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Assault—the Mental Element

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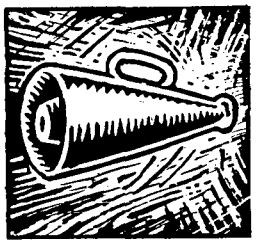
COMMENTARY

EDUCATION AND THE LAW

Assault – the mental element

DPP v. *Khan* [1989] NLJ Rep. 1455 (*The Independent, 19 October 1989*)



Misbehaviour by pupils in schools must comparatively rarely give rise to formal criminal proceedings. When it does, one would expect the circumstances to be unusual. Not only was this so in *DPP* v. *Khan* but the case also shows the Divisional Court responding to a novel situation in a way that may have important consequences for the law of assault generally.

The defendant, a 15-year-old schoolboy, had been attending a chemistry lesson which involved the use of concentrated sulphuric acid. After splashing some of it on his hand he was given permission to visit the toilet to wash it off. Unknown to the teacher in charge of the class he took with him a tube of the acid, apparently so that he could test its reaction on some toilet paper. In the midst of this experiment he heard footsteps in the corridor. Fearing detection and in a state of panic he poured some of the acid down a hot air drier with the intention of concealing it and returning later to deal with the situation. He then went back to the classroom. Later another pupil used the drier. Some of the acid in the machine was ejected onto his face and caused a permanent scar. As a result the defendant was charged with assault occasioning actual bodily harm contrary to s. 47 of the Offences Against The Person Act 1861. Initially the charge was dismissed by the magistrates on the grounds that because he had not intended to harm the other pupil, or anyone else, his conduct did not constitute an assault for the purposes of s. 47 of the 1861 Act. Ordinarily dismissal of the charge in a magistrate's court would be the end of the matter. Nevertheless, an appeal against an acquittal is possible on a point of law by way of the 'case stated' procedure. In effect, the magistrates record their findings of fact and the higher court then determines how the relevant principles of law should be applied. As they were therefore entitled to do, the prosecution appealed to the Divisional Court who allowed the appeal and remitted the case to the magistrates with a direction to convict and proceed to sentence.

PARKER LJ, giving the judgment of the court, began by stating that there could be no doubt that if a person placed acid in a machine with the intent that it should be ejected onto the next user, and so harm him, an assault would take place when the harm occurred. This is an uncontroversial statement supported by dicta such as those of STEPHEN J in *R* v. *Clarence* (1889) 22 QBD 23 at 45 where the judge commented:

> 'If a man laid a trap for another into which he fell after an interval the man who laid it would during the interval be guilty of an attempt to assault and of an actual assault as soon as the man fell in'.

It would clearly be the same if a person placed an incendiary device timed to go off later in a public place with the intent to injure passers-by when the device did ignite. It can make no difference that at the time of the explosion the person responsible is miles away from the scene and giving no thought to what is then happening.

Lord Parker went on to state that a person may be guilty of an assault not only if he intended a result but also if he possessed the 'relevant recklessness'. It is at this point that difficulties arise. Ever since the decision in *R* v. *Caldwell* [1982] AC 341 and the related case of *R* v. *Lawrence* [1982] AC 510 it has been clear that the term recklessness is used by lawyers in two quite different ways. The first, and long established, sense in which the term is understood is best exemplified by the

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decision in *R* v. *Cunningham* [1957] 2 QB 396. Although strictly speaking the court was construing the word 'maliciously' as it appeared in the 1861 statute, the statement that the defendant in that case, even if he did not intend the harm, must at least foresee the risk of resulting harm is regarded as a classic exposition of the meaning of recklessness as it had been generally understood prior to the decision in *Caldwell*. The advance taken in *Caldwell/Lawrence* was to extend the meaning of recklessness to cover not only the case where the defendant foresees the possible result of his conduct but also the case where an accused does an act which, in fact, creates an obvious risk and yet he gives no thought to the possibility of there being any such risk. Clearly this is a very different state of mind and one that it may be difficult to distinguish from what has normally been regarded as the province of negligence. There is surely a world of difference between a person who foresees a risk of harm and still deliberately chooses to run that risk and another person who, however imprudently, never gave any thought to there being a risk in the first place.

All of this leaves the courts with the difficult problem of determining in relation to each crime whether the *Cunningham* or the *Caldwell/Lawrence* test applies. On this Lord Roskill in *R* v. *Seymour* [1983] 2 AC 493 offered some general guidance when he said:

> 'Reckless should today be given the same meaning in relation to all offences which involve recklessness as one of the elements unless Parliament has otherwise ordained.... That simple and single meaning should be the ordinary meaning of those words as stated in this House in *R* v. *Caldwell* and *R* v. *Lawrence*'.

Nevertheless, this general guidance was clearly only an *obiter dictum* and need not necessarily have been understood to mean that all previously established authority on the issue of recklessness was now suspect. This was particularly true of crimes whose ingredients did not involve the use of the word reckless in a modern statute.

The greatest difficulty in this case is to understand from the report why the court felt bound to hold, as it apparently did, that *Caldwell/Lawrence* recklessness was applicable in the context of an assault under s. 47 of the 1861 Act. It had been generally assumed prior to this decision that the *mens rea* (mental element) for this type of assault was *Cunningham* style recklessness as laid down in *R* v. *Venna* [1976] QB 421. It can hardly be correct to discount the authority of this case by saying that it was decided before the *Caldwell/Lawrence* line of cases developed. The type of assault with which the defendant was charged in this case has its ingredients laid down by the common law. It is not, therefore, unreasonable to interpret its ingredients as to the mental element in the light of long established common law principles, of which the need for *Cunningham* style recklessness was one. It is true that the decisions in *Seymour* and *Kong Cheuk Kwan* v. *R* (1985) 82 Cr. App. R. 18 suggest that a direction to the jury on the common law offence of manslaughter may be put in terms of the *Caldwell/Lawrence* test, but this hardly supports the case for treating common assault in the same way. Manslaughter has always been a somewhat anomalous offence in what one might describe as the 'assault' type crimes. Courts have long used the word reckless in the context of manslaughter in a way which made clear that a high degree of negligence, not *Cunningham* style recklessness, sufficed to found liability. At least until the decision in *Seymour* and the present case it would be difficult, if not impossible, to find authority for regarding the mental element required for common assault in the same way.

Naturally the court did consider some earlier cases and on behalf of the defendant it was argued that the previous cases on *Caldwell/Lawrence* recklessness could be distinguished. None of them, it was said, involved a gap between the act of the defendant and the resulting harm during which the accused had an opportunity to neutralize the risk in the way the defendant had in the present case. In the man trap example, it was suggested, the relevant recklessness did not occur until the setter of the trap abandoned the opportunity to disarm it. If such abandonment was for good reason, such as answer-

ing a scream for help, there could be no offence. In the present case the defendant had left the drier in its dangerous state as a result of panic and the *Caldwell/Lawrence* test was therefore inapplicable.

It is not altogether obvious from the brief report how these submissions could greatly have assisted the defendant. The case of *R* v. *Miller* [1983] A.C. 161 suggests that liability can be imposed when there is a gap between the act of the defendant which gave rise to the harm and a later failure to do anything about it. The element which made *Miller* so unusual was that the defendant was initially unaware that he had done anything. As regards the man trap example, it is again not altogether clear that the defence submission is tenable. Suppose a terrorist plants an explosive device set to ignite at a later time with the intent at that time of causing injury to others. Before the device is due to explode he regrets his actions but on the way to the police station to report what he has done stops to assist an accident victim. As a result he arrives too late for the bomb to be defused and people are injured in the ensuing explosion. Could he really be heard to say that he is not guilty because, at the time of the explosion, he had justifiably abandoned his plans to avert the disaster? *A fortiori*, surely it should not be a defence that the abandonment was the result of panic? In the event, of course, the court upheld the prosecution's contention that the *Caldwell/Lawrence* line of cases controlled the situation, although quite how the defence submissions were disposed of is not entirely clear from the report.

Amidst the various legal arguments the true severity of the approach adopted by this case emerges clearly from PARKER LJ's statement that:

> 'The magistrates' findings make it abundantly clear that the defendant knew full well that he had created a dangerous situation and the inescapable inference appears to me to be that he decided to take the risk of someone using the machine before he could get back and render it harmless *or gave no thought to that risk*'. (author's italics).

Whatever misgivings one might have about drawing 'inescapable' inferences or trying to assess the level and duration of the defendant's state of panic are rendered somewhat otiose by the addition of 'or gave no thought to that risk'. Panic, on its own, is an unlikely defence to a crime. It may, however, be a potent factor in assessing exactly what a particular defendant foresaw, if anything, at the moment he acted. What this judgment suggests is that it may be immaterial that the defendant foresaw no risk because the thought did not cross his mind. This may be, after *Caldwell*, the mental element which suffices for criminal damage to property. Does it really make sense to apply the same Draconian standard to the very different area of assault?

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Restraints on the dismissal of governors

R v. *Trustee of the Roman Catholic Diocese of Westminister, ex parte Andrews* (*The Times, 18 August 1989*)

Of late, the powers of governor-appointing bodies to influence the management of schools through dismissal (or the threat of the same) has rarely been out of the courts. Only now can the actual extent of these powers be accurately stated.

Earlier this year, the House of Lords in *R* v. *Inner London Education Authority, ex parte Brunyate* [1989] 1 WLR 542 ruled that the apparently unbridled power of dismissal enjoyed by local education authorities (LEAs) in relation to their governor-appointees could not, in fact, be used to remove in mid term those governors who refused to support the LEA's policy for the school's future. In these circumstances, it is not surprising that the Court of Appeal in the present case reversed the first instance decision of SIMON BROWN J

([1988] 86 LGR 507), and quashed a decision of the trustee (the appointing body) to dismiss two foundation governors who had failed to support the trustee's scheme for the re-organization of the Cardinal Vaughan Memorial School. The governors (who lost at first instance) succeeded in the Court of Appeal on the grounds that the trustee's action amounted to an interference with matters solely entrusted to the governors.

The decision, which has relevance beyond foundation governors at voluntary-aided schools, confirms the autonomy of governors in matters connected with the management of the schools recently articulated in *ex parte Brunyate*. However, as I have argued elsewhere (see *Education and the Law*, 1989 **1**: 119), this newly conferred protection may not, in the case of individual governors, prove long lived. This emerges from the acceptance by the House of Lords in *ex parte Brunyate* that the freedom of governor-appointing bodies not to renew the term of a governor seeking re-appointment is a 'wholly unfettered discretion'. In practice therefore those with most to gain from the courts' qualified support of governors' autonomy will be recently appointed governors.

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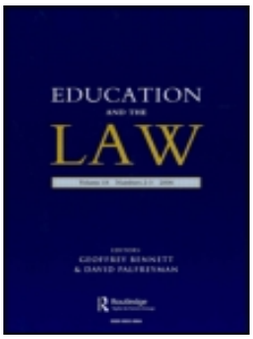

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