do so, she stayed out all night. At about 5 am she poured white spirit on the floor of a garden shed, lit it and it flared up out of control. The shed was destroyed. The magistrates, considering her age, understanding, lack of experience and exhaustion, considered that the thought of risk had not entered head. But they also found that it was a risk that should have been obvious had she given any thought to the matter. They acquitted on the grounds that the risk had to be obvious to that particular defendant. The Divisional Court allowed the prosecutor's appeal - the defendant was reckless if the risk was one that was obvious to a reasonably prudent person.
Such cases question Diplock's assertion that there is no moral difference between these two states. Equally, the Cunningham test was certainly applied by juries in countless cases (both before and after Cunningham) without noticeable evidence that juries were having difficulty with a 'fine and unpracticable' distinction.

Lord Diplock referred to the accused either recognising the risk and continuing or not recognising the risk at all. Within this reasoning, there is a gap - what if the accused adverted to the risk but decided that it was safe to proceed? This is illustrated in Shimmen (1987) where the accused was showing off his Korean martial arts skills. He lashed out with his foot anticipating that it would stop two inches short of the shop window. He miscalculated and broke the window. The Divisional Court sent the case

back to the justices with directions to convict but without ruling on this point. Whether such a lacuna still exists is a moot point.

To what cases does this test of recklessness apply?

In theory, to all statutory offences which include the word 'recklessly' but so far there has been little enthusiasm except in cases of criminal damage and reckless (now dangerous) driving. However there is now a statutory definition of 'dangerous' under s.1 Road Traffic Act 1991
BUT it has not been applied to rape S (1983) nor is it felt that it applies to deception cases
NOR has it been applied to those statutory offences which contain the word 'maliciously' - this is the result of Cunningham which paradoxically remains good law. Diplock regarded 'malice' as a term of art whereas he saw recklessness as bearing an ordinary, everyday meaning. In W v. Dolbey (1983) a fifteen-year-old boy was shooting with an air rifle. He met P and pulled trigger thinking that there was nothing in the gun. There was a pellet left which hit P between the eyes. He was charged under s.20 Offences Against the Person Act 1861 - unlawful and malicious wounding. The Divisional Court quashed the conviction - though 'maliciously' meant intentionally or recklessly, this was not 'reckless' in the sense given to that word in Caldwell. If the defendant did not advert to the possible risk, then he was not malicious and therefore not liable.
At common law, it applied to the offence of manslaughter which, until 1994, could be committed 'recklessly' but the House of Lords decision in Adomako means that we now apply a test of gross negligence.

Thus, in considering the standards, which the courts use to assess blame and impose criminal liability, we need to draw the following distinctions:
Strict liability offences where the prosecution does not have to prove mens rea in regard to one or more elements of the offence. Normally these are statutory where the text excludes any reference to mens rea. As such, it requires the court to decide whether to interpret the statute as including the word 'knowingly' in the text
Negligence involves the inadvertent taking of a risk, which a reasonable person would not take. However, the level of risk is not high (mere carelessness) and the potential harm often not serious. There are few - under the Road Traffic Act 1988 it is an offence to drive a car without due care and attention or without due consideration
Gross negligence involves the inadvertent taking of a risk, which a reasonable person would not take. The level of risk is much higher (more than mere carelessness) and the potential harm will be serious. This standard applies to manslaughter
Caldwell recklessness again involves the inadvertent taking of a risk, which a reasonable person would not take. Again, the level of risk is high and the potential for harm serious. This test has been considerably restricted in recent years.
Cunningham recklessness involves the advertent taking of unjustified risks, realising the risk but going ahead. The latter was much nearer the idea of foresight, as was discussed in relation to malice aforethought and murder (Hyam). This has an important role to play in offences against the person under the 1861 Act and property offences such as deception, which can involve lying recklessly (s.15 Theft Act 1968)
Finally intention - purposive conduct