RECKLESSNESS

UK CASES

***Reg. v Stephenson* [1979]:** "A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act… The risk must be one which it is in all the circumstances unreasonable for him to take."

***CPM v Caldwell* [1981]:** "Not only deciding to ignore a risk of harmful consequences resulting from one's actions that one has recognised as existing, 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 is."

- Objective test, departed from a long line of authority incl. *Stephenson.*
- Lord Edmund-Davies dissenting: has to be known risk-taking, acknowledges the Law Commission's reports.
- Directly defeats intention of parliament – John Smith.

Law Commission Working Paper No. 23: Wanted to continue recklessness as in the meaning of *Cunningham,* which required foresight.

***Elliot v C* [1983]:** Bound to apply *Caldwell.*

- Robert Goff L.J (dissenting): D should only be reckless "by virtue of his failure to give thought to an obvious risk…where such a risk would have been obvious to *him*."

***R v G* [2003]:** "Acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that would occur, and it was, in the circumstances known to him unreasonable to take the risk."

- Subjective and objective limb.
- Must appreciate or foresee risk.

NZ CASES

***R v Howe* [1982]:** Recklessness has "no separate legal meaning… it is not limited to deliberate risk-taking but includes failing to give thought to an obvious and serious risk." -

- Applied *Caldwell* to the case but not to NZ law as a whole. Can apply it if a statute seems objective.

***R v Harney* [1987]:** "'recklessly' has usually been understood in NZ to have the meaning given pre-*Caldwell*."

- Expressly rejects the application of *Caldwell.*

***R v Tipple* [2005]:** Affirms the application of *Stephenson* and *R v G.* In addition:

- Does not have to be a huge risk.
- Look at utility and degree and nature of risk to see if something is unreasonable. (Wild J)

***Cameron v R* [2016]:** Recklessness is such that:

a) "If D recognised that there was a real possibility that:
   a. Their actions would bring about the proscribed result;
   b. and/or the proscribed result existed: and
b) Having regard to that risk those actions were unreasonable." – William Young J

DIFFERENCES BETWEEN NZ AND UK POSITION

- NZ rejected *Caldwell* a lot earlier.
- NZ and UK interpretations are now aligned.
- *Caldwell* re recklessness does not apply at all in NZ regardless of the offence.

TRANSFERRED MR

- Can occur where there was a different actual AR than intended, but all the elements of a crime were there – "doctrine of transferred malice."
- The AR and MR that must be transferred must complete a whole offence.
- If MR exists (e.g intent to murder) and the AR occurs (murder) it can be transferred.

INTOXICATION

VOLUNTARY:

UK CASES

R v Caldwell: Majority held that "self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary MR."

- Only applies to specific intent crimes. Recklessness is never a specific intent crime.
- Edmund-Davies LJ dissenting: *Majewski* saying there was no defence intended to be confined to assault and basic intent. Harsh to not be able to use the defence where recklessness is part of a specific intent crime.

R v Heard: The court upheld the distinction between specific and basic intent crimes from *DPP v Beard*.

- Recklessness test in *Caldwell* not that accurate. Just about distinguishing basic and specific intent crimes.
- May be difficulties in saying that intoxication can provide MR because someone can then be charged just for being drunk.

NZ CASES

***R v Kamipeli* [1975]:** "Regard all the evidence, including evidence as to the accused's drunken state… It is the fact of intent rather than the capacity of intent which must be the subject matter of the inquiry." (McCarthy P)

- A man does not intend the natural consequences of his actions.
- It is up to the Crown to disprove the defence "beyond all reasonable doubt" once D has pointed to some evidence suggesting it.
- Shouldn't say "incapability" – drunk intent is still intent.
- Asserts jury's rights on matters of fact.

DIFFERENCES BETWEEN NZ AND UK POSITION

- In the UK the defence is a partial exculpation for specific intent crimes only. It means that the MR could not be formed (why D is under no burden of proof).
- For basic intent it becomes a matter of substantive law which could be used to establish culpability.
- *Majewksi:* specific crimes are ones of 'ulterior intent': there must be proof of purpose of consequences, which are not confined to but includes intent/purpose going beyond the AR.

Why NZ has a better position:

1. Much more holistic and principled.
2. Seems stricter, likely more equitable because principle of MR upheld.
3. Not complicated by objective tests e.g 'recklessness test'.
4. More purposive approach so judges can't form and impose their own standards.
5. Doesn't complicate w considerations of capacity (or whether the person would've acted that way sober re involuntary and UK CA approach).
6. Specific and basic intent has overcomplicated UK position. Not consistent, hard to apply w/o criminal code.
7. Easy to apply NZ position.
8. Takes away unfair principle that you intend the natural consequences of your actions.

INVOLUNTARY:

Reg v Kingston:

CA Position:

- Involuntary intoxication will always be available as a defence where the reason why D formed the intent was because of the involuntary intoxication.
- Purposes of CL is not helped by charging people who did not have a guilty mind. Moral guilty is equated with MR.

House of Lords Position: D fails on 3 grounds;

- There is no principle that moral guilt = MR.
- There is no authority to suggest that the defence exists.
- The Court cannot create the new defence because:
    - Would have to reconcile discrepancy between other defences e.g inability to claim a defence because of an internal impulse.
    - As a general defence, D would be able to escape all liability despite seriousness of offence.
    - The defence would have forensic problems.
    - Easy to manufacture, difficult to disprove.
    - Can be taken into account in sentencing anyway.
- Current common law position was retained (similar to what is in *Kamipeli*).
- Law Commission wanted the approach decided which was that it is about the presence of MR.

MISTAKE OF FACT

- Mistake of fact is not a defence: it just negates the formation of the MR.
- The only burden the defence has is to raise the issue if there is no evidence of mistake of fact already. It is then up to P to disprove it beyond reasonable doubt.

AUTHORITY

***DPP v Morgan* (UK):** if the law requires intention or recklessness with respect to some element in the AR, a mistake, whether reasonable or not, which precludes both states of mind will deny criminal liability.

***R v Strawbridge* [1970] (NZCA):**

- Applied the reasoning in *Sweet v Parsley.*
- Not necessary for the Crown to establish knowledge on the part of the accused in the absence of evidence in the contrary.
- BUT if there is evidence that the accused "honestly believed on reasonable grounds that her act was innocent" then P has to disprove this beyond reasonable doubt.

***R v Wood* [1982] (NZCA):**

- Took away the requirement that the belief had to be reasonable.

***R v Metuariki* [1986] (NZCA):**

- If D's perception were true, his conduct would be legal.

***R v Tulson* (NZ):** "Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty" – Cave J.

- In NZ the preferred approach is that of *Wood* and *Metuariki.*

NEGLIGENCE

- A person is negligence if they fail to exercise care, skill and foresight as a reasonable man in that situation would.
- This is the only fault that needs to be proved, once proved it is up to D to demonstrate there was no negligence.

NZ POSITION

- Not many crimes can be committed negligently but NZ parliament has been willing to depart from this stance in cases of life or death.

R v Yogasakaran:

- Negligence in relation to manslaughter is normal levels of negligence in the tortious sense i.e does not have to be gross negligence.
- Cooke P suggested that it might be time to look at this again.
- Affirmed the position in *R v Storey* – Myers CJ: it must be the standard of skill and care which would be observed by a reasonable man.
- Court reaffirms because:
    - Other jurisdictions have own problems.
    - There aren't enough reasons to depart.

UK POSITION

- Gross negligence is usually the only thing that will suffice for criminal provisions.
    - E.g *RSPCA v C.*
- H.L.A Hart: D's capacity to take the precautions must also be taken into account. This view is taken in the UK.

CONTEMPORANEITY

- The MR and AR must exist at the same time.

Thabo Meli v Reginam: Where there is a preconceived plan, if MR was present at the start of the plan, it carries through till the plan's completion as they are viewed as an inseparable series of acts.

***R v Ramsay* – NZ Position:** One must look at the individual act that caused the death to ascertain whether the required knowledge was there:

- *Thabo Meli* does not always apply: can separate acts out where there was no plan.
- Whether there is a series of interconnected acts or not, the MR prescribed by statute must exist at that point in time.

STRICT LIABILITY

Civil Aviation Department v MacKenzie: In the case of public welfare regulatory offences, a defence of a total absence of fault is available unless clearly excluded in terms of the legislation, the onus of proving such a defence to the balance of probabilities standards rests on the defendant.

Millar v MoT: Have to see if there is a "weighty enough" reason to displace the presumption of an MR:

- *Sweet v Parsley:* penal presumption – have to take best interpretation for D.
- Considerations can include the penalty, the legislative history, purpose, scheme, context and whether or not parliament has said anything about it being absolute liability.

Stevenson v R: Affirms the above.

- The assumption that a provision has an MR requirement still stands.
- Can only be strict liability for "public welfare regulatory offences" e.g not driving disqualified.

Some people disagree w objective liability because:

- Does not fulfill the objections of the criminal law.
- Too harsh.
- Fault element supposed to be conscious.