Address

Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Culpability

THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG, LORD CHANCELLOR*

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1. Introductory Remarks

Ladies and Gentlemen, let me begin by thanking this great University for giving me the opportunity to make a small contribution to the celebration of its 150th anniversary.

One hundred and fifty years ago William Charles Wentworth had the vision, against the tide of popular opinion, to see a place for advanced education in Sydney's bright future. He fought long and hard to found Australia's first university here. Teaching began in 1852, with 24 students studying Greek, Latin, Mathematics and Science. The University had three professors: one from Oxford, one from Cambridge and one, I am pleased to say, from Aberdeen. Today, you have more than 160 professors, and more than 37,000 students. Almost one tenth of your students come from overseas and many great world figures have passed through your hands, among them two Nobel Laureates, James Wolfensohn, the President of the World Bank and Robert May, the Chief Scientific Adviser to the British Government.

Law has long been taught at Sydney University. You have provided Australia with three Prime Ministers, including John Howard, four Chief Justices of the High Court, including Chief Justice Gleeson, nine Chief Justices of the Supreme Court of New South Wales and, of course, Sir William Deane, the Governor-General. Many fine legal scholars have graced the Faculty. The list is a roll of honour, but I confine myself to three: Professor Julius Stone, one of the great figures of the school of sociological jurisprudence; William Morison, a remarkable legal theorist who made substantial contributions in judicial procedure and torts; and, more recently, Ross Parsons who was instrumental in establishing the study of taxation as an academic discipline in law schools.

As a Scot, however, let me mention another name, not as distinguished as the others as a lawyer, but certainly one identified with an enduring image of the Australian spirit. George Patterson, also known as 'Banjo' Patterson, was an Australian-Scottish solicitor practising in this city in the 19th century. In 1895, on a visit to friends in the outback at Dagworth station, he heard his hostess, Christine MacPhereson, play on the piano a haunting tune called 'Craigielea' – in Scotland

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originally called 'The Bonnie Wood of Craigielea'. It was to this tune that Banjo Patterson eventually composed a new set of words. By the time of the Great War his song had become the most popular in Australia; today it ranks alongside Auld Lang Syne among the best loved around the world. But out of consideration for the feelings of others, I shall not detain you today with my own rendition of 'Waltzing Matilda'.

Instead, let me move from the sublime to the deeply serious to consider how the concept of culpability has influenced the development of mens rea doctrines in Australia and England over recent decades; particularly the two best-known forms of fault in criminal law: intention and recklessness.

2. *Opening*

The State can deliver no stronger condemnation than a finding of criminal guilt. Its reach can extend beyond the punishment itself – to loss of employment, or professional status, or even the freedom to travel abroad. These extra-judicial consequences record the social truth that, implicit in a criminal conviction, is the judgment that the defendant has done something reprehensible, warranting serious moral blame. Ultimately, it is the implicit moral condemnation in a conviction that gives the word 'criminal' its cultural resonance.

It is unsurprising, therefore, that the common law has been reluctant to inflict these labels without an integral finding of culpability. *Actus non facit reum nisi mens sit rea* may be a clumsy maxim, and dubious Latin, but it gestures toward something profound in the criminal law: that people should not be branded criminals on the basis of accidents or misfortunes. Especially in cases of serious crime, there must first be some finding of fault – typically, some finding of mens rea. As Kenny put it, at the beginning of the 20th century, 'no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it is produced by some form of mens rea.'[1]

In practice, however, shaping mens rea doctrines so as best to serve these underlying notions of culpability has generated many difficulties for courts throughout the Commonwealth.[2]

Let me begin with two conceptions of criminal fault: *subjective* and *objective*.

A long-standing debate in modern criminal law is whether criminal mens rea is to be measured by a subjective or an objective standard. Should culpability be assessed subjectively, by reference to the defendant's own characteristics and state of mind, and especially his own deliberate choice to do, or risk doing, a criminal

1 *Outlines of Criminal Law* (2nd ed, 1904) 39.

2 The same underlying concern with culpability has also motivated judicial activism in common law defences. The courts of Australia, England, and elsewhere, have wrestled in recent decades with such questions as the proper effect of unreasonable mistakes made in self-defence; the inculpatory or exculpatory effects of intoxication; the extent to which defences such as duress and provocation should require levels of fortitude or self-restraint of which the defendant himself was incapable; and so forth. Time, however, does not permit me to address these questions today.

act? Or should it be assessed objectively, by reference to his actions, and perhaps the characteristics, and hypothetical beliefs and choices, of the so-called reasonable man?

This long-standing debate is also a foundational one. Among its other rôles, mens rea is the bridgehead between an actus reus perpetrated by the accused and a finding that the defendant is culpable for perpetrating that actus reus. Mens rea links action to blame, supplying the moral warrant for a conviction. When criminal lawyers dispute the merits of the 'objective' against the 'subjective' approaches to blame, their dispute is about the conditions under which a condemnatory finding of criminal 'guilt' is justified. Under a fully subjective standard of fault, for example, convictions are warranted only when an offence is done intentionally, or perhaps recklessly. Justifying criminal liability for negligence, on the other hand, requires commitment to a more objective theory of blame.

In the courtroom, the same debate lies behind some pressing doctrinal questions. Courts must decide whether particular mens rea elements, such as 'intention' and 'recklessness', should be interpreted to require 'subjective' foresight of risk by the accused. And, if liability may sometimes be imposed for an inadvertent failure to avoid harm, on the basis of an 'objective' standard of foreseeability, what standard of behaviour are we entitled to expect of the accused? Suppose an anaesthetist makes a mistake. His patient dies. On a charge of manslaughter by gross negligence, to what standard must the accused be held?[3] Is it sufficient to exculpate the accused that he did the best that he knew how? Or should he be required to meet the standard of behaviour expected of a reasonable person, irrespective of his own experience or capacities? These are legal questions of immediate practical importance, yet go to the foundations of the criminal law.

Today, I confine myself to intention and recklessness. My thesis is this: over the past 40 years, Australian and English courts have not always seen eye to eye over these doctrinal questions, despite their centrality. Looking back, the Australian courts, and the High Court in particular, have been the more consistent. Australian criminal law has more rigorously followed the subjective path when approaching questions of mens rea. By contrast, English courts, and the House of Lords in particular, have sometimes deviated from that path. Yet, over time, we in England have tended to find our way back to that subjective path, so that our jurisdictions have begun our new century more closely aligned on these issues than in recent decades.

3. Intention

Let me begin with intention. In 1960, the House of Lords decided *DPP v Smith*.[4] Smith was driving a car that contained, on its back seat, stolen scaffolding clips. A police officer saw the clips and, suspecting they were stolen, instructed Smith to pull over to the kerb. This Smith failed to do. He accelerated away. The police

3 Compare *Adomako* [1995] 1 AC 171 with *Yogasakaran* [1990] 1 NZLR 399.

4 [1961] AC 290 (hereinafter *Smith*).

officer clung to the side of the car and was dragged along with it. Apparently in an effort to shake off the officer, Smith repeatedly tacked across the road, travelling by now at considerable speed. Ultimately, the officer was dislodged; but directly into the path of an oncoming car. He was run over and killed.

Smith was convicted of murder. He appealed, claiming that the trial judge, Donovan J, misdirected the jury about proof of the mens rea element in murder. Donovan J had directed the jury, inter alia, that they were permitted to infer Smith's intention from the surrounding circumstances, including 'the presumption... that a man intends the natural and probable consequences of his acts.'[5]

The Court of Criminal Appeal upheld the appeal. It ruled that the judge had failed to make clear that the jury's ultimate task was to decide what, subjectively, was Smith's own intention, and that the presumption that people intend the natural and probable consequences of their actions was merely evidential and capable of being rebutted.

But the House of Lords reversed that decision and restored Smith's conviction, holding that Donovan J made no error at all. The presumption was much more than a matter of evidential inference. It was an irrebuttable rule. Mental incapacity cases aside, a person should be *deemed* to intend a consequence if a reasonable person would foresee it as probable.[6]

The effect of *DPP v Smith* was to change the legal definition of intention. It was surely a major change of approach: although the then Lord Chancellor, Viscount Kilmuir, was able to draw upon some authority to support his conclusions,[7] the balance of the case law favoured a more narrow conception of intention that focused on the subjective state of mind of the defendant himself.[8]

A. The Australian Response

To the credit of the High Court of Australia, it was not for a moment tempted to rechart its own course. Prior to *Smith*, in a sequence of its own decisions, it had affirmed the subjective view that, under the common law in Australia, it must be proved beyond reasonable doubt that the accused himself had the requisite intention. These decisions had culminated in the 1957 case of *R v Smyth*,[9] in which the defendant was convicted of murder after striking his victim several times with

5 See *Smith*, above n4 at 299–300 (CA); 325 (HL).

6 '[O]nce the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility.' *Smith*, above n4 at 331.

7 Most notably *Ward* [1956] 1 QB 351 at 356, which is criticised in the note at (1956) 72 LQR 166 and by S Prevezer, 'Murder by Mistake' [1956] *Crim LR* 375.

8 See for example, Rupert Cross, 'The Need for a Re-definition of Murder' [1960] *Crim LR* 728; HR Stuart Ryan, 'The Objective Test of Intention in Criminal Liability' (1960) 3 *Crim LQ* 305; *Smith*, above n4, noted at [1960] *Crim LR* 765; Glanville Williams, 'Constructive Malice Revived' (1960) 23 *Mod LR* 605; Rex A Collings, 'Negligent Murder' (1961) 49 *Calif LR* 254; S Prevezer, 'Recent Developments in the Law of Murder' (1961) 14 *CLP* 16; Sir Cyril Salmon, 'The Criminal Law Relating to Intent' (1961) 14 *CLP* 1; JL Travers & Norval Morris, 'Imputed Intent in Murder' (1961) 35 *ALJ* 154.

9 (1957) 98 CLR 163.

a wrench. At trial, the judge directed the jury in terms remarkably similar to the language used later by Donovan J.[10] But his direction, said the High Court, had been wrong:[11]

> [w]e think that the direction complained of is not in accordance with law and ought not to be given. In this Court disapproval has been expressed on more than one occasion of the use, where a specific intent must be found, of the supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable, consequences of his acts....[12]

The discrepancy between our two legal systems soon came to a head in *Parker v R*,[13] a case where the defendant had killed his wife's lover by running him over with a motor car. The High Court took the opportunity fully and clearly to endorse its earlier decisions, a move of considerable constitutional as well as criminal law significance. The Court set itself directly against the decision of the House of Lords, which was described by Dixon CJ as 'misconceived and wrong'. Thus, *DPP v Smith* had proved a valuable catalyst in Australia, contributing to the development of its distinctive juridical identity. Formerly, the High Court had regarded itself as bound by decisions of the House of Lords on issues of general legal principle, even in the face of contrary High Court precedents.[14] By refusing to follow *Smith*, the High Court in *Parker* was forced explicitly to sever the yoke of English legal authority.[15]

B. The Path Back

Time has proved the High Court right. The presumption endorsed in *Smith* was effectively undone by statute in England, with the passing of the *Criminal Justice Act* 1967 (UK).[16] At common law, too, the case has since been disavowed by the Privy Council.[17] An objective test of intention, at least in murder, has no place in the common law.

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10 Ibid: 'If you think that grievous bodily harm... was a natural and probable consequence of what the accused man might be found by you to have done, then the law is that he is presumed to have intended those very consequences.'

11 Above n9 at 166–167. Application for special leave to appeal was nonetheless refused.

12 Citing *Stapleton v R* (1952) 86 CLR 358 at 365; *Baily v Baily* (1952) 86 CLR 424 at 427; *Deery v Deery* (1954) 90 CLR 211 at 219–223; *Gow v White* (1908) 5 CLR 865 at 876.

13 (1963) 111 CLR 610; reversed on other grounds (1964) 111 CLR 665.

14 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313; *Brown v Holloway* (1909) 10 CLR 89 at 102; Zelman Cowen, 'The Binding Effect of English Decisions Upon Australian Courts' (1944) 60 *LQR* 378.

15 'Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* Case [1961] AC 290 I think that we cannot adhere to that view or policy.... I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's* Case [1961] AC 290 should not be used as authority in Australia at all.' (1963) 111 CLR 610 at 632 (Dixon CJ, in a passage endorsed by the entire bench).

16 Section 8. See also RJ Buxton, 'The Retreat from Smith' [1966] *Crim LR* 195, who shows that the decision was being ignored by trial judges even before the 1967 Act.

17 *Frankland and Moore v R* [1987] AC 576 at 594.

But it is important to observe that pressure on the definition of intention in murder did not end with the demise of *Smith* at the hands of the *Criminal Justice Act* 1967 (UK). Although it is sometimes unnoticed, *Smith* involved not one, but two, derogations from a subjective test of intention. The first was to equate *foreseeable* consequences with *foreseen* ones: if it was a natural and probable consequence, then Smith would be taken to have foreseen (and in turn intended) it. This extension blurs the boundaries between recklessness and negligence. The second derogation from a subjective test of intention was to equate foresight of a probable consequence with intention: if Smith foresaw the police officer's death, then he *intended* it. This extension blurs the boundary between recklessness and intention. At the time, it was the first extension that attracted notoriety and a statutory response. But the boundary between recklessness and intention has proved the more enduring difficulty.

In part, this second problem persisted because the mental element of murder in England is narrower than in Australia. It requires an intention to kill or inflict grievous bodily harm;[18] by contrast with the law in Australia's common law jurisdictions, where foresight of probable death or grievous bodily harm is sufficient.[19] Sometimes, this generates moral and legal pressure-points in cases where our instinct may be that the accused ought to be convicted of murder, but where it cannot be proved that he intended the victim's death, in the full sense of having sought to bring that about.

In *Hyam*,[20] for example, a vengeful Mrs Hyam poured petrol through the letterbox of Mrs Booth's house, after Mrs Booth had supplanted her in the affections of a Mr Jones. She set the petrol alight, intending only to frighten Mrs Booth, but recognising that serious injury was likely to follow. Two people died, and Mrs Hyam was charged with murder. In Australia, she could be convicted without the need to describe death or grievous bodily harm as intended, because foresight that serious injury is probable is sufficient mens rea for murder in Australia. In England, however, because murder requires a finding of intent, in order to uphold her conviction the House was compelled to regard Mrs Hyam's foresight that serious harm was highly probable as establishing, in law, an intention to inflict that harm.

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18 *Vickers* [1957] 2 QB 664 at 672; *Smith*, above n4; *Hyam* [1975] AC 55 at 68; *Leung Kam-Kwok v R* (1985) 81 Cr App R 83.

19 *Crabbe* (1985) 156 CLR 464; *Knight* (1992) 175 CLR 495, 501; *Crimes Act* 1900 (NSW), s18; *Crimes Act* 1900 (ACT), s12. The fact that it makes no practical difference in this context explains the *dicta* in *Crabbe* at 469 and *Vallance* (1961) 108 CLR 56 at 59, 82 noting that the law sometimes treats foreseen probable consequences of an act as intended. See Peter Gillies, *Criminal Law* (4th ed, 1997) 51–56. Contrast the law in codified States, where recklessness per se is insufficient but is compensated for by varieties of constructive murder: *Criminal Code Act* 1899 (Qld), Schedule 1 s302; *Criminal Code Act* 1924 (Tas), Schedule 1 s157; *Criminal Code* Act *Compilation Act* 1913 (WA), Schedule 1 ss278–9; also *Criminal Code Act* (NT), s162.

20 *Hyam*, above n18.

It was not until 1985, in *Moloney*,[21] that the House of Lords clearly differentiated between actual intention and foresight of probable outcomes. Subsequent cases[22] have confirmed and refined the division between these two forms of mens rea. They culminate most recently in *Woollin*,[23] a decision that would have been inconceivable at the time of *Smith*, or even *Hyam*. The accused in that case lost his temper and apparently threw his three-month-old son against a hard surface. The child's skull fractured and death ensued. In Woollin's trial for murder, the prosecution alleged that Woollin had foreseen the risk of serious injury with sufficient certainty for this to be, in law, a case of intention. The House accepted the possibility of this analysis in principle.[24] Nonetheless, it quashed Woollin's conviction and substituted a conviction for manslaughter because the trial judge had misdirected the jury by requiring only that the accused foresaw a 'substantial risk' (rather than the 'virtual certainty') of serious injury or death. In the leading judgment, Lord Steyn explicitly rejected the possibility that a person's intention can be inferred, as a matter of substantive law, from his foresight of a risk falling short of virtual certainty. Any such inference is merely evidential. Thus intention is, at last, unequivocally a subjective legal concept in England, and one clearly distinguished from recklessness: the defendant must either seek deliberately to bring about the relevant consequence, or recognise that the consequence is a virtually certain concomitant of some other outcome sought. It is not enough that the consequence was foreseeable, or even foreseen as probable.

It has been about 40 years since *Smith* was decided. During the intervening years, the reluctance to acquit of murder those wrongdoers who deliberately put at risk the lives of others, yet did not actually seek to cause death, has inevitably put pressure on the definition of intention. English law has made some wrong turnings. But the shadow of *Smith* is now fully lifted. English law has, at last, a definition with which Australian courts might again feel comfortable.

4. *Recklessness*

In recklessness, the controversial decision corresponding to *Smith* is *Commissioner of Police of the Metropolis v Caldwell* in 1982.[25] The accused had been working for the proprietor of a residential hotel. He developed a grievance against the proprietor, and, after drinking too much one evening, decided to set the hotel on fire. This he did, although the amount of damage caused was fairly minor. Caldwell was charged, inter alia, with an offence against s1(1) of the *Criminal Damage Act* 1971 (UK). This makes it an offence to damage another's property

21 [1985] AC 905 at 928: 'foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence.'

22 Notably *Hancock and Shankland* [1986] 1 AC 455 (HL) and *Nedrick* [1986] 1 WLR 1025 (CA).

23 [1999] 1 AC 82.

24 Compare, in Australia, *Hurley* [1967] VR 526 at 540 ('fully aware that the result would follow'); *Hatty v Pilkinton* (1992) 108 ALR 149 at 158 ('a virtual inevitability').

25 [1982] AC 341.

'being reckless as to whether any such property would be destroyed or damaged'. The House of Lords held that a person is reckless in law if:[26]

> (1) he does an act which in fact creates an obvious [and serious][27] risk that property will be destroyed or damaged and (2) when he does the act he 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.

The ruling was a radical departure from the traditional understanding of recklessness. According to well-known precedents, such as the 1957 decision in *Cunningham*,[28] recklessness was a subjective concept, requiring actual foresight of the risk by the accused. The essence of *Caldwell* was to create a second category of recklessness in criminal law, by which the defendant will also be counted reckless if he fails to think of a risk when that risk is a glaring one. In effect, as Professor Fisse has observed,[29] recklessness under *Caldwell* embraces both advertent wrongdoing and gross negligence.

May I interpose that I am well aware of the recent tragedy at Childers in Queensland and my reference to *Caldwell* is not, of course, intended to have any bearing upon it.

Rather like the House's foray into intention in *Smith*, *Caldwell* introduced two dimensions of objectivity into the law governing mens rea. First, the decision extends liability beyond the traditional subjective requirement for actual foresight on the part of the accused, so that it is sufficient if the consequence is obvious to a reasonable man. Secondly, the foreseeability standard supplied by the 'reasonable man' test is applied without reference to the defendant's own limitations.

The effect of this second dimension of objectivity was seen in 1983 in *Elliott v C (a minor)*,[30] where a 14 year old girl of low intelligence had wandered away from home and spent the night outdoors without sleep before ending up in a garden shed. She then destroyed the shed while playing with matches and some white spirit. Even though it was found as a fact that the risk of setting fire to the shed would not have been obvious to someone of her limited capacities, she was convicted of criminal damage. The Divisional Court held, on the authority of *Caldwell*, that the test of obviousness is itself objective: would the risk be obvious to an ordinary adult, rather than, should it have been obvious to the particular defendant.[31]

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26 Id at 354. This definition enabled the House to uphold D's conviction also for the more serious charge under s1(2), of damaging property being reckless whether life would thereby be endangered. D had claimed that, being drunk, he had not considered the risk to life that his actions posed.

27 Interpolated in *Lawrence* [1982] AC 510 at 527.

28 [1957] 2 QB 396.

29 Brent Fisse (ed), *Howard's Criminal Law* (5th ed, 1990) 444.

30 [1983] 1 WLR 939.

31 See also *R. Stephen* (1984) 79 Cr App R 334.

A. The Australian Response

At the time, *Caldwell* was criticised quite forcefully by Australian academic lawyers,[32] whereas the Australian courts seem to have regarded it as going only to the interpretation of a specific statute, and so of no general significance.

The High Court has ignored *Caldwell* almost entirely.[33] Exceptionally, McHugh J's judgment in *Royall v R*[34] mentions *Caldwell* when considering the mens rea element of 'reckless indifference to death' contained in s18 of the *Crimes Act* 1900 (NSW). However, like the rest of the High Court, he went on to reject an objective interpretation, ruling that the section requires foresight of the probability or likelihood of death.[35] The Court's analysis explicitly echoed the leading case of *Crabbe*,[36] where the mens rea element of malice aforethought in murder at common law was said to require, at least, foresight of the probability of death or grievous bodily harm. *Crabbe*, decided in 1985, and *Royall*, decided in 1991, bear close resemblance to the subjective analysis of malice aforethought and recklessness found, back in 1957, in the English case of *Cunningham*. In these cases, one can see that English and Australian law are true cousins. Correspondingly, according to the critics,[37] it is the bloodline of *Caldwell* that was moot.

Nonetheless, Australian law has not always been immune to the charms of an objective concept of recklessness. There are a number of reported cases in which Australian courts have used the term 'reckless' to refer, in effect, to gross negligence – or 'reckless negligence', as Windeyer J once memorably expressed it.[38] This is accepted, for example, in *MacPherson v Brown*, a South Australian case, where Chief Justice Bray recognised that Australian law knows two senses of the word:

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32 See, in particular, Editorial, 'The Demise of Recklessness' [1981] 5 *Crim LJ* 181; Fisse, above n29 at 444 ('a radical departure from principle'); and in New Zealand, KE Dawkins, 'Criminal Recklessness: Caldwell and Lawrence in New Zealand' (1983) 10 *NZULR* 364.

33 Apart from parenthetical references to *dicta* in the case which do not touch on the definition of recklessness: *Peters v R* (1998) 192 CLR 493 at 543 n249 (theft); *Crabbe*, above n19 at 471 (noting that a passage by Glanville Williams was cited in Edmund-Davies' *dissenting* judgment).

34 (1991) 172 CLR 378 at 455.

35 See also *Annakin* (1988) 37 A Crim R 131; *White* (1989) 17 NSWLR 195; *Solomon* (1980) 1 NSWLR 321.

36 *Crabbe*, above n19.

37 Even in England: see, for example, *Smith* [1981] *Crim LR* 393 at 410; Glanville Williams, 'Recklessness Redefined' [1981] *CLJ* 252; Griew, 'Reckless Damage and Reckless Driving: Living with *Caldwell* and *Lawrence*' [1981] *Crim LR* 743; Jenny McEwan & St John Robilliard, 'Recklessness: the House of Lords and the Criminal law' (1981) 1 *LS* 267; George Syrota, 'A Radical Change in the Law of Recklessness?' [1982] *Crim LR* 97; RA Duff, 'Professor Williams and Conditional Subjectivism' [1982] *CLJ* 273; RA Duff, *Intention, Agency and Criminal Liability* (1990) ch 7; Glanville Williams, 'The Unresolved Problem of Recklessness' (1988) 8 *LS* 74.

38 *Mamote-Kulang v R* (1964) 111 CLR 62 at 79.

> The term "recklessness" is sometimes confined to advertent conduct and sometimes used to include inadvertent conduct... In this [second] sense recklessness is synonymous with criminal negligence.[39]

Chief Justice Bray's own preference was that 'the word "reckless" should be confined to action where the relevant consequences are adverted to'. But it is clear from this and from other cases[40] that *Caldwell* recognises a strain of analysis to which voice had previously been given even in Australia.

Despite these divergent authorities, however, it is right to say that by the time of *Caldwell* the subjective meaning of recklessness was predominant in Australia.[41] It had already been endorsed in a series of cases at state level,[42] and blessed by the High Court in such cases as *Vallance v R*[43] *and Pemble v R.*[44] *Caldwell* elicited no change in this position.[45] Even the phrase 'reckless indifference', found in the South Australian statutory offence[46] of criminal damage – surely a phrase and an offence redolent of *Caldwell*, if any were – has been said by the Supreme Court of that state to require proof of the accused's knowledge of the risk.[47]

B. The Path Back

If *Caldwell* failed to take hold elsewhere in the Commonwealth,[48] its roots have proved shallow even in England. Although the decision exercised considerable influence during the 1980s, its importance has diminished. For example, it no longer governs the English law of manslaughter,[49] rape,[50] or assault.[51] In effect, its application is now restricted to the offence in *Caldwell* itself (criminal damage), and to a few other statutory offences.[52] Professor Ashworth has observed rightly,

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39 (1975) 12 SASR 184 at 188, quoting, in part, from Colin Howard, *Criminal Law* (2nd ed, 1970) at 56–57. The two possible senses of 'recklessness' are noted also by Windeyer J in *Phillips* [1971] ALR 740 at 756–757.

40 For example, *Evgeniou v R* (1964) 37 ALJR 508 at 513; Compare *Sivewright v Casey* (1949) 49 SR (NSW) 294, in the context of contractual rescission.

41 However, in order to avoid confusion, a direction that avoids use of the term itself has often been preferred: *La Fontaine v R* (1976) 136 CLR 62 at 76–77 (Gibbs J); *Pemble v R* (1971) 124 CLR 107 at 120–121 (Barwick CJ); *Crabbe*, above n19.

42 *Nydam v R* [1977] VR 430 at 437; *MacPherson v Brown*, above n39; *Stones* (1955) 56 SR (NSW) 25 at 34; *Ashman* [1957] VR 364 at 366.

43 Above n19 at 64 (Kitto J).

44 (1971) 124 CLR 107 at 119 (Barwick CJ).

45 See, for example, *Smith* (1982) 7 A Crim R 437 at 440, 446–7; *Taylor* (1983) 9 A Crim R 358.

46 *Criminal Law Consolidation Act* 1935 (SA) s85.

47 *Durwood v Harding* (1993) 61 SASR 283; *Tziavrangos v Hayes* (1991) 55 SASR 416. See too *Athanasiadis* (1990) 51 A Crim R 292 (rape); *Hemsley* (1988) 36 A Crim R 334 (sexual assault).

48 See, apart from Australia, *Sansregret v R* (1985) 17 DLR (4th) 577; *Harney* [1987] 2 NZLR 576.

49 *Adomako* [1994] 3 All ER 79, reversing *Seymour* [1983] 2 AC 493.

50 *Satnam and Kewal Singh* (1983) 78 Cr App R 149.

51 *Spratt* (1990) 91 Cr App R 362.

52 For example, *Large v Mainprize* [1989] Crim LR 213.

that 'the *Caldwell* definition is now of little practical significance.'[53] Subjective recklessness of the variety found in *Cunningham* and *Royall* now predominates and, once more, English law is aligned with Australian.[54]

At least, mostly aligned. I mentioned earlier that there were two objective dimensions to *Caldwell*. The second dimension of *Caldwell* may yet survive. Where an offence can be committed negligently, or with gross negligence, *Caldwell* and *Elliott v C* remain authorities that the criminal law makes no allowance for personal characteristics of the defendant, such as low intelligence, when assessing foreseeability. Contrast *Boughey v R*,[55] a murder case from Tasmania in which the accused, a medical practitioner, had strangled his partner in the course of somewhat unconventional but consensual sexual activity. Section 157(1)(c) of the *Tasmanian Criminal Code* provides that a culpable homicide is murder if perpetrated by 'any unlawful act or omission which the offender knew, *or ought to have known*, to be likely to cause death in the circumstances....' [Emphasis added].

The High Court endorsed a more subjective approach to the section than is found in *Caldwell*. According to the Court:

> The starting point of the inquiry on the question whether an accused ought to have known that his or her actions were likely to cause death must be the knowledge, the intelligence and, where relevant, the expertise which the particular accused actually possessed. The relevant question is not whether some hypothetical reasonable person in the position of the accused would have appreciated the likely consequences of the applicant's act. It is what the particular accused, with his or her actual knowledge and capacity, ought to have known in the circumstances in which he or she was placed.[56]

Boughey is irreconcilable with *Elliott v C*. Yet even here, there are signs that English law is moving toward a more subjective approach.[57] Given that the accused in *Caldwell* was not burdened with abnormal capacities, the decision can be regarded as obiter on that point. Moreover, in *Adomako*, in 1995, a case of grossly negligent manslaughter by an anaesthetist, Lord Mackay, the then Lord Chancellor, suggested that gross negligence involves conduct so bad that it may be characterised as reckless 'in the ordinary connotation of that word'.[58] If that is the test then, surely, in ordinary language, 'recklessness' involves an assessment of the

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53 Andrew Ashworth, *Principles of Criminal Law* (3rd ed, 1999) 191.

54 Note the discussion here is concerned primarily with consequences. In respect of circumstances, especially the victim's lack of consent in an offence of sexual violence, both England and Australia have indicated a preference for what is at least a partially objective test: *Tolmie* (1995) 37 NSWLR 660; *Evans* (1987) 30 A Crim R 262 at 267–268, 273–274; *Satnam and Kewal Singh*, above n50.

55 (1986) 161 CLR 10. (Application for special leave to appeal was refused).

56 Id at 28–29 (Mason, Wilson & Deane JJ).

57 See also *Hudson* [1966] 1 QB 448 at 455. In Canada, the Supreme Court has favoured taking account of personal incapacities. See *Creighton* [1993] 105 DLR (4th) 632.

58 Above n3 at 187. See the note by Simon Gardner, 'Manslaughter by Gross Negligence' (1995) 111 *LQR* 22 at 23–24.

offender's conduct by reference to his own capacities. As Goff LJ pointed out in *Elliott v C*,[59] the accused in that case was not reckless in any ordinary sense of that word. Indeed, given her limited intelligence, she would probably not even be negligent.

There are also dicta from the decision of the House in *Reid* in 1992,[60] a reckless driving case, to the effect that fault should be assessed by reference to the capacities of the particular defendant.[61] And, only a little time ago in *Smith*,[62] the House has ruled that the sufficiency of provocation is to be assessed by having regard to all the circumstances, including the accused's own state of depression, and not against a fully objective standard of reasonableness. While none of these cases is decisive, each suggests a more sympathetic awareness of involuntary human frailties; a recognition that criminal culpability must sometimes allow for personal limitations that the defendant cannot transcend.

5. *Conclusion*

The requirement for some form of mens rea in offences is venerable. It can be traced as far back as the time of Henry I.[63] But the interpretation and application of mens rea principles has not been static. The past century, in particular, has seen an evolution in the general doctrines of mens rea at common law, a trend toward the incorporation of subjective principles of criminal culpability. Through both legislation[64] and judicial reform,[65] constructive liability crimes, such as felony murder, have become increasingly uncommon. Most serious offences now require some element of foresight of the actus reus by the accused.

Sometimes, English courts have been innovative in developing subjective doctrines, such as the rule that mistakes made in self-defence need not be reasonable, and the recent decision in *Smith* that provocation must take account of the defendant's own capacity for self-restraint. For these defences, the law in England is now more subjective than it is in Australia.[66] Yet on questions of mens rea, as I have suggested today, the English have often lagged behind their antipodean counterparts. Australian courts have more consistently developed a subjectivist theme, resisting the siren voice of objectivism and the ostensible moral pull of the facts in particular cases. There has, perhaps, been a greater willingness

59 Above n30 at 949.

60 [1992] 3 All ER 673.

61 In particular, Lord Keith states that a defendant should not be liable where his inadvertence is owing to 'some condition not involving fault on his part' (at 675C); Lord Goff similarly mentions 'illness or shock' (at 690J); while Lord Browne-Wilkinson refers to 'sudden disability' (at 696F).

62 [2000] 3 WLR 654.

63 *Leges Henrici Primi* c5, § 28. A very valuable paper is Sir Owen Dixon's 'The Development of the Law of Homicide' (1935) 9 *ALJ (Supp)* 64.

64 For example, s1 of the *Homicide Act* 1957 (UK).

65 *A-G's Reference (No 3 of 1994)* [1997] 3 All ER 936.

66 Compare *Beckford* [1988] AC 130 with *Zecevic v DPP (Vic)* (1987) 162 CLR 645 (self-defence); also *Smith*, above n62 with *Masciantonio v R* (1995) 183 CLR 58 (provocation).

to acquit a particular accused, or to convict him only of a lesser offence, rather than to stretch the fibres of mens rea concepts beyond their natural tolerances.[67] Perhaps, too, English appellate courts were hampered in earlier decades by their previous inability to order a retrial after a misdirection–an impediment that fortunately now is removed.

Indeed, 'the persistent heresy of objective guilt',[68] as Chief Justice Bray once characterised it, is not always heresy in England, even today.[69] In offences of strict liability, for example, the *Proudman v Dayman*[70] defence of reasonable mistake is unavailable in England. That much has been recently confirmed by the House in *B (a minor) v DPP*,[71] a decision that otherwise gives resounding support to the presumption of subjective mens rea espoused by Lord Reid in *Sweet v Parsley*.[72]

Quite apart from applauding Australian lawyers for their consistency, there is much to be said for taking a subjective approach to culpability. The most culpable form of wrongdoing is the knowing, deliberate infliction of harm; and we can be sure that a subjective interpretation of such mens rea concepts as intention and recklessness will highlight these cases in particular. Moreover, there is much to be said for recognising personal limitations. It is surely wrong to blame people for failing to achieve the impossible. It is certainly undesirable that criminal sanctions should be inflicted because a person is less intelligent than the rest of us and, like the defendant in *Elliott v C*, cannot foresee the damage her actions may cause.

But I finish on a note of caution. Subjectivism is simple and appealing. Yet, although it captures the most graphic types of fault, it is incomplete. Not all wrongdoing is deliberate. A purely subjective law of mens rea would, for example, leave manslaughter by gross negligence unpunished. More generally, objective standards will always have a role to play in our law. They help articulate the limits on individual freedom that the criminal law exists to impose. Without external standards of reasonableness, frequently it would be impossible to distinguish wrongful acts from accidents or from cases of justification. This is why there remain requirements of proportionate response, for instance, in defences such as self-defence and duress.

Let me recall the point with which I began. Our legal doctrines should reflect the public implication of moral fault that accompanies a criminal conviction.

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67 The judgment of Lord Steyn in *Woollin* [1999] 1 AC 82 at 94 provides a striking modern contrast: 'It is true that [the test of foresight of virtual certainty] may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk-taking.'

68 *MacPherson v Brown*, above n39.

69 Contrast, for example, the more objective rules governing intoxication in English law (*DPP v Majewski* [1977] AC 443) with the straightforwardly subjective approach taken in Australia (*O'Connor* (1980) 146 CLR 64).

70 (1941) 67 CLR 536.

71 [2000] 1 All ER 833.

72 [1970] AC 132; *He Kaw Teh v R* (1985) 157 CLR 523, the leading Australian decision on mens rea in statutory offences.

Often, to achieve that, the courts must select between objective and subjective versions of the law. My claim now in closing is that neither theory offers a sufficient explanation of culpability by itself. History has sided with the High Court of Australia on the interpretation of intention and recklessness, but a more general arbitration between objective and subjective views is likely to be impossible, and probably misguided. This is all the more true when we take account of the practical constraints that surround the operation of the criminal legal system. Not every moral nuance can be reflected by the law, and the mens rea concepts of intention and recklessness cannot be expected to accommodate all the subtleties to which diverse cases can give rise. Certainly, they have not borne the weight of *Smith* and *Caldwell* without controversy. Yet, even under Australian law, analogous difficulties have arisen. We know that intention here is a subjective concept and that foresight of a risk falls within the ambit of recklessness. Australian courts have avoided *Smith* only at the price of a different problem, one that the English law of murder does not encounter. According to the High Court,[73] foresight of a *possibility* of death is insufficient to support a conviction for murder at common law. But if that is so, what *degree* of probability of death suffices? In this context, words like 'substantial', 'probable', and 'likely' are frequently deployed.[74] These are intractable terms, and necessarily objective. They involve a risk of death that the accused must foresee. But it is surely not for the accused himself to decide what level of risk he is permitted to run. That must be for the law to decide. And we have to decide these perplexing questions, with a level head and an open mind, perhaps best 'under the shade of a coolabah tree'.

73 *Crabbe*, above n19; *Boughey*, above n55.

74 See *Smith* (1982) 7 A Crim R 437; *Hallett* [1969] SASR 141 at 153; *Sergi* [1974] VR 1 at10.