

IS RECKLESSNESS SUBJECTIVE OR OBJECTIVE???

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HISTORY

It is of essence for one to take a Historical legal journey in other to answer the question above-mentioned. For ages, there has been a conundrum between lawyers, Judges, and law students as to whether recklessness is subjective or objective. Due to this confusion, recklessness is misunderstood to be the same as negligence. Prior to the decision of the house of Lords in the **R V G&R**¹, there were two positions of recklessness developed in the law.

The Cunningham recklessness, which is the present state of the law on recklessness, is subjective in nature. It established the principle that, A defendant is reckless if he/she was aware that there was a risk and that his/her actions could cause a particular result, the risk was unreasonable one for the defendant to take.

The other was Caldwell² recklessness, which was objective in nature. The basis of Caldwell recklessness was that, If the risk was an obvious one and the defendant had failed to foresee the risk, he was to be blamed for not doing so. This law (Caldwell recklessness) was seen to be unreasonable as it was punishing the inexperienced and those whose inadvertent results from mental or other incapacity. This created a room for injustice as people who were not to punish were punished, thus violated the principle of "Punishment in justice requires punishment to be deserved". Albeit the injustice it created, there was also a merit in it, as it was punishing a person who knows the risk but claiming not to know.

The test proved to be problematic in some cases. In **ELLIOT V C**³, a 14 _year _old girl with learning difficulties set a fire to a shed, after setting fire to some white spirit, the court held that as the risk of fire would have been obvious to a reasonable person and as the girl had not considered the risk she could be convicted. This decision produced an outcry. The law in this area was punishing people that could not foresee a risk.

With respect to the force of the principled criticisms outlined above, the house of Lords in **R v G**⁴ concluded that it should depart from Caldwell because it was "Just" to do so. It was therefore

¹ [2003] UKHL 50, [2004] 1 AC 103

² [1982] AC 341

³ MINOR[1983] 1 WLR 939

⁴ IBID

unanimously overruled with Lord Bingham referred to it as "Neither just nor moral" and Lord Steyn as a "Cynical strategy". **R v G&R**⁵ returned the Cunningham recklessness to be the present position or test of recklessness to be subjective. In short, defendant must take a risk and be aware of it and it must be unreasonable.

CRITICISM OF THE CUREENT POSITION OF THE LAW

As a matter of law, the test of recklessness is still considered to be subjective, but as a matter of fact, the issue of it being subjective or objective is not purely conclusive. The case of **R v PARKER**⁶, demonstrates the difficulties with the subjective approach of recklessness (as it requires the defendant to aware of the risk). In that case, a man who had had a terrible day arrived at his home railway station late when he tried to telephone for a taxi from a public phone booth and the telephone did not work, it was all too much. He smashed the phone down in a rage, breaking it. He was convicted of causing criminal damage to the phone but appealed. His appeal had some merit. He argued quite simply that his state of mind had not fallen into the definition of recklessness (as set out in Cunningham) at the time when he broke the telephone, he was not consciously taking the risk of damaging the phone. His mind, no doubt was fully of angry thoughts, rather than consideration of the fragility of plastic telephone receiver. With no surprise, the Court of Appeal upheld his conviction. Of course, if they had not, the kind of claim Parker was making could be made by many defendants. The Court of Appeal's explanation for why Parker was reckless was not entirely convincing. They held that he was aware of the fragile nature of telephone receiver and was aware that he was slamming the receiver down. So even if he was not consciously aware of the risk he was 'closing his mind to the obvious'. Just because the defendant was in a bad temper, the court held he should not be able to escape liability for a risk that he would have known about had he stopped to think. But this kind of reasoning comes perilously close to the argument that the defendant is reckless because he ought to have known about the risk, whether he did in fact know about the risk or not. Yet that is the kind of objective assessment which is not meant to take place using a subjective notion of recklessness. It could be argued that the test in **R v PARKER**⁷ (closing your mind to the obvious...) has some objective assessment as it is saying that the defendant "ought to have known" which is a form of comparing him/her to that of a reasonable person. The test in **Caldwell** (fail to foresee an obvious risk) and that in Parker (Closing your mind to the obvious risk) are comparable, it's like a distinction with no difference. This has proven to all and sundry that the Judges in **R v G&R**⁸ never overruled the case of Caldwell because of the objective

⁵ IBID

⁶ [1977] 1 WLR 600

⁷ IBID

⁸ IBID

assessment but it's because of the injustice it created. The difference between the two is that, Caldwell test was so broad to serve society interest justly (as it was applicable to all), but the Parker is a narrow one(as it is not applicable to all), but the truth is that they both have some objective assessment.

In furtherance to the difficulties with the subjective approach, it's not only the case of Parker that the definition of recklessness had been stretched. In the case of Brady⁹, A defendant who fails to foresee a risk because he or she is voluntarily intoxicated will also be reckless. The intoxication rules have been developed with some complexity, which cannot be gone into here, but in brief they mean that a defendant who is charged with a recklessness crime will be treated as having foreseen a risk that they would have foreseen had they been sober. Thus, a person who can't foresee a risk is guilty. And that brings us to the key issue in this section. When, if ever, should a defendant who has not seen or aware of a risk, nevertheless be found reckless?

In addition to the issue Supra, the test in Cunningham has some objectivity especially the second limb of the test (the risk must be unreasonable). A question one will want to ask is that, if a defendant persistently says his/her action is not unreasonable, what test would the court used to know if his action is truly reasonable??? The answer to this question is that the court has no option but to use the reasonable test (objective test).

POSSIBLE RE-FORMS.

The law regarding recklessness being partially subjective and partially objective depending on the surrounding circumstances is reasonable. This is because, it's trying not to let people who are guilty to go Scott free. In the words of Walter Savage, it would be a pity for the guilt and a treason to the innocent. The test should be **expressing** stated to be subjective and objective depending on the facts of a case. It's an illusion or a misnomer to say the test is purely subjective. This conundrum should be eradicated as it's making the test very difficult for Judges, lawyers and budding lawyers to contrast it with negligence.

CONCLUSION

It is submitted that neither a purely subjective nor a purely objective test for recklessness because it will not be adequate. Under the purely subjective approach those who fail to see an obvious risk due to their arrogance, drunkenness or indifference to others can escape liability. However, under an objective approach those who fail to see an obvious risk through no fault of their own (e.g. their age or mental health) can face a conviction.

⁹ [2006] EWCA CRIM 2413, [2006] 10 WLUK 507,[2007] CRIM. LR 564

ABOUT THE WRITER

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