CARRY ON CALDWELL

R. v. *Aaron Roy G., Steven Michael R.*

[2002] EWCA Crim 1992; [2002] Crim. L. R. 926
(C.A. Crim. Div.) (Dyson L.J., Silberand J., Beaumont J.)

INTRODUCTION

The case of *R.* v. *G and R*[1] is the latest to raise the issue of the appropriate test to be applied to determine recklessness in cases where young persons are prosecuted for criminal damage under section 1 of the Criminal Damage Act 1971.

Section 1(1) of the Act provides that "a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence". Section 1(2) provides that a person who intentionally or recklessly destroys or damages any property, "intending ... to endanger the life of another or being reckless as to whether the life of another would be endangered" is guilty of an offence. Where the property is destroyed or damaged by fire, it is charged as arson.[2] The offence can be committed either intentionally or recklessly. The test for recklessness, established in *R* v. *Caldwell,*[3] has two stages. First, a person is reckless as to whether property is destroyed or damaged if he or she does an act which in fact creates an obvious and serious risk that property will be destroyed or damaged. Second, when the person does the act, he or she 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. This has become know as "the *Caldwell* test". It is sometimes referred to as objective recklessness, because a person may be liable, even though not aware of a risk, for failing to consider a risk that would be obvious to the "ordinary, prudent individual".[4]

THE DECISION IN *R.* v. *G and R*

G and R, who were aged 11 and 12 respectively, were camping out for the night. In the early hours of the morning, they entered the yard of a shop, opened up bundles of newspapers, and set some of them alight. They threw the burning newspapers under a large wheelie-bin, leaving them to burn. The bin caught fire, the fire spread to the shop and some adjoining buildings, causing approximately £1 million of damage. The boys first denied any involvement, but later admitted what had happened. They said, however, that they thought that the ignited newspapers would burn themselves out on the concrete floor, and that it never crossed their minds that there was a risk that the fire would spread to the building.

The boys were charged with arson, contrary to sections 1(1) and (3) of the Criminal Damage Act 1971, on the grounds that they caused damage to property, being reckless as to whether such property would be damaged. The trial judge directed the jury in accordance with the *Caldwell* test. Thus, for the purposes of deciding whether the boys

[1] *R.* v. *G and R* [2002] EWCA Crim 1992.
[2] Section 1(3).
[3] [1982] A.C. 341.
[4] *R.* v. *Caldwell* [1982] A.C. 341, per Lord Diplock, 354.

had been reckless as to whether property would be destroyed or damaged, the risk had to be obvious to the ordinary prudent individual, rather than to a person possessing the characteristics of G and R. The trial judge made it clear that no allowance was made by the law for the youth, lack of maturity or inability of the boys to assess the consequences of their actions.

The boys were convicted of the offence and sentenced to a one-year supervision order. They appealed, the basis of the appeal being that the judge was wrong to rule that the *Caldwell* test was the correct test to apply. He should have held either that it does not apply to children, or if it does, that it is incompatible with Article 6 of the European Convention on Human Rights. The Court of Appeal dismissed the appeal, holding that the decision in *Caldwell* was binding, and that therefore the judge had correctly directed the jury for the purposes of deciding whether the boys had acted recklessly. As for the human rights challenge, Article 6 was not concerned with the fairness of the provisions of substantive law, and therefore the appeal was also rejected on this ground.

CALDWELL RECKLESSNESS

The case of *R.* v. *Caldwell* was itself concerned with section 1(1) and 1(2) of the Criminal Damage Act 1971. The accused in that case set fire to a hotel, but claimed that when he did so he was so drunk that it did not occur to him that there might be anyone there whose life might be endangered. Caldwell's appeal to the House of Lords turned on the question of whether self-induced intoxication can be relevant to cases of intention or recklessness in relation to the endangering of life. Lord Diplock examined the states of mind that might constitute recklessness. On the one hand, a person may realise that some risk is involved, and on the other, a person "may not even trouble" to consider the possibility of a risk. He concluded that neither state of mind "seems . . . to be less blameworthy",[5] and on that basis it was decided that recklessness should have a wider meaning than was originally thought. He decided[6] that recklessness therefore includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing,[7] but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was.[8]

This view accords with the law in relation to self-induced intoxication, as established by *R.* v. *Majewski*[9] some five years earlier. That case established that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary *mens rea*. An intoxicated person cannot be excused for being unaware of a risk, if that risk would have been obvious to him or her if sober. However, Lord Diplock's judgment is not expressed in a way that confines this definition of recklessness to cases of self-induced intoxication. It has a more general application.

[5] *Ibid.*, 352B.

[6] Lords Keith and Roskill concurred.

[7] This is subjective, or "*Cunningham*" recklessness. See *R.* v. *Cunningham* [1957] 2 Q.B. 396.

[8] This formulation of recklessness allows for the possibility that a person will not be reckless where thought is given to the risk, but the erroneous conclusion is drawn that there is no risk involved (see *R* v. *Reid* [1992] 3 All E.R. 673). This so-called "lacuna" or loophole was pleaded unsuccessfully in *Chief Constable of Avon and Somerset* v. *Shimmen* (1987) 84 Cr. App. R. 7.

[9] [1977] A.C. 443.

The extent of its application was tested the following year in *Elliot* v. *C*,[10] another criminal damage case. Here, the accused was unaware of the risk of damage not because she was drunk, but because she was a 14 year-old, who was below average intelligence. The lower court said that it was implicit in the decision in *Caldwell* that defendants should only be held to have acted recklessly where the risk would have been obvious to them, if they had given any thought to the matter. As it was found that C would not have been aware of the risk, no matter how much thought she had given to the matter, the case was dismissed. The Divisional Court reluctantly allowed the prosecutor's appeal, despite the fact that this was not a case of a "deliberate disregard" or "mindless indifference" to a risk,[11] but because they were "constrained by authority".[12] The court could find no reason to qualify Lord Diplock's speech to import an interpretation which would make a person reckless for giving no thought to an obvious risk, only where it would have been obvious to him or her if they had given thought to the matter.

This approach was confirmed in *R.* v. *R (Stephen Malcolm)*[13] in the following year. This case concerned a 15 year-old boy, and it was argued that the test of recklessness should be whether a person of the age of the defendant, and with his characteristics which might be relevant to his ability to foresee risk, would have appreciated the risk involved. The Court of Appeal was clear that it was not open to the court to accept this suggested modification to the *Caldwell* test. More recently, in *R.* v. *Coles*,[14] where a 15 year-old set a barn alight, the defence wished to call expert evidence from a psychologist on the capacity of the defendant to foresee the risks involved in his actions. The trial judge refused to allow this evidence, and rejected the defence submission that the test for recklessness should be subjective. The point of contention in the case was not in relation to the intention to damage the property, but in relation to the recklessness as to whether the lives of the defendant's two friends would be endangered by setting fire to a barn in which they were sleeping. The Court of Appeal dismissed the appeal, declining the invitation to reformulate the law on recklessness, because it had "so recently been confirmed, after full consideration, by a decision of the House of Lords".[15]

CRITICISMS OF CALDWELL

The *Caldwell* test has been subjected to much criticism since it was first handed down. In a commentary on the case, the late Professor J. C. Smith noted that it set back the law "concerning the mental element in criminal damage ... to before 1861".[16] Smith and Hogan noted that "*Caldwell*, as interpreted in *Elliott* v. *C*, appears to be a slippery slope to intolerable injustice with no obvious exit".[17] How can the *mens rea* of the defendant be the mental state of some non-existent hypothetical person? Surely the question should be whether the risk was an obvious risk to that defendant. Its "most damning moral indictment" is that defendants can be convicted without having

[10] [1983] 1 W.L.R. 939.

[11] *Elliott* v. *C* [1983] 2 All E.R. 1005, per Goff L.J., at 1011.

[12] *Ibid.* at 1010.

[13] (1984) 79 Cr. App. R. 334.

[14] (1995) 1 Cr. App. R. 157.

[15] *Ibid.*, per Hobhouse L.J. He was referring to the reckless driving case of *R.* v. *Reid* [1992] 1 W.L.R. 793, where the House of Lords endorsed the reasoning in *R.* v. *Caldwell* [1982] A.C. 341.

[16] *R.* v. *Caldwell* [1981] Crim. L.R. 392–396, at 393.

[17] Smith and Hogan *Criminal Law* 10th ed. (Butterworths, 2002), p.81.

had a fair opportunity to make their behaviour correspond with the law, because they lacked the capacity to foresee a risk.[18] It has been argued that, even if there is a presumption that defendants are capable of foreseeing the risks that the reasonable person would see as obvious, they should be able to present evidence that they were not at the time capable of doing so, provided that the incapacity was not self-induced.[19]

Professor Smith thought that the decision might have to be reversed by legislation,[20] but it has proved to be a durable rule. That it has existed for so long is probably due to the fact that it has not been given general application, and is now mainly confined to criminal damage cases. It did apply to the statutory offence of causing death by reckless driving,[21] but is no longer relevant in driving cases, as the earlier offence of reckless driving has now been replaced by causing death by dangerous driving.[22] It is not applicable to manslaughter,[23] assault[24] or rape,[25] and does not apply to offences against the person involving malice.[26] More recently, it has been held that subjective recklessness is required for the offence of causing annoyance by flying.[27] The undesirable effects of the decision have thus been mitigated to some extent. Notably, *Caldwell* has not been applied in a number of Commonwealth jurisdictions.

However, as in other cases before the Court of Appeal, the court in *R.* v. *G and R* felt unable to hold that the *Caldwell* test should not be applied. Like the other attempts to distinguish *Caldwell* or to persuade the court not to apply *Caldwell*, this too failed. The Court of Appeal was clear that all the previous authority supported the *Caldwell* approach, and it was not open to it to depart from a decision of the House of Lords.

HUMAN RIGHTS

Another approach adopted in this case was to argue the appeal on the basis that the *Caldwell* test was incompatible with the rights under the Human Rights Act 1998. The argument was based on Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. Article 6(1) states that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .

This article sets the standard to be applied in determining whether a trial has been fair, including for example, providing access to a court. Defendants are to have, for example, adequate notice of the proceedings, a real opportunity to present the case and are entitled to a reasoned decision.

The defence argued that to judge the moral and legal culpability of a child by reference to the understanding and life experience of an adult is irrational and, therefore, unfair. Moreover, the *Caldwell* test is disproportionately harsh given the serious consequences that can potentially flow from a conviction under section 1 of the

[18] S. Field and M. Lynn "Capacity, Recklessness and the House of Lords" [1993] Crim L.R. 127–129, at 128.

[19] *Ibid.*, at 129.

[20] *R.* v. *Caldwell* [1981] Crim. L.R. 392–396, at 393.

[21] Road Traffic Act 1972 section 1. See *R* v. *Lawrence* [1982] A.C. 510.

[22] Road Traffic Act 1988 section 1.

[23] *R.* v. *Adomako* [1994] 3 All E.R. 79.

[24] *R.* v. *Spratt* [1990] 1 W.L.R. 1073.

[25] *R.* v. *S. (Satnam)* (1983) 78 Cr. App. R. 149.

[26] *R.* v. *Savage* [1992] 1 A.C. 699.

[27] *R.* v. *Paine* [1998] 1 Cr. App. R. 36.

1971 Act, which is detention for life. The Court of Appeal felt that these submissions were misconceived. Although Article 6 should be given a "broad and purposive interpretation",[28] it is concerned with the procedural aspects of trials, not with the fairness of the provisions of substantive law. The *Caldwell* test defines the mental element of the offence. It is "a matter of substantive law since it is part of the very definition of what constitutes the offence".[29] To come within the concerns of Article 6, the matter would have to be procedural, for example, the point at issue would have to concern the means by which the existence of such a mental element may be proved.

It is for Contracting States to choose how to define the essential elements of an offence, and Article 6 is not concerned with the fairness of substantive law.[30] Offences of strict liability, for example, do not violate Article 6(2), which provides that those charged with criminal offences "shall be presumed innocent until proved guilty according to law".[31] The Court of Appeal was quite clear therefore that the fairness of the test, as it applied to children, was not justiciable under Article 6, and the appeal was dismissed on this ground too.

CONCLUSION

Another attempt to challenge the effect of the *Caldwell* decision has been unsuccessful, so it is carry on *Caldwell*, until and unless the House of Lords addresses the issue and decides otherwise.[32] The Court of Appeal has certified a point of law for decision by the House of Lords, as follows:

> Can a defendant properly be convicted under section 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk but, by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it?

The Court of Appeal declined to give leave to appeal, leaving it to the House to decide whether they wished to receive the appeal or not. It is to be hoped that the House of Lords does decide to revisit *Caldwell*, and reconsider the "important issue"[33] of the proper interpretation of section 1 the Criminal Damage Act 1971.

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[28] *R.* v. *G. and R.* [2002] EWCA Crim 1992, [2002] Crim. L. R. 926, *per* Dyson L.J., para. 27.

[29] *Ibid.*, para. 28.

[30] *Z. and others* v. *United Kingdom* (2002) 34 E.H.R.R. The case concerned a negligence claim against a local authority for failure to protect the applicants from abuse by their parents. The negligence claim was struck out by the U.K. courts as disclosing no cause of action. The application to the European Court of Human Rights claimed that there was a breach of Article 6 because there was a denial of access to a court. It was held that there was no breach, because Article 6 was only concerned with procedural matters. The basis of the applicants' claim related to rules about the domestic law of negligence. That was a substantive matter, and the fairness of the provisions of the substantive law of the Contracting States was not a matter for investigation under Article 6.

[31] *Salabiaku* v. *France* (1991) 13 E.H.R.R. 379.

[32] Or the decision is reversed by legislation.

[33] *R.* v. *G. and R.* [2002] EWCA Crim 1992, *per* Dyson L.J., para. 4.

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