Recklessness

R. v. *G and another* [2003] UKHL 50, [2004] 1 AC 1034, [2003] 3 WLR 1060, [2003] 4 All ER 765.

Even by the mid-1990s it was fair to say that the decision in *R* v. *Caldwell* [1982] AC 341 [S&S § 5.2] was become confined largely to its own offence. Whereas it was, at first, treated as a general authority concerning the mens rea requirements of recklessness-based offences (and their like; cf. *Seymour* [1983] 2 AC 493), over the subsequent decade or so it came to be seen primarily as a decision concerning the interpretation of section 1 of the Criminal Damage Act 1971.

Now, in that specific context, *Caldwell* is no more. In *R.* v. *G and another* the House of Lords has determined that, within the terms of section 1, "recklessness" requires actual foresight of the risk (i.e. *Cunningham* recklessness). As Lord Bingham put it [at 41], drawing on the definition in the Draft Criminal Code,

> "A person acts … 'recklessly' within the meaning of s 1 of the 1971 Act with respect to – (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk...."

An important question remains. *Caldwell* may be undone with respect to the Criminal Damage Act 1971, but is it still authority of any more general application?

Technically, the answer is yes. Even though *Caldwell* recklessness has not been favoured in other offences, it remains an available interpretation of the recklessness requirement, where it occurs, in any particular offence. To see this, one must look more closely at the decision in *G* itself. Three broad propositions may be extracted from the judgments.

1. The key proposition in *G* is that, as a matter of statutory interpretation, the House of Lords in *Caldwell* misconstrued section 1 of the Criminal Damage Act 1971 and failed to give effect to the meaning of "reckless" that Parliament intended. All five of their Lordships concurred in this conclusion. In the leading judgement, Lord Bingham (with whom Lords Browne-Wilkinson and Hutton agreed) undertook an extensive review of the legislative and case-law history of the offence. The review establishes clearly that the interpretation of section 1 in *Caldwell* was not in accord with Parliamentary intent; a conclusion echoed following a similar exercise conducted by Lord Steyn (with whom Lord Hutton also concurred).

2. That was enough to decide the case and, by itself, it does not foreclose the deployment of *Caldwell* recklessness on another occasion in another statute. Lords Bingham and Steyn, however, went further and buttressed their reading with a moral argument: one who commits an actus reus inadvertently may not be, or at least may not clearly be, sufficiently blameworthy to warrant conviction and/or punishment for a serious crime:

   > "But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication (see *DPP v Majewski* [1977] AC 443)) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment." [At 32; see also Lord Steyn at 55.]

   Indeed, especially where the defendant suffers from limitations of age, intellect, or the like, to convict on the *Caldwell* standard [as interpreted in *Elliott* v. *C (a minor)* [1983] 1 WLR 939, DC; S&S §§ 5.2(i)(b), 5.5(ii)] would be manifestly unfair:

   > "It is neither moral nor just to convict a defendant (least of all a child) on the strength of

> what someone else would have apprehended if the defendant himself had no such apprehension. Nor, the defendant having been convicted, is the problem cured by imposition of a nominal penalty." [At 33; cf. Lord Steyn at 52-54.]

3. So what is left? Lord Rodger is alone in restricting his objection to *Caldwell* to statutory interpretation grounds rather than moral reasons:

> "It does not follow, however, that Lord Diplock's broader concept of recklessness was undesirable in terms of legal policy. On the contrary, there is much to be said for the view that, if the law is to operate with the concept of recklessness, then it may properly treat as reckless the man who acts without even troubling to give his mind to a risk that would have been obvious to him if he had thought about it." [At 69.]

His Lordship notes that this possible interpretation may be better suited to some but not all offences, citing the (former) offence of reckless driving, where a *Caldwell* analysis was preferred by the House of Lords in *Lawrence* [1982] AC 510 and *Reid* [1992] 1 WLR 793. Yet in this, Lord Bingham appears to agree:

> "I mean to make it as plain as I can that I am not addressing the meaning of 'reckless' in any other statutory or common law context. In particular, but perhaps needlessly since 'recklessly' has now been banished from the lexicon of driving offences, I would wish to throw no doubt on the decisions of the House in *R v Lawrence* and *R v Reid*." [At 28.]

So, at the level of legal principle, it is possible that *Caldwell* recklessness might still be a plausible construction of particular offences, notwithstanding the moral objections espoused by Lords Bingham and Steyn. But in practice, it now seems that any offences of this type will be very rare. We think the most likely offences where this might occur are those where the recklessness refers to the *manner* in which an actus reus is performed (e.g. reckless driving), rather than to consequential or circumstantial elements of the offence. [This possibility is discussed in S&S, § 5.2(ii).] However, offences of this type will be found very rarely, if ever.