Judgments - Regina v. G and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division))

HOUSE OF LORDS SESSION 2002-03
[2003] UKHL 50
on appeal from: [2002] EWCA Crim 1992

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina v. G and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division))

ON

THURSDAY 16 OCTOBER 2003

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Browne-Wilkinson

Lord Steyn

Lord Hutton

Lord Rodger of Earlsferry

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LORD BINGHAM OF CORNHILL

My Lords,

1. The point of law of general public importance certified by the Court of Appeal to be involved in its decision in the present case is expressed in this way:

> "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 appeal turns on the meaning of "reckless" in that section. This is a question on which the House ruled in *R v Caldwell* [1982] AC 341, a ruling affirmed by the House in later decisions. The House is again asked to reconsider that ruling.

2. The agreed facts of the case are very simple. On the night of 21-22 August 2000 the appellants, then aged 11 and 12 respectively, went camping without their parents' permission. In the early hours of 22 August they entered the back yard of the Co-op shop in Newport Pagnell. They found bundles of newspapers which they opened up to read. The boys then lit some of the newspapers with a lighter they had with them. Each of them threw some lit newspaper under a large plastic wheelie-bin, between which and the wall of the Co-op there was another similar wheelie-bin. The boys left the yard without putting out the burning papers. The newspapers set fire to the first wheelie-bin and the fire spread from it to the wheelie-bin next to the shop wall. From the second bin the fire spread up under the overhanging eave, to the guttering and the fascia and then up into the roof space of the shop until eventually the roof of the shop and the adjoining buildings caught fire. The roof collapsed. Approximately £1m worth of damage was caused. The appellants' case at trial was that they expected the newspaper fires to extinguish themselves on the concrete floor of the yard. It is accepted that neither of them appreciated that there was any risk whatsoever of the fire spreading in the way that it eventually did.

3. An indictment was preferred against the appellants charging them with arson contrary to section 1(1) and (3) of the Criminal Damage Act 1971. The particulars of the offence charged were that they on 22 August 2000 "without lawful excuse damaged by fire commercial premises belonging to … others being reckless as to whether such property would be damaged".

4. Section 1 of the 1971 Act provides:

> "1. (1) 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.
> (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another -

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;
shall be guilty of an offence.
(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson."

Section 4(1) of the Act provides that a person guilty of arson under section 1 shall on conviction on indictment be liable to imprisonment for life.

The trial

5. The appellants stood trial before His Honour Judge Maher in March 2001. At the outset of the trial, submissions were made on the meaning of "reckless" in section 1(1) since the appellants were charged with being reckless whether the premises would be destroyed or damaged and not with intending to destroy or damage them. The judge ruled (in effect) that he was bound to direct the jury in accordance with *R v Caldwell* [1982] AC 341.

6. This is what the judge did. He helpfully provided the jury with a typed copy of this part of his direction and said:

> "If we look at this together, what the prosecution have to prove is: (1) the defendant damaged by fire the building, the commercial premises, shown in the photographs; (2) that the defendant in doing what he did, created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building, the commercial premises, would be damaged by fire; and (3) that when he, meaning a defendant, did what he did, either he had not given any thought to the possibility of there being such a risk, or having recognised that there was some risk involved in doing what he did, nonetheless went on and did the act. The word 'risk' which appears in paragraph 3 means, as will be apparent, I hope, from the wording of paragraph 2, the risk that the building would be damaged by fire. So, those are the matters which the prosecution have to prove."

The judge pointed out that proof of the first of these matters was not in dispute. The judge then addressed the second matter and continued:

> "That does not mean the boys are guilty of this offence, because it is questions nos 2 and 3 which are at the heart of this case. Question no 2: that the defendant, in doing what he did, created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building, the commercial premises, would be damaged by fire. So, this requires you to find as a fact on the whole of the evidence in the case, what did they do? Having established that, this is the test that you will apply: first, focus upon the moment when the two boys left the compound. Then, find as a fact, upon the evidence, what it was that would have been visible to the reasonable bystander, the ordinary reasonable bystander, looking on. Then, ask

> yourselves question no. 2: at that moment, having determined that, would it have been obvious to that ordinary, reasonable bystander that there was a risk that the fire would spread from paper, or papers, to bin, or bins, up to the building? It is not necessary for the ordinary reasonable bystander to have foreseen in his mind the full extent of the damage which in fact occurred because, as you will well know, once fire takes hold, it is probably anybody's guess where it is going to end up.
> The ordinary, reasonable bystander is an adult. He does not have expert knowledge. He has got in his mind that stock of everyday information which one acquires in the process of growing up. This is why to leave this question to a jury of twelve is probably the best tribunal that one could have for answering this question. You will notice also that we are using the language, the vocabulary of risk - not certainty. When you answer this question as to whether it would have been obvious to an ordinary reasonable bystander watching that the fire, in effect, would spread as I have just explained it, the ages of these defendants are irrelevant. Their good characters are irrelevant. No allowance is made by the law for the youth of these boys or their lack of maturity or their own inability, if such you find it to be, to assess what was going on. So, if it would have been obvious to an ordinary, reasonable bystander that there was a risk of the fire spreading (as I have just described) to the building, it is irrelevant that you say, 'Well, we think this is a bit harsh. We don't think it would have been apparent to these boys, even though it might have been apparent to an ordinary, reasonable bystander'. It is too bad. So, in that sense, when you are answering this question, you leave wholly on one side everything you know about these two young boys here because - I repeat - it is what would have been perceived by the ordinary, reasonable bystander which is the test."

The judge observed:

> "Now, I say to you, quite frankly, that you may think this is a harsh test to apply to youngsters, because no allowance is made for age and immaturity. Many people would be sympathetic with you. But, it is my task to expound the law to you as it is, and it is your duty to apply the law as it is - not as you might like it to be - to the facts of the case. Sympathy can play no part in the answering of this question.
> Now, I cannot tell you - or even begin to help you - and it would be quite wrong for me to try and help you, with what the ordinary, reasonable bystander would not have perceived as a risk in terms of the fire spreading from paper to bin, to building. You have heard the evidence and you will decide."

The judge then directed the jury on the third of the matters he had listed:

> "Let me assume the prosecution have jumped hurdle no. 2. Hurdle no. 3 must also be jumped, and here you see it is in two parts: that when he did what he did, either he had not given any thought to the possibility of there being such a risk, or having recognised that there was some risk involved in doing what he did, nonetheless he went on and did the act.
> Now, I begin with the second part of paragraph 3 which is a question that

does concern the state of mind of the two boys. If you were to say, 'We are, all twelve of us, satisfied so that we are sure that these boys when they started the fire and left the compound, appreciated in their minds that there was some risk of the fire spreading from paper to bin, to soffit, to building, and nonetheless went on and did what they did', then it is difficult to see how they could be anything other than guilty of this offence. It is not primarily the way the prosecution put their case. As you know, to cut a long story short, the boys have said to you, each of them, as they said in their second interview to the police, that it never crossed their minds for a moment that there was this risk of the fire actually spreading to the building itself. Now, it is a matter for you whether you believe them, but I am going to proceed on the basis that you will say either that you are satisfied that they --- that their minds did not perceive the risk of the fire spreading to the building, or you will say, 'Well, we can't be sure that that serious finding can be made against them'. If that is so, then the first part of paragraph 3 is satisfied - that they had not given any thought to the possibility of there being such a risk - that is, a risk of the fire spreading, as I have just described, to the building itself. You will see that if a defendant says, 'I didn't give any thought whatsoever to the possibility of the fire spreading from what I had done to a building itself', that is no defence if question no 2 is answered by a jury against such a person. So, pulling it all together - and I suspect that your deliberations may centre around this - if you say, 'Well, hurdle no. 1 is jumped, and we don't think these young boys, in their minds, gave any thought to the possibility of the fire spreading from paper, to bin, to soffit, to building, but ---- but, it would have been obvious to an ordinary, reasonable bystander watching that the fire might spread to the building, and that the building might be damaged by the fire', then they are guilty of the offence."

7. After the jury had retired on the afternoon of 21 March the judge made clear, in the presence of the appellants, that "nothing unpleasant" awaited them even if the jury convicted. But the jury had difficulty reaching a verdict. Later that afternoon they asked the judge why they should consider the risk as perceived by a reasonable person or layman. He replied:

> "The answer to that lies in my task. My task is to give you directions on the law as it is, and it is your task to apply the directions on the law as I have expounded it to you to the facts as you find them. I am not free to give you a direction on the law which perhaps some of us might like it to be; nor are you free to substitute your own view of what the law is for the law as I have explained it to you. At the beginning of the trial you took an oath to try the case on the evidence presented to you, and part of that involves taking the law from me. That is my function.
> Just to explain a little more to you, the Criminal Damage Act 1971 creates the offence of criminal damage. It was not new; it has existed, as you know, for centuries. But, that is the up-to-date statute. The higher courts - the House of Lords, in particular ---- The Law Lords have given guidance to all courts as to how juries are to be directed as to the meaning of the word 'reckless' in this context. That direction must be followed by trial judges because I am no more free to invent the law, or to make it up as I go along,

> than anyone else is. It is my task to do my best to identify the law, and to expound it to a jury clearly and accurately so that the jury know what the relevant principles of law are. That is what I have done. That is the task that every judge in every trial has. The jury must act upon the direction which they are given. You may remember, I said that some may feel it is a harsh test, and there are many who would be sympathetic to that view. But, sympathy does not permit me to give you a direction on the law other than as it is.
> Similarly, applying that direction means that you - if I may answer your question - must consider the risk as perceived by a reasonable person or layman because that is the test; that is the law which is applicable in this area."

The judge went on to repeat his direction on the three matters the prosecution had to prove. The jury were unable to agree on a verdict that afternoon. They returned on another day and convicted. On receiving the verdict the judge adjourned the proceedings for a pre-sentence report, but said:

> "For the benefit of whoever may speak to the preparer of the report, I am quite satisfied that they did not intend to burn down the building. Indeed, the prosecution never alleged that they so intended. I am quite satisfied in my mind that they subjectively did not perceive a risk in their minds that the building would be burned down. As we know, the question posed by the jury as to why they had to act upon the direction which I gave to them strongly suggests to me - and this is the basis upon which I propose to proceed - that the correct approach to sentence is that they have been convicted - this is the basis upon which I propose to sentence - that the risk they created would have been perceived by an adult; by a reasonable bystander as carrying with it a risk of damage to the building."

The judge expressed regret at the law he had felt bound to apply, and added:

> "I am satisfied in my mind that this is just one of those almost childish - maybe 'prank' is too mild a word - which just went horribly wrong, and there, but for the grace of God, go many people.
> Members of the jury, with respect, it is irrelevant as to whether you share these sentiments, but I see that some of you may do."

In due course the judge made a one year supervision order in the case of each appellant. It was not suggested in argument before the House that the judge's directions to the jury were other than correct on the law as then understood and applied.

The historical background

8. Section 51 of the Malicious Damage Act 1861 (24 & 25 Vict c 97) provided, so far as relevant,

> "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever ….. the damage,

> injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanour ….."

The defendant in *R v Pembliton* (1874) LR 2 CCR 119 was charged under this section. He had been fighting in the street and had picked up a large stone and thrown it at the people he had been fighting with. The stone missed its human target but broke a window causing damage of a value exceeding £5. The jury convicted the defendant, although finding that he had not intended to break the window, and the recorder referred the case to the Court of Crown Cases Reserved (Lord Coleridge CJ, Blackburn J, Pigott B, Lush J and Cleasby B) which quashed the conviction. The words "unlawfully and maliciously" were very widely used in the 1861 Act and the issue on appeal was whether the defendant had acted "maliciously". Lord Coleridge CJ said (at page 122):

> "… it seems to me that what is intended by the statute is a wilful doing of an intentional act. Without saying that if the case had been left to them in a different way the conviction could not have been supported, if, on these facts, the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary."

Blackburn J was of the same opinion:

> "The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do."

Thus the court interpreted "maliciously" as requiring proof of intention, but were inclined to accept that intention could be shown by proof of reckless disregard of a perceived risk. This was also the approach followed in *R v Welch* (1875) LR1 QBD 23, where the defendant faced charges of unlawfully and maliciously killing, maiming and wounding a mare contrary to section 40(1) of the 1861 Act. The trial judge was held to have been right to direct the jury to convict if they found that the defendant in fact intended to kill, maim or wound the mare or, in the alternative, that he knew that what he was doing would or might kill, maim or wound the mare and nevertheless did what he did recklessly and not caring whether the mare was injured or not.

9. The first eight sections of the 1861 Act all related to arson and all used the expression "unlawfully and maliciously". In the first edition of his *Outlines of Criminal Law* published in 1902, Professor Kenny addressed the meaning of "maliciously" with particular reference to arson. He wrote (pages 163-165, footnotes omitted):

> "(a) *'Maliciously.'* Burning a house by any mere negligence, however gross it be, is, as we have seen, no crime; (an omission in our law which may well

> be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of an unlawful act, or even of a felonious one, will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, 'malice' must, as we have already seen, be taken?not in its vague common law sense as a 'wickedness' in general, but?as requiring an actual intention to do the particular kind of harm that in fact was done. Consequently, if a criminal, when engaged in committing some burglary or other felony, negligently sets fire to a house, he usually will not be guilty of arson ….. But it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, will necessarily become guilty of arson if the fire should happen to spread to an arsonable building. For when a man mischievously tries to burn some chattel inside a house, and thereby, quite accidentally and unintentionally, sets fire to the house, this does not constitute an arson. And even if his setting fire to this chattel inside the building was intrinsically *likely* to result in setting fire to the building itself, he still will not necessarily be guilty of arson. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so. Of course the mere fact that this probability was an obviously manifest one will be strong evidence to warrant the jury in finding, if they think fit, that the prisoner did, in fact, thus recognise the danger and regard it with indifference."

One of the cases cited by Kenny was *R v Harris* (1882) 15 Cox CC 75, where the charge was of setting fire to a dwelling house. The judge, at page 77, directed the jury:

> "Again, if you think that the prisoner set fire to the frame of the picture with a knowledge that in all probability the house itself would thereby be set on fire, and that he was reckless and utterly indifferent whether the house caught fire or not, that is abundant evidence from which you may, if you think fit, draw the inference that he intended the probable consequences of his act, and if you draw that inference, then, inasmuch as the house was in fact set on fire through the medium of the picture frame, the prisoner's crime would be that of arson."

This was consistent with the ratio of *R v Child* (1871) LR1 CCR 307 (also cited by Kenny) where it was held that the defendant had not intended to set fire to a house and had thought that what he was doing would not do so. Another case cited by Kenny was *R v Faulkner* (1877) 13 Cox 550, decided in the Irish Court of Crown Cases Reserved. The defendant had set fire to a ship while stealing rum from its hold. He had been boring a hole by candlelight and some rum had spilled out and been ignited. It was conceded that he had not intended to burn the vessel, and his conviction was quashed. Barry J (at page 555) said:

> "[*R v Pembliton*] must be taken as deciding that to constitute an offence under the Malicious Injuries to Property Act, section 51, the act done must be in fact intentional and wilful, although the intention and will may (perhaps) be held to exist in, or be proved by, the fact that the accused knew

> that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences."

10. *R v Pembliton* was again relied on in *R v Cunningham* [1957] 2 QB 396. The defendant in that case had wrenched a gas meter from the wall and stolen it. Gas had escaped. He was charged under section 23 of the Offences against the Person Act 1861 with unlawfully and maliciously causing a noxious thing, namely coal gas, to be taken by the victim. He pleaded not guilty but was convicted. Giving the reserved judgment of the Court of Criminal Appeal, Byrne J said (at page 399-400):

> "We have considered those cases [among others, *R v Pembliton* and *R v Faulkner*], and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C S Kenny in the first edition of his Outlines of Criminal Law published in 1902 and repeated at p.186 of the 16th edition edited by Mr. J. W. Cecil Turner and published in 1952: 'In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards 'the person injured". The same principle is repeated by Mr. Turner in his 10th edition of Russell on Crime at p. 1592."

That was accepted as an accurate statement of the law. In the course of his able address, Mr Perry (for the Crown) pointed out, correctly, that the words quoted had not appeared in the first (1902) edition written by Professor Kenny. It does not, however, appear that the later summary misrepresents what the Professor had written, quoted in paragraph 9 above.

11. *R v Mowatt* [1968] 1 QB 421 arose from the robbery by the defendant of a victim W. When W retaliated, the defendant struck him in the face. He was charged with wounding with intent to do grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861, on which an alternative verdict of unlawful wounding contrary to section 20 of that Act was open to the jury. The trial judge gave no direction to the jury on the meaning of "maliciously" and the jury convicted under section 20. The defendant's appeal against conviction on the ground of this non-direction failed. In a judgment of the Court of Appeal (Diplock LJ, Brabin and Waller JJ) reference was made to *R v Cunningham* [1957] 2 QB 396 and the court (page 425) cast no doubt on the proposition that "maliciously in a statutory crime postulates foresight of consequence", but the court regarded Professor Kenny's more general statement as inapposite to the specific alternative statutory offences described in sections 18 and 20 (pages 425-426). The court held (page 426) that "maliciously" imports an awareness that an act may have the consequence of causing some physical harm to some other person, even if the harm foreseen was relatively minor. The court ruled (pages 426-427):

> "But where the evidence for the prosecution, if accepted, shows that the physical act of the accused which caused the injury to another person was a

> direct assault which any ordinary person would be bound to realise was likely to cause some physical harm to the other person (as, for instance, an assault with a weapon or the boot or violence with the hands) and the defence put forward on behalf of the accused is not that the assault was accidental or that he did not realise that it might cause some physical harm to the victim, but is some other defence such as that he did not do the alleged act or that he did it in self-defence, it is unnecessary to deal specifically in the summing-up with what is meant by the word 'maliciously' in the section … In the absence of any evidence that the accused did not realise that it was a possible consequence of his act that some physical harm might be caused to the victim, the prosecution satisfy the relevant onus by proving the commission by the accused of an act which any ordinary person would realise was likely to have that consequence …"

The 1971 Act

12. In its second programme of law reform the Law Commission, then under the chairmanship of Scarman J, envisaged the codification of the criminal law. As part of that project it examined a number of specific offences, among them the law of malicious damage, on which it published its Working Paper No 23 in April 1969. This described the Malicious Damage Act 1861, despite five later amending statutes, as "unsatisfactory" (paragraph 2). In a brief statistical introduction the Law Commission drew attention (in paragraph 9) to the prevalence of malicious damage offences among the youngest criminal age group (the 10 to 14 year olds) as well as among other juveniles, and to the fact that more than half of those convicted of the most serious offence (arson) were under 21. In a section on "The Mental Element" the Law Commission referred to a working party which was formulating draft propositions on the mental element in crime and observed (in paragraph 31):

> "For the present purpose, we assume that the traditional elements of intention, knowledge and recklessness (in the sense of foresight and disregard of consequences or awareness and disregard of the likelihood of the existence of circumstances) will continue to be required for serious crime."

In paragraph 33 of the working paper the Law Commission identified "intent to do the forbidden act or recklessness in relation to its foreseen consequences" as the "essential mental element in the existing malicious damage offences" and quoted with the apparent approval the passage from *R v Cunningham* [1957] 2 QB 396 which is set out in paragraph 10 above. The Law Commission considered that the word "maliciously" should be avoided (paragraph 34) and favoured its replacement by "wilful or reckless" (paragraph 64). It proposed (paragraph 68) that the new group of offences should require "traditional *mens rea*, in the sense of intention or recklessness in relation to prescribed consequences and, where appropriate, knowledge or recklessness in relation to prescribed circumstances". The working paper does not suggest that the law as then understood was thought to be leading to unjustified acquittals. In a published comment on the working paper, Professor Brian Hogan wrote ([1969] Crim LR 283, 288):

> "What is implicit in 'maliciously' in the present law will appear explicitly as intention or recklessness in the new code. No doubt the meanings ascribed to intention and

recklessness in the codification of the general principles will be applied *mutatis mutandis* to offences of damage to property."

13. In its Report on Offences of Damage to Property (Law Com. No 29) published in July 1970, the Law Commission broadly followed, in respects relevant to this appeal, the lines of the working paper. On the mental element of criminal damage offences the Law Commission said (in paragraph 44):

> "44. In the area of serious crime (in contrast to offences commonly described as 'regulatory offences' in which the test of culpability may be negligence, or even a test founded on strict liability) the elements of intention, knowledge or recklessness have always been required as a basis of liability. The tendency is to extend this basis to a wider range of offences and to limit the area of offences where a lesser mental element is required. We consider, therefore, that the same elements as are required at present should be retained, but that they should be expressed with greater simplicity and clarity. In particular, we prefer to avoid the use of such a word as 'maliciously', if only because it gives the impression that the mental element differs from that which is imposed in other offences requiring traditional *mens rea*. It is evident from such cases as *R v Cunningham* and *R v Mowatt* that the word can give rise to difficulties of interpretation. Furthermore, the word 'maliciously' conveys the impression that some ill-will is required against the person whose property is damaged. ….."

It does not appear from the report that the Law Commission's consultation had elicited any complaint that the existing law was unduly favourable to defendants. Annexed to the report was a draft bill: in this clause 1(1) and (2) were exactly as enacted in the 1971 Act, but what became section 1(3) was omitted. On 16 June 1970, a month before this report was published, the Law Commission had published its working paper No 31 (*General Principles: The Mental Element in Crime*). In that working paper a definition of recklessness was proposed (on page 48):

> "A person is reckless if,
> (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and
> (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present."

In the 1971 Act as passed all except six sections of the Malicious Damage Act 1861, a lengthy Act, were repealed, very much as the Law Commission had proposed.

14. Enactment of the 1971 Act did not at once affect the courts' approach to the causing of unintentional damage. In *R v Briggs (Note)* [1977] 1 WLR 605 the defendant had been charged under section 1(1) of the 1971 as a result of damage caused to a car and the appeal turned on the trial judge's direction on the meaning of "reckless". The appeal succeeded since the judge had not adequately explained that the test to be applied was that of the defendant's state of mind. The Court of Appeal (James LJ, Kenneth Jones and Pain JJ) ruled (at page 608):

> "A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act."

This definition was adopted but modified in *R v Parker (Daryl)* [1977] 1 WLR 600 where the defendant in a fit of temper had broken a telephone by smashing the handset violently down on to the telephone unit and had been convicted under section 1(1) of the 1971 Act. The court (Scarman and Geoffrey Lane LJJ and Kenneth Jones J) readily followed *R v Briggs (Note)* (page 603) but held that the defendant had been fully aware of all the circumstances (page 603) and that if (page 604)

> "he did not know, as he said he did not, that there was some risk of damage, he was, in effect, deliberately closing his mind to the obvious - the obvious being that damage in these circumstances was inevitable."

The court accordingly modified the *Briggs* definition in this way (page 604):

> "A man is reckless in the sense required when he carried [*sic*] out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act."

This modification made no inroad into the concept of recklessness as then understood since, as pointed out by Professor Glanville Williams, *Textbook of Criminal Law* (1978), page 79, cited by Lord Edmund-Davies in his dissenting opinion in *R v Caldwell* [1982] AC 341, 358,

> "A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter."

15. The meaning of "reckless" in section 1(1) of the 1971 Act was again considered by the Court of Appeal (Geoffrey Lane LJ, Ackner and Watkins JJ) in *R v Stephenson* [1979] QB 695. The defendant had tried to go to sleep in a hollow he had made in the side of a haystack. Feeling cold, he had lit a fire in the hollow which had set fire to the stack and damaged property worth £3500. He had been charged and convicted under section 1(1) and (3) of the 1971 Act. The defendant however had a long history of schizophrenia and expert evidence at trial suggested that he may not have had the same ability to foresee or appreciate risks as the mentally normal person. Giving the reserved judgment of the court, Geoffrey Lane LJ (at pages 700-703) reviewed the definition of recklessness in the Law Commission's Working Paper No 31 (see paragraph 13 above), the acceptance of that definition by the leading academic authorities and the House of Lords' adoption of a subjective meaning of recklessness in tort in *Herrington v British Railways Board* [1972] AC 877. The court (at page 703) thought it fair to assume that those who were responsible for drafting the 1971 Act were intending to preserve its legal meaning as described in Kenny and expressly approved in *R v Cunningham* [1957] 2 QB 396. The court then continued:

> "What then must the prosecution prove in order to bring home the charge of arson in circumstances such as the present? They must prove that (1) the defendant deliberately committed some act which caused the damage to property alleged or part of such damage; (2) the defendant had no lawful excuse for causing the damage; these two requirements will in the ordinary case not be in issue; (3) the defendant either (a) intended to cause the damage to the property, or (b) was reckless as to whether the property was damaged or not. 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. It is however not the taking of every risk which could properly be classed as reckless. The

> risk must be one which it is in all the circumstances unreasonable for him to take. Proof of the requisite knowledge in the mind of the defendant will in most cases present little difficulty. The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of the defendant is not conclusive proof of the defendant's knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk."

The appeal was accordingly allowed. But the court recognised that what it called the subjective definition of recklessness produced difficulties. One of these was where a person by self-induced intoxication deprived himself of the ability to foresee the risks involved in his actions. The court suggested that a distinction was to be drawn between crimes requiring proof of specific intent and those, such as offences under section 1(1) of the 1971 Act, involving no specific intent:

> "Accordingly it is no defence under the Act of 1971 for a person to say that he was deprived by self-induced intoxication of the ability to foresee or appreciate an obvious risk" (page 704)."

16. In the 1979 (40th) edition of Archbold *Pleading, Evidence and Practice in Criminal Cases*, on which jury directions were no doubt routinely based at the time, the better view was said (page 958, paragraph 1443c) to be

> "that whereas 'intent' requires a desire for consequences or foresight or probable consequences, 'reckless' only requires foresight of possible consequences coupled with an unreasonable willingness to risk them."

R v Caldwell

17. *R v Caldwell* [1982] AC 341 was a case of self-induced intoxication. The defendant, having a grievance against the owner of the hotel where he worked, got very drunk and set fire to the hotel where guests were living at the time. He was indicted upon two counts of arson. The first and more serious count was laid under section 1(2) of the 1971 Act, the second count under section 1(1). He pleaded guilty to the second count but contested the first on the ground that he had been so drunk at the time that the thought there might be people in the hotel had never crossed his mind. His conviction on count 1 was set aside by the Court of Appeal which certified the following question:

> "Whether evidence of self-induced intoxication can be relevant to the following questions - (a) Whether the defendant intended to endanger the life of another; and (b) Whether the defendant was reckless as to whether the life of another would be endangered, within the meaning of section 1(2)(b) of the Criminal Damage Act 1971."

In submitting that the two questions should be answered (a) Yes and (b) No, counsel for the Crown did not challenge the correctness of *R v Briggs (Note)* [1977] 1 WLR 605 or *R v Stephenson* [1979] QB 695.

18. In a leading opinion with which Lord Keith of Kinkel and Lord Roskill agreed, but from which Lord Wilberforce and Lord Edmund-Davies dissented, Lord Diplock discounted

Professor Kenny's statement of the law approved in *R v Cunningham* [1957] 2 QB 396 (see paragraph 10 above) as directed to the meaning of "maliciously" in the 1861 Act and having no bearing on the meaning of "reckless" in the 1971 Act: page 351. It was, he held, no less blameworthy for a man whose mind was affected by rage or excitement or drink to fail to give his mind to the risk of damaging property than for a man whose mind was so affected to appreciate that there was a risk of damage to property but not to appreciate the seriousness of the risk or to trust that good luck would prevent the risk occurring: page 352. He observed :

> "My Lords, I can see no reason why Parliament when it decided to revise the law as to offences of damage to property should go out of its way to perpetuate fine and impracticable distinctions such as these, between one mental state and another. One would think that the sooner they were got rid of, the better."

Reference was made to *R v Briggs (Note)* [1977] 1 WLR 605, *R v Parker (Daryl)* [1977] 1 WLR 600 and *R v Stephenson* [1979] QB 695, but Lord Diplock saw no warrant for assuming that the Act of 1971, whose declared purpose was to revise the law of damage to property, intended "reckless" to be interpreted as "maliciously" had been: page 353. He preferred the ordinary meaning of "reckless" which (pages 353-354):

> "surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts 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 was.
> If one is attaching labels, the latter state of mind is neither more nor less 'subjective' than the first. But the label solves nothing. It is a statement of the obvious; mens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the offence; it cannot be the mental state of some non-existent hypothetical person."

To decide whether a person had been reckless whether harmful consequences of a particular kind would result from his act it was necessary to consider the mind of "the ordinary prudent individual" (page 354). In a passage which has since been taken to encapsulate the law on this point, and which has founded many jury directions (including that in the present case) Lord Diplock then said (at page 354):

> "In my opinion, a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious 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. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled."

On the facts Lord Diplock concluded that the defendant's unawareness, owing to his self-induced intoxication, of the risk of endangering the lives of hotel residents was no defence if that risk would have been obvious to him had he been sober (page 355). He held that evidence of self-induced intoxication was relevant to a charge under section 1(2) based on intention but not to one based on recklessness (page 356).

19. In his dissenting opinion Lord Edmund-Davies expressed "respectful, but profound, disagreement" with Lord Diplock's dismissal of Professor Kenny's statement which was "accurate not only in respect of the law as it stood in 1902 but also as it has been applied in countless cases ever since, both in the United Kingdom and in other countries where the common law prevails" (page 357). Lord Edmund-Davies drew attention to the Law Commission's preparation of the 1971 Act and its definition of recklessness in Working Paper No 31 (pages 357-358) and continued:

> "It was surely with this contemporaneous definition and the much respected decision of *R v Cunningham* [1957] 2 QB 396 in mind that the draftsman proceeded to his task of drafting the Criminal Damage Act 1971."

He observed (page 358):

> "In the absence of exculpatory factors, the defendant's state of mind is therefore all-important where recklessness is an element in the offence charged, and section 8 of the Criminal Justice Act 1967 has laid down that:
> 'A court or jury, in determining whether a person has committed an offence,?(a) shall not be bound in law to infer that he intended *or foresaw* a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend *or foresee* that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.'."

Lord Edmund-Davies differed from the majority on the relevance of evidence of self-induced intoxication: in his opinion such evidence was relevant to a charge under section 1(2) whether the charge was based on intention or recklessness (page 361).

R v Lawrence (Stephen)

20. Judgment was given by the House in *R v Lawrence (Stephen)* [1982] AC 510 on the same day as *R v Caldwell* [1982] AC 341, although only two members (Lord Diplock and Lord Roskill) were party to both decisions. The defendant had ridden a motor cycle along an urban street after nightfall and had collided with and killed a pedestrian He had been charged and convicted under section 1 of the Road Traffic Act 1972 which made it an offence to cause the death of another person by driving a motor vehicle on a road recklessly. His appeal had succeeded on the ground of an inadequate direction to the jury. The issue on appeal to the House concerned the mental element in a charge of reckless driving.

21. Lord Hailsham of St Marylebone LC, agreeing with Lord Diplock (page 516) and with the majority in *R v Caldwell* (page 521), understood recklessness to evince "a state of mind stopping short of deliberate intention, and going beyond mere inadvertence" (page 520). Lord Diplock rehearsed the history of motoring offences based on recklessness beginning with section 1 of the Motor Car Act 1903 and applied essentially the same test as laid down in *R v Caldwell*, by reference to the "ordinary prudent individual" (page 526). He formulated an appropriate jury direction to the same effect, *mutatis mutandis*, as that in *R v Caldwell* (pages 526-527). But he added (at page 527):

> "It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves. If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference."

Lord Fraser of Tullybelton, Lord Roskill and Lord Bridge of Harwich agreed with Lord Hailsham and Lord Diplock.

Later cases

22. The decisions in *R v Caldwell* and *R v Lawrence (Stephen)* were applied by the House (Lord Diplock, Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Brightman) in *R v Miller* [1983] 2 AC 161, although subject to a qualification germane to the facts of that case but not to the facts of the present case (page 179).

23. In *Elliott v C* [1983] 1 WLR 939 the defendant was a 14-year old girl of low intelligence who had entered a shed in the early morning, poured white spirit on the floor and set it alight. The resulting fire had flared up and she had left the shed, which had been destroyed. She was charged under section 1(1) of the 1971 Act and at her trial before justices the prosecution made plain that the charge was based not on intention but on recklessness. The justices sought to apply the test laid down in *R v Caldwell* but inferred that in his reference to "an obvious risk" Lord Diplock had meant a risk which was obvious to the particular defendant. The justices acquitted the defendant because they found that the defendant had given no thought at the time to the possibility of there being a risk that the shed and contents would be destroyed, and this risk would not have been obvious to her or appreciated by her if she had thought about the matter (page 945). The prosecutor's appeal was allowed. Glidewell J, giving the first judgment, accepted the submission (pages 945-947) that:

> "if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular defendant gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it."

Robert Goff LJ felt constrained by the decisions of the House in *R v Caldwell, R v Lawrence (Stephen)* and *R v Miller* to agree, but he expressed his unhappiness in doing so and plainly did not consider the outcome to be just. A petition for leave to appeal against this decision was dismissed by an appeal committee.

24. The defendant in *R v Stephen Malcolm R* (1984) 79 Cr App R 334 had thrown petrol bombs at the outside wall of the bedroom of a girl who he believed had informed on him in relation to a series of burglaries. He had admitted throwing the bombs but claimed he had done so to frighten the girl and without realising that if a bomb had gone through the window it might have killed her. He was charged with arson under section 1(2) of the 1971 Act, on the basis of recklessness. At trial, it was submitted on the defendant's behalf that when

considering recklessness the jury could only convict him if he did an act which created a risk to life obvious to someone of his age and with such of his characteristics as would affect his appreciation of the risk (page 337). On the trial judge ruling against that submission the defendant changed his plea and the issue in the Court of Appeal (Ackner LJ, Bristow and Popplewell JJ) was whether the ruling had been correct. The court held that it had: if the House had wished to modify the *R v Caldwell* principle to take account of, for instance, the age of the defendant, the opportunity had existed in *Elliott v C* [1983] 1 WLR 939 and it had not been taken. Although concerned at the principle it was required to apply, the court had little doubt that on the facts of the case the answer would have been the same even if the jury had been able to draw a comparison with what a boy of the defendant's age would have appreciated.

25. On his appeal to the House (Lord Keith of Kinkel, Lord Roskill, Lord Ackner, Lord Goff of Chieveley and Lord Browne-Wilkinson) in *R v Reid* [1992] 1 WLR 793 the defendant, convicted of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972, later re-enacted in section 1 of the Road Traffic Act 1988, asked the House to reconsider its decision in *R v Lawrence (Stephen)* [1982] AC 510 on which the trial judge's jury direction had been based. The House unanimously affirmed its earlier decision as correct in principle for essentially the reasons which Lord Diplock had given. Lord Keith, however, accepted (at page 796) that Lord Diplock's suggested jury direction might call for modification or addition:

> "where the driver acted under some understandable and excusable mistake or where his capacity to appreciate risks was adversely affected by some condition not involving fault on his part. There may also be cases where the driver acted as he did in a sudden dilemma created by the actions of others."

Lord Ackner (page 806) drew attention to Lord Diplock's acceptance that "regard must be given to any explanation [the defendant] gives as to his state of mind which may displace the inference" (see paragraph 21 above) and commented:

> "I read this as no more than a cautionary instruction to the jury that, while it would be open to them at first sight to find that the accused was driving recklessly from the mere manner of his driving, if it shows a clear disregard for the lives or safety of others without any explanation for this conduct, yet before reaching any firm conclusions they must have regard to any explanation which accounts for his conduct. In short, they must have regard to all the available evidence."

Lord Ackner (page 805), Lord Goff (page 807) and my noble and learned friend Lord Browne-Wilkinson (pages 816-817) all, with varying degrees of emphasis, made plain that their observations were directed to recklessness in the context of driving and not to recklessness in the context of section 1 of the 1971 Act or any other context.

26. In *R v Coles* [1995] 1 Cr App R 157 a 15 year old defendant convicted under section 1(2) of the 1971 Act on the basis of recklessness again challenged, unsuccessfully, the rule laid down by Lord Diplock in *R v Caldwell* [1982] AC 341. Since recklessness was to be judged by the standard of the reasonable prudent man, it followed that expert evidence of the defendant's capacity to foresee the risks which would arise from his setting fire to hay in a barn had been rightly rejected.

27. In the present case the Court of Appeal (Dyson LJ, Silber J and His Honour Judge Beaumont QC) reviewed the authorities but was in no doubt that the *Caldwell* test had been rightly applied: [2002] EWCA Crim 1992, [2003] 3 AllER 206, paragraph 18. It acknowledged that the *Caldwell* test had been criticised and had not been applied in a number of Commonwealth jurisdictions (paragraph 18) and saw great force in these criticisms (paragraph 23) but held that it was not open to the Court of Appeal to depart from it.

Conclusions

28. The task confronting the House in this appeal is, first of all, one of statutory construction: what did Parliament mean when it used the word "reckless" in section 1(1) and (2) of the 1971 Act? In so expressing the question 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* [1982] AC 510 and *R v Reid* [1992] 1 WLR 793.

29. Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change. So the starting point is to ascertain what Parliament meant by "reckless" in 1971. As noted above in paragraph 13, section 1 as enacted followed, subject to an immaterial addition, the draft proposed by the Law Commission. It cannot be supposed that by "reckless" Parliament meant anything different from the Law Commission. The Law Commission's meaning was made plain both in its Report (Law Com No 29) and in Working Paper No 23 which preceded it. These materials (not, it would seem, placed before the House in *R v Caldwell*) reveal a very plain intention to replace the old-fashioned and misleading expression "maliciously" by the more familiar expression "reckless" but to give the latter expression the meaning which *R v Cunningham* [1957] 2 QB 396 and Professor Kenny had given to the former. In treating this authority as irrelevant to the construction of "reckless" the majority fell into understandable but clearly demonstrable error. No relevant change in the mens rea necessary for proof of the offence was intended, and in holding otherwise the majority misconstrued section 1 of the Act.

30. That conclusion is by no means determinative of this appeal. For the decision in *R v Caldwell* was made more than 20 years ago. Its essential reasoning was unanimously approved by the House in *R v Lawrence* [1982] AC 510. Invitations to reconsider that reasoning have been rejected. The principles laid down have been applied on many occasions, by Crown Court judges and, even more frequently, by justices. In the submission of the Crown, the ruling of the House works well and causes no injustice in practice. If Parliament had wished to give effect to the intention of the Law Commission it has had many opportunities, which it has not taken, to do so. Despite its power under *Practice Statement* (*Judicial Precedent*) [1966] 1 WLR 1234 to depart from its earlier decisions, the House should be very slow to do so, not least in a context such as this.

31. These are formidable arguments, deployed by Mr Perry with his habitual skill and erudition. But I am persuaded by Mr Newman QC for the appellants that they should be rejected. I reach this conclusion for four reasons, taken together.

32. First, it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but

that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R 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.

33. Secondly, the present case shows, more clearly than any other reported case since *R v Caldwell*, that the model direction formulated by Lord Diplock (see paragraph 18 above) is capable of leading to obvious unfairness. As the excerpts quoted in paragraphs 6-7 reveal, the trial judge regretted the direction he (quite rightly) felt compelled to give, and it is evident that this direction offended the jury's sense of fairness. The sense of fairness of 12 representative citizens sitting as a jury (or of a smaller group of lay justices sitting as a bench of magistrates) is the bedrock on which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern. Here, the appellants could have been charged under section 1(1) with recklessly damaging one or both of the wheelie-bins, and they would have had little defence. As it was, jury might have inferred that boys of the appellants' age would have appreciated the risk to the building of what they did, but it seems clear that such was not their conclusion (nor, it would appear, the judge's either). On that basis the jury thought it unfair to convict them. I share their sense of unease. 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.

34. Thirdly, I do not think the criticism of *R v Caldwell* expressed by academics, judges and practitioners should be ignored. A decision is not, of course, to be overruled or departed from simply because it meets with disfavour in the learned journals. But a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention. One need only cite (among many other examples) the observations of Professor John Smith ([1981] Crim LR 392, 393-396) and Professor Glanville Williams ("Recklessness Redefined" (1981) 40 CLJ 252). This criticism carries greater weight when voiced also by judges as authoritative as Lord Edmund-Davies and Lord Wilberforce in *R v Caldwell* itself, Robert Goff LJ in *Elliott v C* [1983] 1 WLR 939 and Ackner LJ in *R v Stephen Malcolm R* (1984) 79 Cr App R 334. The reservations expressed by the trial judge in the present case are widely shared. The shopfloor response to *R v Caldwell* may be gauged from the editors' commentary, to be found in the 41st edition of *Archbold* (1982): paragraph 17-25, pages 1009-1010. The editors suggested that remedial legislation was urgently required.

35. Fourthly, the majority's interpretation of "reckless" in section 1 of the 1971 Act was, as already shown, a misinterpretation. If it were a misinterpretation that offended no principle and gave rise to no injustice there would be strong grounds for adhering to the misinterpretation and leaving Parliament to correct it if it chose. But this misinterpretation is offensive to principle and is apt to cause injustice. That being so, the need to correct the misinterpretation is compelling.

36. It is perhaps unfortunate that the question at issue in this appeal fell to be answered in a case of self-induced intoxication. For one instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others. In *R v Caldwell* it seems to have been assumed (see paragraph 18 above) that the risk would have been obvious to the defendant had he been sober. Further, the context did not require the House to give close consideration to the liability of those (such as the very young and the mentally handicapped) who were not normal reasonable adults. The overruling by the majority of *R v Stephenson* [1979] QB 695 does however make it questionable whether such consideration would have led to a different result.

37. In the course of argument before the House it was suggested that the rule in *R v Caldwell* might be modified, in cases involving children, by requiring comparison not with normal reasonable adults but with normal reasonable children of the same age. This is a suggestion with some attractions but it is open to four compelling objections. First, even this modification would offend the principle that conviction should depend on proving the state of mind of the individual defendant to be culpable. Second, if the rule were modified in relation to children on grounds of their immaturity it would be anomalous if it were not also modified in relation to the mentally handicapped on grounds of their limited understanding. Third, any modification along these lines would open the door to difficult and contentious argument concerning the qualities and characteristics to be taken into account for purposes of the comparison. Fourth, to adopt this modification would be to substitute one misinterpretation of section 1 for another. There is no warrant in the Act or in the *travaux préparatoires* which preceded it for such an interpretation.

38. A further refinement, advanced by Professor Glanville Williams in his article "Recklessness Redefined" (1981) 40 CLJ 252, 270-271, adopted by the justices in *Elliott v C* [1983] 1 WLR 939 and commented upon by Robert Goff LJ in that case is that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter. This refinement also has attractions, although it does not meet the objection of principle and does not represent a correct interpretation of the section. It is, in my opinion, open to the further objection of over-complicating the task of the jury (or bench of justices). It is one thing to decide whether a defendant can be believed when he says that the thought of a given risk never crossed his mind. It is another, and much more speculative, task to decide whether the risk would have been obvious to him if the thought had crossed his mind. The simpler the jury's task, the more likely is its verdict to be reliable. Robert Goff LJ's reason for rejecting this refinement was somewhat similar (*Elliott v C*, page 950).

39. I cannot accept that restoration of the law as understood before *R v Caldwell* would lead to the acquittal of those whom public policy would require to be convicted. There is nothing to suggest that this was seen as a problem before *R v Caldwell*, or (as noted above in paragraphs 12 and 13) before the 1971 Act. There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never

thought of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done.

40. In his printed case, Mr Newman advanced the contention that the law as declared in *R v Caldwell* was incompatible with article 6 of the European Convention on Human Rights. While making no concession, he forebore to address legal argument on the point. I need say no more about it.

41. For the reasons I have given I would allow this appeal and quash the appellants' convictions. I would answer the certified question obliquely, basing myself on clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report "A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill" (Law Com No 177, April 1989):

> "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 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."

LORD BROWNE-WILKINSON

My Lords,

42. I agree with the reasons given by Lord Bingham of Cornhill. I would allow the appeal and answer the certified question as he proposes.

LORD STEYN

My Lords,

43. This appeal raises an important question on the interpretation of section 1(1) of the Criminal Damage Act 1971. It provides:

> "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."

The focus of the appeal is on the meaning of the words "being reckless as to whether any such property would be destroyed or damaged". In broad terms, the issue is whether "reckless" in section 1(1) covers only advertent wrongdoing or is wide enough to include inadvertent wrongdoing. In *R v Caldwell* [1982] AC 341 the House by a 3:2 majority held that the wider interpretation is the correct one. The House followed *Caldwell* in later decisions. The House is now asked to re-examine the question, to depart from *Caldwell*, and to rule that the narrower interpretation of section 1(1) is the correct one.

Departing from a House of Lords decision

44. The target of the appellant is an ambitious one. The relevant words in section 1(1), *taken by themselves*, are capable of bearing either the narrower or wider meaning. In these circumstances it could be said that there was in *Caldwell* a choice to be made, and that choice was made by the requisite majority in favour of the wide view. The conclusion of the House in *Caldwell* produced a clear rule expressed by Lord Diplock as follows (at p 354):

> ". . . a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious 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. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled."

Lord Diplock also stated (and has always been so understood) that the criterion is the mind of the ordinary prudent adult individual: at page 354. In accordance with *Caldwell* no allowance is to be made by a jury for the youth or lack mental capacity of the defendant. The clarity of the decision is a factor weighing against departing from it. Moreover, a fair reading of the judgment of Lord Diplock reveals that the House was probably influenced by the consideration that the opposite view could leave beyond the reach of the criminal law wrongdoers who should be punished. If this perception was correct it would be a strong thing to depart from such a view. In combination these factors militate in favour of following *Caldwell.* A departure from *Caldwell* could only be justified if compelling legal considerations demand it.

Conclusions in outline

45. In my view the very high threshold for departing from a previous decision of the House has been satisfied in this particular case. In summary I would reduce my reasons to three propositions. First, in *Caldwell* the majority should have accepted without equivocation that before the passing of the 1971 Act foresight of consequences was an essential element in recklessness in the context of damage to property under section 51 of the Malicious Damage Act 1861. Secondly, the matrix of the immediately preceding Law Commission recommendations shows convincingly that the purpose of section 1 of the 1971 Act was to replace the out of date language of "maliciously" causing damage by more modern language while not changing the substance of the mental element in any way. Foresight of consequences was to remain an ingredient of recklessness in regard to damage to property. Thirdly, experience has shown that by bringing within the reach of section 1(1) cases of inadvertent recklessness the decision in *Caldwell* became a source of serious potential injustice which cannot possibly be justified on policy grounds. These three propositions require some explanation.

The pre-existing law

46. In enacting section 1 of the 1971 Act Parliament must be presumed to have been aware of the relevant pre-existing law. The best evidence of the state of the law was the reserved judgment of the Court of Criminal Appeal in *R v Cunningham* [1957] 2 QB 396. Giving the judgment of the Court of Appeal Byrne J said (at pp 399-400):

> "We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C S Kenny in the first edition of his Outlines of Criminal Law published in 1902 and repeated at p 186 of the 16th edition edited by Mr J W Cecil Turner and published in 1952: 'In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) *recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it)*. It is neither limited to nor does it indeed require any ill will towards "the person injured". The same principle is repeated by Mr Turner in his 10th edition of Russell on Crime at p 1592.' (Emphasis added)

This was a clear statement that under section 51 of the Malicious Damage Act 1861 foresight of the consequences of an act was necessary. It would without doubt have been the basis on which the parliamentary draftsman would have prepared the provision in the Bill which became section 1 of the 1971 Act. In substance the reference to Professor Kenny's views was correct. His explanation had then been the traditional view for at least 70 years. The pedigree and consistency of this interpretation would also have been known at the time of the drafting and enactment of the 1971 Act. As Lord Edmund-Davies pointed out in his powerful dissenting judgment in *Caldwell* (assented to by Lord Wilberforce) Lord Diplock was unnecessarily dismissive of the views of the distinguished author who contributed so much to the rational explanation of the criminal law. But the real basis of Lord Diplock's judgment in *Caldwell* was that the meaning of "maliciously" under section 51 of the 1861 Act "has no bearing on the meaning of 'reckless' in section 1 of the Criminal Damage Act 1971": page 351G. This is the foundation of the view of the majority. It must now be examined in the light of the internal and external aids to the interpretation of section 1.

The purpose of section 1 of the 1971 Act

47. Lord Diplock's formulation leaves no room, in the great majority of cases, for any inquiry into the defendant's state of mind. In a withering contemporary criticism Professor John Smith [1981] Crim LR 393, 394) explained with precision what Lord Diplock's meaning of recklessness involved:

> ". . . it amounts to no more than this: 'If there was an obvious risk of damage to property, the defendant is guilty: it makes no difference whether he realised there was a risk or not.' It does not require the jury to inquire into the defendant's state of mind at all and is apparently inconsistent with his Lordship's view that '*mens rea* is a state of mind of the accused himself.'
> Whether there is an 'obvious' risk can be answered only by considering whether any ordinary, prudent person would have realised there was a risk; and, if he would, it makes no difference what the defendant thought, because he is guilty whether he realised there was a risk or not. Only very exceptionally will there be any room for any inquiry into the actual state of mind of the defendant. If he considered the question whether there was a risk and decided wrongly, that there was not, then he would not be reckless within the new definition. Such cases are likely to be extremely rare. In the absence of any evidence by the defendant that he had performed this mental operation, it seems the judge need not direct the jury about it."

Unquestionably, *Caldwell* was a radical departure from the law as previously understood.

48. The question is: on what grounds did the majority infer that it represented the meaning which Parliament intended? Lord Diplock, at p 351, pointed out that, in accordance with the long title, the purpose of the 1971 Act was "to *revise* the law" (he italicised the word "revise"). Lord Diplock said that, at p 352, he could "see no reason why Parliament when it decided to revise the law … should go out of its way to perpetuate fine and impracticable distinctions." This reasoning attributes to Parliament a remedial intent, viz to change the mental element of the offence by including cases of inadvertent wrong doing.

49. What are the grounds for this assumption? It is true that the 1971 Act revised the law in a number of respects. This is, however, a neutral fact. Apart from replacing the word "maliciously" by more modern language there is no indication in section 1, and in the rest of the 1971 Act, that Parliament intended to embark on a revision of the mental element of the offence. No reliance was placed in *Caldwell* on any external aids supporting the interpretation. There are none. In its own terms the majority reasoning in *Caldwell* rests on fragile foundations.

50. The decisive factor is, however, that there was overwhelming evidence that Parliament did not intend to alter the existing meaning of recklessness in regard to damage to property. That follows from the fact that, as far as the mental element is concerned, the Parliament was implementing Law Commission reports. In plain terms the recommendation of the Law Commission was that subject to replacing "maliciously" by more contemporary language the mental element of the offence should remain the same. This material was published and was therefore available to the House in *Caldwell:* Lord Edmund Davies explained in outline the effect of it. In his already cited note Professor John Smith described in detail the Law Commission materials which show convincingly there was no intention to change the mental element of the offence. It is unnecessary for me to marshal these materials again. The evidence is all one way.

51. The conclusion is inescapable: *Caldwell* adopted an interpretation of section 1 of the 1971 Act which was beyond the range of feasible meanings.

Justice and policy

52. In the case before the House the two boys were 11 and 12 respectively. Their escapade of camping overnight without their parents' permission was something that many children have undertaken. But by throwing lit newspapers under a plastic wheelie bin they caused £1m of damage to a shop. It is, however, an agreed fact on this appeal that the boys thought there was no risk of the fire spreading in the way it eventually did. What happened at trial is highly significant. The jury were perplexed by the *Caldwell* directions which compelled them to treat the boys as adults and to convict them. The judge plainly thought this approach was contrary to common sense but loyally applied the law as laid down in *Caldwell.* The view of the jurors and the judge would be widely shared by reasonable people who pause to consider the matter. The only answer of the Crown is that where unjust convictions occur the judge can impose a lenient sentence. This will not do in a modern criminal justice system. Parliament certainly did not authorise such a cynical strategy.

53. Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child which entered into force on 15 January 1992. Article 40.1 provides:

> "States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and *which takes into account the child's age* and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." (Emphasis added)

This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system. For example, it would plainly be contrary to article 40.1 for a state to set the age of criminal responsibility of children at, say, five years. Similarly, it is contrary to article 40.1 to ignore in a crime punishable by life imprisonment, or detention during Her Majesty's pleasure, the age of a child in judging whether the mental element has been satisfied. It is true that the Convention became binding on the United Kingdom after *Caldwell* was decided. But the House cannot ignore the norm created by the Convention. This factor on its own justified a reappraisal of *Caldwell*.

54. If it is wrong to ignore the special characteristics of children in the context of recklessness under section 1 of the 1971 Act, an adult who suffers from a lack of mental capacity or a relevant personality disorder may be entitled to the same standard of justice. Recognising the special characteristics of children and mentally disabled people goes some way towards reducing the scope of section 1 of the 1971 Act for producing unjust results which are inherent in the objective mould into which the *Caldwell* analysis forced recklessness. It does not, however, restore the correct interpretation of section 1 of the 1971 Act. The accepted meaning of recklessness involved foresight of consequences. This subjective state of mind is to be inferred "by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances": see Lord Edmund-Davies, citing section 8 of the Criminal Justice Act 1967; at 358E. That is what Parliament intended by implementing the Law Commission proposals.

55. This interpretation of section 1 of the 1971 Act would fit in with the general tendency in modern times of our criminal law. The shift is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant. Like Lord Edmund-Davies I regard section 8 of the Criminal Justice Act 1967, as of central importance. There is, however, also a congruence of analysis appearing from decisions of the House. In *R v Morgan* [1976] AC 182 the House ruled that a defence of mistake must be honestly rather than reasonably held. In *Beckford v The Queen* [1988] AC 130, 145 per Lord Griffiths, the House held that self defence permits a defendant to use such force as is reasonable in the circumstances as he honestly believed them to be. *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 concerned the offence contrary to section 1(1) of the Children Act 1961 (inciting a girl under 14 to commit an act of gross indecency). The House held that the accused's *honest* belief that a girl was over 14 need not be based on reasonable grounds. Lord Nicholls of Birkenhead observed that (at p 462):

> "Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief."

To same effect is *R v K* [2002] 1 AC 462 where it was held that while a girl under the age of 16 cannot in law consent to an indecent assault, it is a defence if the defendant honestly believed she was over 16. It is true that the general picture is not entirely harmonious. Duress requires *reasonable* belief: see Lord Lane CJ in *R v Graham (Paul)* [1982] 1 WLR 294, 300, approved by the House of Lords in *Regina v Howe* [1987] AC 417; *R v Martin* [1989] 1 All ER 652. Duress is a notoriously difficult corner of the law. However, in *Graham* Lord Lane CJ, at p 300, stated that in judging the accused's response the test is:

> "… have the prosecution made the jury sure that a sober person of reasonable firmness, *sharing the characteristics of the defendant,* would not have responded to whatever he reasonably believed [the threatener] said or did by taking part in the offence." (Emphasis added)

The age and sex of the defendant (but possibly no other characteristics) are relevant to the cogency of the threat: *R v Bowen* [1997] 1 WLR 372: In regard to provocation a wider view of the impact on defendant has prevailed: *R v Smith (Morgan)* [2001] 1 AC 146 (by a 3:2 majority).

56. These developments show that what Lord Diplock in *Caldwell* described an "esoteric meaning" of recklessness (353H) was also consistent with the general trend of the criminal law.

Conclusion on Caldwell

57. The surest test of a new legal rule is not whether it satisfies a team of logicians but how it performs in the real world. With the benefit of hindsight the verdict must be that the rule laid down by the majority in *Caldwell* failed this test. It was severely criticized by academic lawyers of distinction. It did not command respect among practitioners and judges. Jurors found it difficult to understand: it also sometimes offended their sense of justice. Experience suggests that in *Caldwell* the law took a wrong turn.

58. That brings me to the question whether the subjective interpretation of recklessness might allow wrongdoers who ought to be convicted of serious crime to escape conviction. Experience before *Caldwell* did not warrant such a conclusion. In any event, as Lord Edmund-Davies explained, if a defendant closes his mind to a risk he must realise that there is a risk and, on the evidence, that will usually be decisive: 358D. One can trust the realism of trial judges, who direct juries, to guide juries to sensible verdicts and juries can in turn be relied on to apply robust common sense to the evaluation of ridiculous defences. Moreover, the endorsement by Parliament of the Law Commission proposals could not seriously have been regarded as a charter for the acquittal of wrongdoers.

59. In my view the case for departing from *Caldwell* has been shown to be irresistible.

60. I agree with the reasons given by Lord Bingham of Cornhill. I have nothing to add to his observations on self-induced intoxication.

Disposal

61. I would also make the orders proposed by Lord Bingham of Cornhill.

LORD HUTTON

My Lords,

62. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they give I too would allow this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

63. I have had the privilege of reading the speech of my noble and learned friend Lord Bingham of Cornhill in draft. As I explain below, I was initially doubtful whether it would be proper for your Lordships' House to overrule *R v Caldwell* [1982] AC 341, especially when it had previously declined an express invitation to do so. In a very different context Scalia J formulated some of the kinds of issues I had in mind in Part I of his characteristically forthright dissenting opinion in *Lawrence v Texas* 539 US ____ (2003). But I have reached the clear view that, whatever the intrinsic merits or demerits of the concept of recklessness which Lord Diplock espoused, Parliament did not intend the word "reckless" in section 1 of the Criminal Damage Act 1971 ("the 1971 Act") to bear the meaning he gave it. Moreover, his speech has proved notoriously difficult to interpret and those difficulties would not have ended with any refinements which your Lordships might have made to the decision. Indeed those refinements themselves would almost inevitably have prompted further questions and appeals. In these circumstances the preferable course is to overrule *Caldwell*.

64. There is nothing on the face of the 1971 Act - and Lord Diplock certainly points to nothing - to indicate that in enacting this particular statute Parliament intended to innovate upon the concept of recklessness as it had been understood to apply in English law immediately prior to 1971. So the natural assumption is that Parliament was using the term in its contemporary legal sense. Section 1(1) and (2) correspond precisely to provisions in the draft bill attached to the report of the Law Commission on *Offences of Damage to Property* (Law Com No 29). Nothing in that report suggests that the Commission had intended their draft bill to incorporate a new notion of recklessness. Indeed, as Lord Bingham of Cornhill has shown, the indications are the other way. Although in *Caldwell* Lord Edmund-Davies referred to the Law Commission report, Lord Diplock did not - perhaps because it was not cited or else on the view that, at most, it would show the meaning that the Law Commission had attached to recklessness and it was up to the judges and no-one else to decide what the words in the statute meant. I refer to his well-known speech in *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, especially at pp 636H - 637 E. None the less in this case the Law Commission report at least indicates the scope of the legislative changes in contemplation and, in that way, tends to confirm the interpretation that I would be disposed to adopt in any event.

65. It is no secret that, for a long time, many of the leading academic writers on English criminal law have been "subjectivists". By that I mean, at the risk of gross over-simplification, that they have believed that the criminal law should punish people only for those consequences of their acts which they foresaw at the relevant time. Those who subscribe to that philosophy will tend to approve the concept of recklessness in *R v Cunningham* [1957] 2 QB 396. The late Glanville Williams and the late Sir John Smith, who

were members of the influential Criminal Law Revision Committee, were two of the most distinguished proponents of such views.

66. Glanville Williams (as well as Edmund-Davies LJ) was also a member of the working party set up by the Law Commission to examine the general principles of the criminal law. In June 1970 they produced a working paper on the mental element in crime. And, not surprisingly, on the matter of recklessness, at pp 48 - 51, it espoused the subjectivist standpoint. Three of the five Law Commissioners also sat on the working party. A month after publishing that working paper, the Law Commission published their report on property offences. In these circumstances it would have been surprising, to say the least, if they had intended their draft bill to do other than incorporate the concept of recklessness that had been developed in *Cunningham* and subsequent cases. Sitting in *Caldwell* Lord Edmund-Davies was well placed to appreciate all these factors.

67. The same view is reflected, of course, in the definition of recklessness in clause 18(c) of the draft code of criminal law published by the Law Commission in 1989 (Report No 177). Again this is scarcely surprising since much of the work was done by a team of academic lawyers that included Sir John Smith. It goes without saying that there are powerful arguments in favour of the view which the Law Commission favoured.

68. On the other hand it is equally clear that other views are not only possible but have actually been adopted by English judges at different times over the centuries. Their judgments reveal many strands of thinking: J Horder, "Two Histories and Four Hidden Principles of Mens Rea" (1997) 113 LQR 95. There is therefore no reason to treat the concept of recklessness expounded in *Cunningham* either as being the quintessence of the historic English criminal law on the point or as necessarily providing the best solution in all circumstances. Indeed in *R v Stephenson* [1979] QB 695, a case on section 1(1) of the 1971 Act, Geoffrey Lane LJ recognised that the subjective approach was problematical in certain situations. Having made it quite clear that in his view the test of recklessness under the 1971 Act remained subjective and that the knowledge or appreciation of risk of some damage must have entered the defendant's mind, he commented, at p 704B - C:

> "There is no doubt that the subjective definition of 'recklessness' does produce difficulties.
> One of them which is particularly likely to occur in practice is the case of the person who by self-induced intoxication by drink or drugs deprives himself of the ability to foresee the risks involved in his actions. Assuming that by reason of his intoxication he is not proved to have foreseen the relevant risk, can he be said to have been 'reckless'? Plainly not, unless cases of self-induced intoxication are an exception to the general rule. In our judgment the decision of the House of Lords in *R v Majewski* [1977] AC 443 makes it clear that they are such an exception."

In *Caldwell* just the kind of problem envisaged by Geoffrey Lane LJ arose: the defendant said that he was so drunk that it did not occur to him that there might be people in the hotel whose lives might be endangered if he set fire to it. Part of what Lord Diplock did to confront the kind of difficulty identified by Geoffrey Lane LJ was to adopt a wider definition of recklessness that covered culpable inadvertence. In so doing, as the House now holds, he misconstrued the terms of the 1971 Act.

69. 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. This approach may be better suited to some offences than to others. For example, in the context of reckless driving the House endorsed and re-endorsed a more stringent version: *R v Lawrence (Stephen)* [1982] AC 510; *R v Reid* [1992] 1 WLR 793. I refer in particular to the discussion of the policy issues by Lord Goff of Chieveley in *Reid* at pp 808H - 812C. Moreover, the opposing view, that only advertent risk taking should ever be included within the concept of recklessness in criminal law, seems to be based, at least in part, on the kind of thinking that the late Professor Hart demolished in his classic essay, "Negligence, *Mens Rea* and Criminal Responsibility" (1961), reprinted in H L A Hart, *Punishment and Responsibility* (1968), p 136.

70. Because the decision in *Caldwell* involved this legitimate choice between two legal policies, I was initially doubtful whether it would be appropriate for the House to overrule it. An alternative way to allow the appeal by re-analysing Lord Diplock's speech and overruling *Elliott v C* [1983] 1 WLR 939 might well have been found. But, for the reasons that I have already indicated, I have come to share your Lordships' view that we should indeed overrule *Caldwell* and set the law back on the track that Parliament originally intended it to follow. If Parliament now thinks it preferable for the 1971 Act to cover culpably inadvertent as well as advertent wrongdoers, it can so enact. The Law Commission recognised that, if codifying the law, Parliament might wish to adopt that approach: *A Criminal Code for England and Wales Vol 2 Commentary* (LC No 177) paras 8.21 and 17.6.

71. Subject to these comments, I respectfully agree with the speech of Lord Bingham of Cornhill and would allow the appeal and answer the certified question as he proposes.