The unresolved problem of recklessness

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We seem to be stuck fast over recklessness. The model direction in *Caldwell*[1] is almost universally deplored, particularly in respect of its operation in cases like *Elliott v C*[2] and *R (Stephen Malcolm)*,[3] but the lords show no sign of repenting, even though in both of the cases last cited expressions of disapproval ascended to them from a Divisional Court. Lord Roskill, an out-and-outer on the point, asserted that the model direction applies 'throughout the criminal law unless Parliament has otherwise ordained in a particular case',[4] which if accepted would reverse the present decisions that the direction does not apply to offences of malice, as most offences against the person still are.[5]

We urgently need action, which could be achieved by legislation or, much more quickly, by the lords themselves if they were so inclined. The Draft Code of the Law Commission's academic team proposes to go back to subjective recklessness, putting an end to the decision in *Caldwell* on the general definitional question: the actor must be 'aware of a risk that it [a particular element of an offence] exists or will exist or occur'[6] – in effect reinstating *Cunningham.*[7] The team genuflects in the direction of the

1. [1982] AC 341.
2. [1983] 1 WLR 939, 2 All ER 1005, 77 Cr App R 103.
3. (1984) 79 Cr App R 334.
4. *Seymour* [1983] 2 AC at 507F.
5. That the direction does not apply to crimes of malice was held by a Divisional Court in *W (A Minor) v Dolbey* [1983] Crim LR 681. The court produced the powerful argument that although it had been said that statutory malice could take the form of recklessness, the authorities had always defined recklessness for this purpose in subjective terms; so it remained the law that malice extended to recklessness only in the sense of subjective recklessness. The dictum in *Seymour*, n 4, was not cited.
6. Law Com No 143 cl 22.
7. [1957] 2 QB 396. The subjective theory of recklessness is of course older. Its first statement in our juristic literature was by Sir John Salmond, *Jurisprudence*, and Professor Kenny, *Outlines of Criminal Law*, both of whose first editions appeared in 1902. Salmond's discussion was the fuller, but it was nevertheless brief; and Salmond underestimated the value of the concept, regarding the distinction of recklessness from inadvertent negligence as 'of little practical importance'. The subjective definition won support from other writers, including philosophers (see particularly Brady in 43 Mod L Rev 381), and increasingly from the courts. Although there was by no means unanimity, a stream of judicial authority in its favour can be dated at least as far back as 1875; see Williams, *The Mental Element in Crime* (Jerusalem and Oxford 1965) Ch 2. The lords accepted it in *Morgan* [1976] AC 182 and also in two civil cases: *Derry v Peek* (1889) 14 App Cas 337 and *Herrington v British Rlys Board* [1972] AC at 898F–G (Lord Reid), 921F (Lord Wilberforce), and 928C (Lord Pearson). Geoffrey Lane LJ (as he then was), giving judgment in *Stephenson* [1979] QB at 73, cited the latter case and said: 'It would be strange if the meaning of "reckless" in the Criminal Damage Act 1971 were harsher towards an accused person than its meaning in the law of tort is to the defendant'. Lord Diplock did not cite *Herrington* in his judgment in *Caldwell*, though he had taken part in it.

lords by providing us also with a definition of 'heedlessness', the relevant requirement for this being that the actor 'gives no thought to whether there is a risk that it exists or will exist or occur although the risk would be obvious to any reasonable person'. This is *Caldwell* with a change of name for the concept being defined, but it is open to the same objection as *Caldwell* recklessness, namely that on its face it is in effect a definition of negligence, or at any rate is so close to negligence as to be an unnecessary concept.

The Draft Code defines negligence as an independent concept, and gives it a meaning stricter than the one offered for heedlessness: it requires that for negligence the deviation from the reasonable standard must be 'very serious', whereas this intensifier is not used for heedlessness. So negligence is more narrowly defined than heedlessness; yet heedlessness is placed above it (and nearer to intention and subjective recklessness) in the Draft's scheme of things. There is no guarantee that a future legislator would choose between the Draft's 'recklessness' and 'heedlessness' on a rational and acceptable basis. Probably the drafting team hope that the concept of heedlessness will merely still criticism in the Lords during the passage of the Bill and will never in fact be used in legislation, but if it is used it will present all the problems of interpretation, justice and policy that we now face with *Caldwell*. I think it is a bad idea and should be omitted from the Draft Code.

The object of this article is to try to discover what it is that Lord Diplock and his colleagues and successors have found wrong with the *Cunningham* test of recklessness. Can their dissatisfaction be identified, notwithstanding the confused and contradictory way in which they expressed it? If identified, can it be persuasively countered, or else can a more acceptable definition of recklessness be devised than that offered in *Caldwell*?

Although the subjective definition requires the jury (or magistrates) to find whether the defendant knew of the risk he was creating, this does not mean that they must rely entirely on his own account of his state of mind. The jury may (and generally should) find that he knew of a risk of which everyone would have known – provided that there is nothing in the facts to indicate that the defendant did not know it.

Subjective recklessness is sometimes harder to establish than intention; but sometimes it is easier, since it does not (like intention) require proof of purpose, or of knowledge of the certainty of the consequence. The striking coal miners who projected the large block of concrete upon the taxi in *Hancock*[8] may or may not have intended to kill their working colleague, but they certainly intended to put him into great peril and were reckless as to killing him. A simple test would be to ask the defendant: 'Would you have cheerfully put yourself into the same position as that into which you put the victim? Would you ride in a taxi when someone is aiming to drop a massive weight in such a way as to give you the closest possible miss?' In a case like this, it may be hard for a jury to decide whether the attacker intended to hit the victim, but it is easy for

8. [1986] AC 455.

them to decide that he wanted at least to give the victim a fright by a narrow miss, and in so doing knowingly took a risk. So it is not always true to say that subjective recklessness is harder to adjudicate than intention.

FOUR WAYS OF EASING THE CONSTRICTIVE EFFECTS OF SUBJECTIVE RECKLESSNESS

Presumably the discontent with the subjective definition of recklessness is that, notwithstanding what has just been said, it is too difficult to prove, or at least that it gives a 'soft' jury too great a chance of acquitting. Or, to put it in another way, it gives the judge too small a chance of leading the jury to convict in a case where he feels they should convict. As a 'subjectivist' I would say that the object of the subjective definition is indeed to restrict the notion of recklessness to the gravest type of unintentional conduct, and thus to procure the acquittal of people whose misdeeds fall short of this degree of gravity. However, anyone who supposes that subjective recklessness is too narrow a concept to be workable labours under a misconception. At least four rules can be used by a judge to give it reasonable width.

(i) First, on a charge of recklessly causing injury to the person or damage to property, all that the prosecution generally have to show is that the defendant must have realised that he was creating a very small risk of the harm in question. It must be something more than the statistical risks that surround us all in life; it must be a risk arising from the particular features of the situation; but it generally need not be 'substantial' or 'probable', and the defendant need not have correctly assessed the magnitude of the risk he was creating, provided that he knew he was creating some small risk. This is because it is generally unjustified to create even a small known risk (greater than the above-mentioned statistical risk) for other people.[9] It is only if there is some degree of value in the defendant's conduct that a more substantial risk is required to constitute recklessness, and even then the latitude given to

9. *Cp* Williams, *Criminal Law: The General Part* (2nd edn) p 59. An illustration is *Chief Constable of Avon and Somerset v Shimmen* (1986) 84 Crim App R 7; see particularly the note by J C Smith in [1986] Crim LR 800 on the survival of this rule since *Caldwell*, and on Lord Diplock's confusion of the issue in *Lawrence*. In some cases it would be reasonable (justifiable) to run an insubstantial risk. For example, suppose the law makes it an offence to deal in uncustomed goods, knowing that they are uncustomed or being reckless as to the fact. The public interest in the freedom and security of transactions would indicate that the offence would not be committed if the defendant knew merely that there was a chance of illegality, particularly if there were no reasonable means open to him of ascertaining the facts.

The American Law Institute's Model Penal Code, POD s 2.02(2)(c), requires that the risk must be 'substantial and unjustifiable', and that the disregard of it must involve a 'gross deviation from the standard of conduct that a law-abiding person would observe'. I disagree with the requirement of substantiality as a matter of general principle, for the reason stated in the text, and doubt the necessity for requiring a gross deviation. Certainly this would be too restrictive for recklessness in some public welfare offences. The proposed new Canadian code is also defective on the point: it defines recklessness in terms of known *probability* (Law Reform Commission of Canada, Report 30, p 100, s 11(c)).

the defendant need only be very small. The jury should have no greater difficulty in deciding what is an unjustifiable risk for the purpose of subjective recklessness than in deciding what is an unreasonable risk for the purpose of negligence; indeed, the two questions are much the same – perhaps entirely the same.

While this seems clear enough, theory has to deal with the awkward customer who undertook a course of conduct that he knew would involve serious risks if performed by someone not highly skilled, but thought that he himself possessed sufficient skill to eliminate danger. One's reaction to this general situation depends upon the specific facts. If the defendant is a doctor who acted in good faith but lacked sufficient skill, one would not want to characterise him as subjectively reckless. But, in contrast, take *Shimmen's* case.[10] The defendant, who held a green belt and yellow belt in the Korean art of self-defence, was demonstrating his skill to his friends. To do this, he made as if to strike a plate-glass window with his foot; however, his kick broke the window. A Divisional Court held that he was guilty of criminal damage by recklessness, since he 'was aware of the kind of risk which would attend his act if he did not take adequate precautions', even though he believed he had taken enough precautions to eliminate or minimise risk (the court hovered between these two verbs, using one in one sentence and the other in another, apparently not realising the significant difference).

This decision was rendered after *Caldwell*, but a conviction might have been sustained even if the subjective definition of recklessness had been applied. On subjective principles the court was wrong in saying that a person who believes he has taken enough precautions to eliminate risk is to be held guilty of recklessness merely because he perceived a risk before taking the precautions. If Shimmen thought he had eliminated risk, he was not subjectively reckless, but the court might have remitted the case to the magistrates with an instruction to decide whether he thought he had eliminated or merely mitigated the risk. This was a case where the defendant needed to be cross-examined. 'Would you have kicked with such force towards your girl friend's or wife's or your baby's head, relying on your ability to stop within an inch of it? No? Then you knew that there was some risk of your boot travelling further than you intended.' A person may be convinced of his own skill, and yet know that on rare (perhaps very rare) occasions it may fail him. In the case at bar, the victim, the owner of the window, did not agree to the demonstration of skill. If the victim does agree (as when a person voluntarily undergoes surgery, or when a stage performer's assistant agrees to take part in a risky act) the degree of foreseen risk is important on the question of recklessness and on the defence of consent to risk, but if the victim does not agree, the actor has no right to impose any foreseen risk on him, beyond those associated with the ordinary business of life. He could be given a hot time in the witness-box if he says that in his opinion there was literally no risk.

(ii) The situation where the defendant seeks to show that he has a low

10. Above, n 9.

IQ, for the purpose of negativing foresight, is a second area of difficulty. A jury can be expected to decide whether an ordinary person would have perceived a particular risk; but what is the range of ordinariness for this purpose? If the evidence is that the defendant has an IQ of (say) 80, the jury will be at sea snd will need expert assistance. (Even an expert may be unable to pronounce with confidence.) The law provides certain principles that could be used to assist a solution, but the courts have not handled them well and in any case they are inadequate. I have discussed the problems elsewhere;[11] here is it enough to suggest the desirable outcome. The proper rule would be that the defendant can always prove his below-average IQ (including mental impairment), with the aid of expert evidence or otherwise,[12] in the hope of gaining an acquittal. If he does this, the prosecution can give evidence in reply, either to show that the defendant is, broadly, normal, or to show that he is more lacking than he has made out. The scheme of the Draft Code (cl 38) is that should the jury acquit they return a verdict of mental disorder if they decide that they have acquitted only by reason of mental disorder – including mental subnormality. Since the Mental Health Act 1983 'subnormality' has become 'mental impairment'. This verdict will give the court special powers of disposal appropriate to the particular circumstances. Of course a special power already exists if the verdict is one of insanity, but the scheme of the Draft Code is greatly preferable; not only is the expression 'mental disorder' less odious than 'insanity', but it is wider; and the proposed abolition of mandatory commitement would greatly lessen the burden of the sentence in many cases. Often no special disposition would be necessary. If an impaired person has accidentally set fire to a house, not realising, because he was stupid, that what he did was dangerous, he can safely be set at large if the accident is not likely to be repeated. The prosecution and conviction of Miss C, the ESN girl who accidentally destroyed a shed, were scandalous.[13]

(iii) Thirdly, the decision in *Caldwell* is acceptable in so far as it excludes voluntary intoxication as a factor to be considered in assessing recklessness. What it does, in this respect, is to achieve by judicial fiat the legislative reform proposed by the Criminal Law Revision Committee in its Report on Offences against the Person.

(iv) Fourthly, we lack authority on the question whether recklessness can be transferred, as intention can be; but there is no reason why not. A person who is reckless in respect of VI should automatically be guilty of recklessness in respect of V2 who is in fact injured. This does no more violence to the concept of subjective recklessness than transferred intention does to the concept of intention. The old term was 'transferred

11. *Textbook of Criminal Law* (2nd end) p 656.

12. The unfortunate decision in *Masih* [1986] Crim LR 395 should not be followed.

13. *Elliott v C*, n 2 above. In *Stephenson* [1979] QB 695 the CA had held that a person could not be convicted of arson if by reason of schizophrenia he did not realise the danger of what he was doing. A conviction would have been just as scandalous as that of Miss C was; but it seems perfectly clear on principle that the result in *Stephenson* should have been an insanity verdict. This was not available in *Elliott v C* because the trial was summary; but a conviction should have been out of the question in either case.

malice', and since 'malice' in modern law means intention or recklessness, both should be transferrable. Indeed, there is stronger reason for transferring recklessness, since there is more need for it. Even if we had no doctrine of transferred intention, the defendant could be convicted of an attempt, whereas this appears not to be possible in cases of mere recklessness.

THE WORKING OF THE SUBJECTIVE DEFINITION

Cunningham, before referred to, is taken as the leading authority on the pre-*Caldwell* subjective definition of recklessness. The facts were that the defendant entered a cellar, wrenched a coin-operated gas meter away from the pipe, and stole the money in the meter. Coal gas escaped from the cellar through the wall to an adjoining house, and was inhaled by a female occupant who was asleep. Cunninghan was charged with theft (of which he was convicted) and also (under the Offences against the Person Act 1861, s 23) with maliciously causing a noxious thing to be taken by a person so as to endanger her life. He did not give evidence (a fact that the judge mentioned to the jury), but the judge told the jury that the defendant must have known that the gas would percolate to the adjoining house. Telling the jury this, instead of leaving them to find it, was wrong, and the judge compounded his mistake by making an awful hash of his direction on statutory malice. So, of course, the resulting conviction was quashed.

Some further details may be given of Cunningham's extraordinary behaviour. He was not an intruder: he was lawfully in the cellar, being permitted to be there by his future mother-in-law, who was the tenant of the house. He left gas issuing from the pipe although there was a stop cock near, which he could have turned off. Cunningham was to move into the house after his marriage! By filling it with gas he presumably made it uninhabitable until such time as the gas could be turned off at the street main. He also created the risk of his future home being blown up or burnt down by some accidental ignition. These things did not happen, but the gas escaped into the next house because the party wall in the cellar was shoddily constructed of rubble loosely cemented (the building had originally been a single house), which enabled the gas to seep through. It was held by the Court of Appeal that Cunningham might properly be convicted of maliciously (that is, recklessly) causing the injury to the neighbour by poison if (but only if) 'he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it'. This direction had not been given.

Cunningham's absence from the witness-box was not a matter relevant to the court's decision; but if the direction had been correct his silence could have had a certain bearing on the case. Two decisions of the lords indicate the importance of the defendant's silence when the issue is one of knowledge. Lord Brightman said:

'If (1) all the other ingredients of the offence are proved, and (2) the defendant . . . chooses not to give evidence of his absence of knowledge,

and (3) there are no circumstances which sufficiently suggest absence of knowledge, the court may properly infer without direct evidence that the defendant did indeed possess the requisite knowledge'.[14]

In effect this creates an evidential presumption of knowledge. Evidential presumptions are the concern of the judge, in ruling on whether there is a case to answer, and do not concern the jury. The rule does not mean that the jury must find knowledge, even though the three conditions are satisfied; but they may be told that they can. If this is the rule for requirements of knowledge, it should apply also to requirements of intention or recklessness; indeed, subjective recklessness (which is part, though only part, of the rule in *Caldwell*) requires knowledge of risk. Putting an evidential burden on the defendant is justifiable, since he is the best person to know what was in his mind. In common sense the judge should be able to go further, and call the jury's attention to the fact that the defendant through his counsel is seeking to deny a mental element while not giving evidence to support his denial. If the definition of recklessness in subjective terms creates practical problems, this is in some part due to the failure of the courts to qualify the 'right of silence'.

I do not pretend to be able to psychologise Cunningham. His behaviour defied canons of common sense. Perhaps he was drunk at the time, but no evidence was given of this (and I agree with the part of the decision in *Caldwell* that excludes evidence of intoxication on the issue of recklessness). Perhaps he was such a dolt as not to know that coal gas was poisonous, but no evidence was given of mental impairment. Conceivably Cunningham knew that coal gas inhaled directly from a gas pipe was poisonous, but thought that it ceased to be harmful when mixed with air. All is speculation, since he avoided any questions as to his state of mind.

We do not know what the jury would have decided if they had been directed in terms of subjective recklessness. They might still have convicted, on the ground that everyone knew the danger of poisoning by coal gas (people regularly used it to commit suicide), and therefore of the danger of leaving it pouring from an unstopped pipe. Since there was absolutely no social value in doing what Cunningham did, it would be enough for conviction if he realised that there was a very small degree of risk involved.

On the other hand, the jury might have acquitted for a number of reasons. The statement of facts does not say that Cunningham knew that the party wall was highly porous. Even if he knew it, he might have thought that the gas would rise rather than seep through the wall. We are not told whether he closed the door when he left the cellar.

Someone might have come into the cellar when it was full of gas; and if

14. *Westminster City Council v Croyalgrange Ltd* [1986] 1 WLR 674, 2 All ER 353, 83 Cr App R 155, following Lord Diplock's dictum in *Woolmington* [1935] AC 462. Lord Bridge spoke to much the same effect in *Croyalgate*, but he required the rebutting evidence to 'originate from the accused', which was surely a mistake. Almost always the defendant would have to give evidence to support a submission of no case, but evidence supporting the defence might occasionally come from a prosecution witness (eg, admitting that the defendant was abroad during the whole of the time when he might have acquired knowledge). Such evidence could 'suggest absence of knowledge' within Lord Brightman's condition (3). I proposed a change in the law in [1988] Crim LR 97.

Cunningham realised that such a person would be at risk of being poisoned his recklessness could have been 'transferred' from such a person to the actual victim. But he might well suppose that such a person would immediately sniff the gas (coal gas was given a powerful and recognisable smell) and make an immediate exit, so that he would not be harmed.

Someone might have entered the cellar smoking a cigarette, and might have been injured in a resulting explosion; it might then have been easy to find that Cunningham was reckless as to that, but the charge was of recklessly causing poison to be taken. Cunningham caused poison to be taken, and he was perhaps reckless as to causing injury to the person and damage to property by an explosion; but that did not make him guilty of recklessly causing the poison to be taken. It is true that the formula pronounced by the Court of Appeal required only that the defendant should have foreseen 'injury to someone', without specifying the kind or means of injury. However, the charge was of poisoning, so the court was perhaps thinking of foresight of this type of injury. It might be persuasively argued that recklessness as to the inflammability of coal gas could not be automatically 'transferred' into recklessness as to its toxicity. Although both qualities can cause injury, they do so in different ways.[15] This type of problem is not confined to recklessness; it is also found in cases of intention and negligence.

When the case was decided everyone thought it impossible to bring such facts under s 20 of the Offences against the Person Act 1861, which was taken to require an assault. The law has now changed, and such an offender could be charged under s 20 with maliciously inflicting grievous bodily harm,[16] so that s 20 now covers much of the ground of s 23. Section 20 does not specify any particular means of inflicting the injury, consequently, the offender could perhaps be convicted under this section of causing the injury by poisoning although his recklessness was only as to causing injury by fire or blast. But the court might require the injury to be caused in the general way that the offender foresaw.

In sum, there is no guarantee that Cunninghm would have been convicted on proper direction, but his acquittal probably did little social harm, apart from producing a sense of indignation in the victim. The injury caused was a freak occurrence, and Cunningham was unlikely to behave in the same way again.

THE ARGUMENT FROM PREOCCUPATION

A particular line of defence possibly open to a person like Cunningham must now be considered. A persuasive defence counsel might have secured his client's acquittal by the following argument, which may for

15. Certainly recklessness cannot be transferred from person to property, any more than intention can. *Cp* the words of Eveleigh J, interpreting the meaning of recklessness in a civil case: 'If all that can be anticipated is the spilling of a cup of tea over someone's dress, it does seem wrong that the [defendant] should be blamed [on the basis of recklessness] for unexpected personal injuries' (*Goldman v Thai Airways* [1983] 1 WLR at 1196H).
16. *Clarence Wilson* [1983] 1 WLR 356, 1 All ER 993.

convenience be dubbed the argument from preoccupation. True, Cunningham must have known (and therefore did know), in general, of the toxicity of coal gas, but the notion of subjective recklessness requires (it may be said) a decision on what was actually in his mind when he was trying to obtain the coins in the meter. Perhaps his sole thought was to get his hands on the money, and he was blind to all other considerations. Defending counsel may put it to the jury that although his client would have realised that he was creating a risk if he had stopped to think, perhaps he did not stop to think because his mind was entirely concentrated on stealing. The desire to exclude this type of argument was evidently the prime mover of the decision in *Caldwell*.

The Criminal Law Revision Committee discussed the question in connection with offences against the person, and came to the conclusion that no difficulty would be experienced in practice, because the jury would convict on the basis of subjective recklessness, if properly directed. They would brush aside an argument from preoccupation. (The point does not appear in the Report.)

The argument from preoccupation may be used by way of defence in all kinds of cases if subjective recklessness is in issue, but it may often be countered by inviting the jury to consider the defendant's knowledge not only when he was committing the crime but when he was planning it and even after committing it.

If for example a terrorist when planning a crime must have contemplated a risk in setting a time-bomb, the fact that he does not think of any particular risk when he plants the bomb is irrelevant. To that extent, at least, knowledge must be regarded as a continuing state of mind.

Also, the decision in *Miller*[17] can be used to bring in later knowledge. Supposing (though it is a tall supposition) that when Cunningham disconnected the gas pipe he did not realise that the result would be an escape of gas: in that case he would not (it may be said) be reckless at the time of doing the act, but if he then realised what a dangerous thing he had done and yet left the house with the gas escaping (as Cunningham did), making no effort to prevent the harmful consequence, the decision in *Miller* shows that his conduct could be considered as a whole, so that he could be found guilty of a reckless act.

These considerations appear to show that subjective recklessness, intelligently applied, is a workable concept, not liable to be readily defeated by an argument from preoccupation. It would be even more workable if judges were allowed to tell juries that they could draw an inference from the defendant's failure to enter the witness-box.

The argument from preoccupation can afford a defence, but this is in cases where the concept of recklessness should not be used. Take the car driver who, preoccupied by business matters, throws open his car door and causes injury to a passing cyclist. If he were cross-examined about the danger of flinging open a car door he would perhaps readily agree that he knew it; but he did not think of the danger at the moment when he acted, and this was because he was completely immersed in some other

17. [1983] 2 AC 131.

matter. *Caldwell* would make him guilty of recklessness, and such a judgment would be wrong. I speak with some feeling, because I recollect one occasion, many years ago, when I incautiously and rapidly opened a car door from inside. The road was quiet, and I was preoccupied. Reader, do not expect a dramatic confession: nothing happened, but I realised the moment after opening the door that I had lacked caution. Ever since, the memory of my blunder has acted as a prophylactic, and has also made me sympathetic to those who cause harm by inadvertence. 'There but for the grace of God go I' is a powerful humaniser. A cyclist might have been passing from behind, and if there had been a serious accident I would have blamed myself bitterly. But I was not reckless; if it had occurred to me that I was creating the smallest risk of an accident I would not have opened the door without checking in my mirror.

THE TEST OF INDIFFERENCE TO RISK

These two cases, *Cunningham* and the door-opener, suggest that the distinction may be one of indifference to risk. Cunningham, it may be said, was simply not concerned with the question of safety. He was indifferent to any risk to others; he 'didn't care' about it; all he wanted was to get the money. Since allowing coal gas to escape in a confined space presents an obvious risk of poisoning someone, if Cunningham did not weigh up the risk no reason can be suggested for his failure to do so other than the fact that he did not bother himself about it. This attitude of mind made him reckless. The absent-minded door-opener in the hypothetical was not indifferent to risk, and so was not reckless.

It may be objected that such a distinction would not always produce the result required: it would not always bring about the conviction of people like Cunningham. If the defendant realised he was creating a risk, he is reckless anyway. If he did not, how can he be said to be indifferent to the risk? You cannot be indifferent to something of which you are ignorant.

The rejoinder perhaps is that it may be clear that the defendant would have shown himself indifferent to the risk even if he had realised it. Nevertheless, I am not entirely happy with a test of indifference to risk, as applied to an unknown risk. The 'indifference' is too hypothetical to be the basis of a satisfactory rule. The framers of the Draft Code were, I think, right in keeping the question to the straightforward one of knowledge of risk.

NOT THINKING OF A RISK

The decision in *Caldwell* was principally concerned with the question whether a person who does not think of a risk is reckless. The way in which the lords dealt with the question was highly defective, but the question nevertheless needs to be considered for the law of the future.

A test case is that of a person charged with rape who says that he never addressed his mind to the question whether the woman was consenting or not. The defence would of course be outrageous, but it is not at first

clear how it is to be met under the terms of the subjective definition (which it has been held still applies to rape[18]). The defendant asserts that he was not aware of any risk that the woman was not consenting, simply because he never considered the question of consent. How can he be aware of a possibility that (if you believe him) he never considered?

One way of dealing with this defence would be simple incredulity. No man engaged on sexual congress (unless perhaps he is intoxicated) has a blank mind on the subject of the woman's consent. Either he believes that she is consenting, or believes that she is not, or is aware of his ignorance on the subject (and in the last case he is reckless as to consent).

Still, since the possibility of this kind of defence evidently weighed upon the lords in *Caldwell*, it would be well for us subjectivists to deal with it expressly if we can, and I suggest the following for consideration. It could be enacted that a person acts 'recklessly' in respect of an element of an offence when (i) he is aware of a risk that it exists, or is almost certain that it exists or will exist or occur, *or does not believe*[19] *that there is no such risk*, and (ii) it is, in the circumstances known to him, unreasonable to take the risk. Putting the third (italicised) branch of paragraph (i) in popular language, a person is unaware of the risk only if he believes that his act is safe. (Of course, this third branch renders at least the first branch unnecessary, if not the second, but it seems desirable to include all three for clarity.) As applied to a charge of rape, the man is unaware of a risk that the woman is not consenting only if he believes that she consents. As applied to a charge of recklessly making a false statement, he is unaware of the risk of falsity only if he believes the statement to be true. This, of course, is the classical notion of recklessness in the law of deceit, expressed in *Derry v Peek*.[20]

The lords could accept this principle without legislation, as a 'reinterpretation' of *Caldwell*. It would achieve what seems to have been in Lord Diplock's mind in that case, and would accord with some of his remarks, though not with the model direction.

I do not think that this test of recklessness, properly administered, need encounter the criticisms made against the model direction. When the driver incautiously swings open his car door, he believes at this moment (however foolishly) that his act is safe. Otherwise he would not have done it. When Miss C[21] lit the fire on the carpet in the shed, she evidently believed (however foolishly) that the fire would not spread and consume the shed. She had sought shelter in the shed, and would not knowingly burn down her place of shelter. But the man accused of rape who says that he did not consider the question of consent confesses that he had no belief that the woman was consenting, and the person charged with making a false statement who says that he did not have any idea what was in the document he was signing confesses that he did not positively believe the contents to be true.

18. *Satnam* (1983) 78 Cr App R 149.
19. 'Belief' and 'believe' should be defined in the code.
20. (1889) 14 App Cas 337.
21. *Elliott v C*, n 2 above.

I acknowledge that the proposed rule would be in some danger of misinterpretation and maladministation. It would have to be monitored, and repealed if it worked badly. I would prefer to be without it, and to rely upon the ordinary subjective test; but, politically speaking, it might be a means of getting ourselves out of the present impasse.

The notion of believing an act to be 'safe' will be further considered in due course, when it will be pointed out that it is to be adjudged on common-sense grounds in the light of the circumstances.

EXCEPTIONS TO THE REQUIREMENT OF SUBJECTIVITY

The definition of recklessness in subjective terms can be fortified by allowing exceptions in certain cases.

The first, already mentioned, relates to intoxication. The Draft Code provides[22] that for the purpose of finding recklessness 'a person who was voluntarily intoxicated shall be treated as having been aware of any risk of which he would have been aware had he been sober.' This follows the rule in *Caldwell*, as formulated by Lord Diplock for cases of intoxication.[23]

A second difficult case for subjective recklessness is that of the man who says that he was acting in a blind rage. One may doubt whether there is in fact any such thing as a blind rage; what rage does is to destroy self-control, not awareness. Anyway, rage, like intoxication, is a common concomitant of aggression, and the law cannot look with sympathy on a defence that 'I was so angry I didn't know what I was doing.' (Reply: You did know what you were doing; you were gaining satisfaction from letting out your wrath on a hated person or object.[24]) No provision was made for blind rage by the Law Commission and the

22. Cl 26(2).

23. When discussing the specific case of intoxication ([1982] AC at 355F), Lord Diplock formulated the rule in the conditionally subjective terms now adopted by the Draft Code (which had appeared in the Model Penal Code of the American Law Institute) – 'a risk of which *he* would have been aware had he been sober' (emphasis supplied). Regrettably, in his model direction relating to recklessness in general, Lord Diplock stated the general rule in objective terms – 'when he does the act he . . . has not given any thought to the possibility of there being any such [ie, obvious] risk'.

24. An illustration of anger against an object counting as recklessness is *Parker* [1977] 1 WLR 600, 2 All ER 77. The CA there tried to reformulate the subjective definition of recklessness to uphold a conviction, but unfortunately did not confine itself to the specific situation of anger, which was the one it had to consider. On the whole question see R A Duff in [1982] CLJ 273, and my reply, *ibid* 286. Mr Duff effectively criticised various suggestions I made for producing a satisfactory definition of recklessness, but I remained unconvinced that his own suggestions were workable. I see the force of a distinction he draws (at p 280) between (1) the person who angrily assaults another in dangerous circumstances, and by reason of his anger does not realise the danger he is causing to the victim of the attack, and (2) the driver who angrily gets out of his car in order to remonstrate with another driver, and by reason of his anger does not consider the danger he is causing to a passing cyclist. 'While [in (1)] the risk to his victim's life is an integral aspect of the assailant's intended attack, [in (2)] the risk to the cyclist is only contingently and coincidentally connected to the motorist's intended action'. Accepting this, I have met the point by including in my formulation (see text above) the words 'anger directed against the person or thing that he harms'.

CLRC in the subjective definition of recklessness they favoured, but this was because these bodies thought that juries would be so likely to reject the defence that it was not worth legislating for. The same opinion is evidently held by the framers of the Draft Code.

My own opinion is that this is a mistake. Extending the intoxication rule to anger would help to make the subjective definition more palatable to the 'hawks', and it is a concession that subjectivists can well make without a substantial departure from their position. I would see no affront to justice in a provision that, if a person causes injury or damage in a fit of anger directed against the person or thing that he harms, and sets up the defence that owing to his anger he did not think of the consequences of what he did, he may be convicted of an offence of recklessness if the tribunal decides that had it not been for his anger he would have foreseen the consequences. People are required to control their anger, and cannot claim it as a reason for being absolved from the ordinary law.

The rule should not, however, be applied to acts done merely in excitement, for example the excitement of play. An instance is the illustration of the 'haka skirt' jester which I have given elsewhere.[25] In short, the principle should be that acts done in excitement, fear, sorrow or other violent emotion, are not necessarily to be accounted reckless, because to extend the notion of recklessness too far would cause this notion to sink into that of negligence in general. This was the trap into which Lord Diplock led his fellow lords in *Caldwell*. Although the case at bar was one of intoxication, Lord Diplock was not satisfied with stating a rule for intoxication; he extended the intoxication rule to cases of rage; and for good measure he brought in other cases of excitement, and even other cases of 'not thinking'.

ALTERNATIVE DEFINITIONS OF RECKLESSNESS

In these pages I have tried to face the difficulties of applying the subjective definition, and have emerged with the conclusion that the difficulties are not so great as may appear, but the unconvinced reader may tell me that with all my explanations and qualifications the definition of recklessness in subjective terms is too subtle for everyday forensic use. If this criticism is accepted, what are the alternatives?

One is the *Caldwell* solution: put the defendant into a cleft stick by saying that either he realised the danger, in which case he is reckless, or he did not realise it, in which case he is reckless. But this merely abandons the concept of recklessness and leaves us with negligence (or, rather, negligence of a peculiar kind).

25. *Textbook of Criminal Law* (2nd edn) p 475. In the case referred to there was an element of intoxication as well; but even under the intoxication rule as formulated in the Draft Code the defendant could argue that it was the excitement and not the intoxicant that blinded him to the risk, ie, that in the excitement of the moment he would not have realised the risk even if he had not taken an intoxicant. From this point of view the facts are borderline, and whether the jury convict or not would depend on their attitude. A conviction would not be against principle, though it might look hard.

Another solution would be to define recklessness in terms of gross negligence.[26] This would be an amelioration of the *Caldwell* formula, which does not require grossness, but the notion of gross negligence has always suffered from vagueness. What quality is it that makes negligence gross? It is the immensity of the harm that will follow if things go badly, irrespective of whether the probability of them going badly is high or low? Or is it the high probability of harm of any degree? Or some combination of these two tests, and if so in what proportions? The last question is obviously unanswerable.

Where there is only a low probability of harm occurring, it would seem reasonable to say that inadvertent negligence cannot be gross. But subjective recklessness can be committed by knowingly incurring even a slight risk of harm, as was shown before. So it looks as though liability for gross inadvertent negligence could not be an alternative to subjective recklessness but could only be an additional head of liability. Before the jury could find for the defendant they would have to consider both doctrines – which would hardly make life simpler for them.

Would there be, in practice, any difference between liability for negligence and for gross negligence in respect of most offences against person and property? When the safety of life and property are at stake, courts are very ready to say that any negligence is gross negligence, and to allow or even encourage juries to take the same view. If, when I opened my car door, I had caused the death of a cyclist, you might say that although entirely oblivious to risk I was grossly negligent, because life was at stake. I prefer a definition of recklessness that would more clearly acquit me and others of an offence of such gravity in such circumstances.

RULING OUT A RISK

Another third possibility would be to accept the decision in *Caldwell* but to insist that it does not apply to a person who considers the risk of harm and rules out the possibility in his own mind. The standard example is *Lamb*,[27] which is a perfect illustration of a person being negligent without realising that there is a risk in his conduct, and without being indifferent to risk. Whether the courts will now accept this as a loophole (or as some call it a lacuna) in the new dispensation of *Caldwell* is uncertain; but there are difficulties in giving an affirmative answer.

Assuredly, strong reasons can be found for the affirmative.[28] One is that Lord Diplock spoke in terms of moral fault: recklessness, he said, involves a 'guilty state of mind', a 'blameworthy' one; he also referred to people who 'do not trouble' to consider risks. These words may possibly be applied, by a very stern judge, to those whose minds are a blank on

26. This solution was proposed by Gerald H Gordon, after a spirited attack upon the utility of the notion of recklessness, in 17 Crim LQ 355 (Can); *cp* Griew in [1977] Crim LR 100–101.

27. [1967] 2 QB 981.

28. I formerly accepted these reasons: see [1981] CLJ 278–282 and 132 NLJ 313, 336. *Cp* Syrota in [1981] Crim LR 658; [1981] CLJ 268–272; 132 NLJ 290, 314. I now have much less confidence that a court will accept them.

the subject of risk, but cannot be extended with any propriety to those who conscientiously believe, after consideration, that what they are doing is safe. A person who has given thought and has decided that there is no risk (whether because, in his opinion, the act is inherently safe or because he has taken sufficient precautions to make it safe) should not (it may be said) be accounted *Caldwell* reckless even though he may have been negligent. And, of course, the burden of establishing that the defendant realised there was a risk is on the prosecution. So, on this argument, Lamb and his like would not be regarded as being constructively reckless under the new rule. As, of course, they should not be: to stigmatise Lamb as having been reckless when he had done all that he thought was necessary to satisfy himself that there was absolutely no risk would be a travesty of the notion.

The argument has the immense advantage of not involving a contradiction of the sacred words of the model direction. The case does not fall within Lord Diplock's formulation of recklessness: it is not one where the defendant has failed to give thought to the risk. In view of the chorus of criticism of *Caldwell*, it may be thought that the lords would not be anxious to extend it, even though they refuse to restrict it.

Moreover, regard ought to be had to the overall state of the law since *Caldwell*. In view of *Elliott v C*,[29] most cases of nominal recklessness within the scope of the rule in *Caldwell* are now degraded to negligence (of a peculiar kind) and the only possible survival (within this rule) of recklessness not amounting to mere negligence is in the respect now being considered. If, even in this respect, the only question is one of negligence, then the specific concept of recklessness has been virtually uprooted from the law. Subject to the doubt about what the lords will do about crimes of malice, it is wholly swallowed up by negligence, and all that is left is a hollow name, a mere synonym for negligence (apart from the fact that, according to Divisional Court cases,[30] recklessness is an even wider, looser and therefore harsher concept than negligence). Such a devastating consequence would be uncomfortably reminiscent of the 'Newspeak' of George Orwell's *Nineteen Eighty-Four*. 'It's a beautiful thing, the destruction of words', says the pernicious Ministry of Truth philologist. Whether Lord Diplock intended it or not, he will, on this view, have exercised 'thought control' to the extent of depriving us of any language in which to express the traditional notion of recklessness.

If it is true that *Caldwell* does not apply where a person has consciously ruled out a risk, the argument cannot logically stop here. A corollary must be that a person who perceives a risk attending his proposed conduct and takes every step that he thinks necessary to eliminate it (as if a person like Lamb moved the bullets into what he thought was a safer chamber) is not *Caldwell* reckless – though a Divisional Court has expressed a contrary opinion, *obiter*.[31]

A second corollary is that when a person firmly believes that a fact is

29. Above, n 2.
30. *Elliott v C* and *R (Stephen Malcolm)*, nn 2 and 3 above.
31. *Chief Constable of Avon and Somerset v Shimmen*, n 9 above.

present or will come about, he need not consider the risk that it is not present or will not come about (and for this purpose, as for others, a fact includes a negative fact – the non-occurrence of a fact). If a man is convinced that what he is saying is true, and therefore does not consider the risk of its being untrue, it would be absurd to say that he is guilty of *Caldwell* recklessness because he does not stop and think. When one fully and firmly believes a fact to be so – believes it to be so beyond a doubt – that is in itself a belief that there is no risk of the fact not being so.[32] Similarly where the belief is as to a fact not being so.

The defendant may have decided that there was no risk because he was dim-witted. Even if his failure to appreciate the risk was imprudent, he should not be guilty of recklessness. Now suppose that such a person does not think about risk, but the tribunal of fact comes to the conclusion that if he had thought about it he would have decided that there was no risk, and would consequently have acted in the same way. Logically, the conclusion should again be that he is not to be accounted reckless, because in these circumstances his failure to think did not have any effect upon his conduct.

So much for the arguments for limiting *Caldwell*. Where the defendant has mentally excluded a risk, outright supporters of *Caldwell*, who are not prepared to accept the 'lacuna', may reply as follows.

Acknowledgment of the 'lacuna' would present the jury with just the kind of ticklish question that it was the object of the lords to avoid. If a person does not think about a risk, the reason is generally that he has, consciously or subconsciously, ruled out the risk in his own mind. Take the case of *Elliott v C* again: did the girl simply not think of the risk of her fire spreading to the shed, or did she think about it and decide there was no risk? In the hypothetical about the driver who swung open his door, is he within the rule in *Caldwell* because he did not think, or is he outside it because when he opened the door he believed the act to be safe? No one would open his car door in circumstances in which he thought that this would, or even might, cause an accident. Why should he? Causing an accident while he is stationary does not serve the driver's purpose in any way, and, at best, involves him in embarrassment and delay. A driver may knowingly take a risk while driving in order to travel more quickly, perhaps only for the joy of speed; but causing an accident when opening a car door is merely a nuisance, even from the most self-centred point of view.

Critics of *Caldwell* may reply that this position rebounds against the decision, strengthening their misgivings about it. The emphasis placed in *Caldwell* on the turpitude of failing to think about risk is unrealistic. We all live in a dangerous world, and if we survive, this is because our minds are equipped with an inconceivably large number of programs for avoiding danger without conscious thought. Riding a bicycle, or driving a car, or walking among traffic, requires an infinity of observations and fine adjustments to keep to the narrow line between safety and danger. These precautions and counter-actions are undertaken either unconsciously or

32. See the argument stated at length by Syrota in [1982] Crim LR 97, and the criticism by R A Duff in [1982] CLJ 273.

semi-consciously. We do not say to ourselves in so many words: 'if I do this I shall be safe; if I do the other thing I shall be in peril'. If we do a thing, it is either because we think it safe or because we consciously decide to run a risk (and can therefore be held to be subjectively reckless as to danger).

'Safety' in this context does not mean merely the safety of oneself. To some extent the same remarks apply in respect of the safety of others. Most people are not ill-disposed to their fellows. Even if they were inclined to cause them harm, they know the unpleasant social consequences of being involved as the culpable party in a disaster. If we do not think of the danger to others involved in what we are doing, this is because nothing makes up suppose, at that moment, that our act is dangerous. In other words, we think it is safe.

Summing this up, the statement 'I thought it was safe' is only another way of saying 'I was not subjectively reckless'. Conversely, everyone who acts without subjective recklessness believes his act to be safe. It is logically impossible to combine an acceptance of the rule in *Caldwell*, rejecting a purely subjective definition of recklessness, with acceptance of a defence that the defendant believed his act to be safe.

Of course, the risks we perceive are not always of a yes-or-no character. Suppose a person thinks about the risk and concludes that there is a risk but that it is of negligible dimensions, so he goes ahead. Some writers have suggested that this is a case of ruling out a risk, and that *Caldwell* should not apply.[33] But suppose that the prudent man would still have seen a substantial risk? If the defendant is allowed to rule out a risk that a prudent man would have seen, this means that the subjective judgement of the defendant is allowed to prevail over the hypothetical judgement of the prudent man.[34] The rule should be that if the defendant perceives the faintest glimmer of a risk that a prudent man would not have run, then if he runs it he is reckless.

To explain this more fully: it is standard theory that the notion of recklessness involves two issues. The first is whether it was objectively reasonable, justifiable, to run the particular risk. The second issue is whether the defendant knowingly ran the risk, or (according to the *Caldwell* formula) failed to think about it. The first issue is stated both in the American Law Institute's Model Penal Code and in the Law Commission's Draft Code. It involves an objective judgement which the defendant is not at liberty to override. If the defendant knows that he is running a given risk, and if that risk is objectively adjudged to be

33. See B J Mitchell in 150 JPN 390; Richard Taylor in 137 NLJ 232. Mitchell points out that the rule in *Caldwell* is now applied to manslaughter, and suggests that this means that a person who has negligently ruled out a real risk, and who kills in consequence, is no longer guilty of manslaughter. But the possibility of such a conclusion would be likely to frighten a court off accepting the 'ruling out a risk' principle.

34. A Divisional Court in *Shimmen's* case, n 9 above, expressed itself as ready to accept a defence of ruling out risk, but would not accept the defence in a case where a reasonable man would still have seeen a risk, which seems to bring the question back to negligence. The judgment is unsatisfactory for this reason and also because it fails to decide whether the defendant thought he had 'eliminated' the risk or merely 'minimised' it.

unjustifiable, then the defendant is guilty of recklessness even on the subjective definition. However, it can be difficult or impossible to determine whether the defendant in his own mind ruled out all risks (which would clear him of subjective recklessness) or all except a 'negligible' amount of risk (which would not). If the decision cannot be made, the defendant must, on subjective principles, be acquitted. The subjectivist would not regard the acquittal as a black mark against subjectivism; he would say that the acquittal is the logical consequence of a decision not to criminalise negligence in this situation.

Reverting now to the case where the defendant rules out all risks in his mind, the present position can only be said to be unclear. Conceivably, a defence of 'ruling out a risk' might avail a person who, like Lamb, conducts a positive enquiry and goes ahead in the belief that its apparently encouraging result provides an assurance of safety. But why should he be required to make an enquiry, in order to escape a finding of recklessness, when he is in his own mind perfectly convinced of the safety of his procedure without an enquiry?

All in all, it seems that no satsifactory line can be drawn between not thinking of risk and ruling out a risk; and what reason of policy is there for trying to draw it? The person who does not think comes under the condemnation of *Caldwell* if his not thinking was negligent (or negligent according to the peculiar conditions of *Caldwell*, as now interpreted). The person who thinks and experiments and draws negligently false conclusions and so goes ahead should, logically, come under the same condemnation. The only reason for imposing the suggested limitation upon *Caldwell* would be the hope of cutting this monstrous rule back a bit, but the conviction of Miss C seems to mean that any attempt to restrict the decision in this artificial way is now doomed to failure. For the same reasons it would be unsatisfactory as a statutory limitation upon *Caldwell*. We must wait until a new generation of law lords shake off their mental bonds of precedent and repudiate the model direction in *Caldwell* (which would be all the easier because it would not involve challenging the actual decision on the point of intoxication[35]), or until the Home Office shows sufficient interest in the substantive criminal law to procure a statutory restatement of recklessness.

35. In *Herrington v British Rlys Board* [1972] AC at 934M Lord Diplock said: 'This House has since 1966 abandoned its former practice of adhering rigidly to the *ratio decidendi* of its previous decisions'.