THE "GUILTY MIND" IN THE CRIMINAL LAW[1]

In 1993 a man named Penn invited a youth, Barry Kingston and a 15 year old boy to his room and there, secretly and without their consent, administered to both of them a stupefying drug. The boy was rendered insensible and, while he was in that condition, both Penn and Kingston did grossly indecent sexual things to him. Penn made a recording of what went on and took photographs. His purpose was to blackmail Kingston.

Penn and Kingston were charged with indecent assault on the boy. It was clear that, in spite of the drugs, Kingston knew exactly what he was doing. He admitted that he had paedophiliac inclinations. His defence was that he would not have given way to them, but for the drug which had been administered to him without his consent and for the very purpose of inducing him to do these acts. The question was whether that, if true, was a defence to the charge of indecent assault. It provoked a difference of judicial opinion. The trial judge ruled that it was no defence. He instructed the jury, 'A drugged intent is still an intent.' The only question for them was whether Kingston intended to do these indecent acts. The jury were satisfied that he did and convicted him.

The Court of Appeal quashed the conviction. Lord Taylor CJ, quoting from a nineteenth century case, said that a man is not responsible for a condition produced by the strategem or fraud of another. Involuntary intoxication by drink or drugs was a defence if it caused

[1]The title, except for the inverted commas, is the same as that of my inaugural lecture delivered in the University of Nottingham on February 6, 1959 and published in (1960) 76 LQR 78; but the content is now completely different.

the defendant to do a criminal act which, but for the drink or drugs, he would not have done.

The House of Lords allowed the prosecution's appeal.[2] The jury had found that Kingston intended to do the acts which the law forbids and that was enough. Common lawyers say that criminal responsibility requires proof of *mens rea*, which, translated literally, means a guilty mind. But the translation may mislead for, as Lord Mustill said, '*rea*' refers to the criminality of the act in which the mind is engaged, not to its moral character.' For the purposes of most crimes, a person has *mens rea* if he intends to do that which the law forbids. Nothing more is required. This is so whether he knows the law forbids his act or not, for ignorance of the criminal law is no defence. In a very recent case, *Dodman*[3] the Court-Martial Appeal Court, disapproving a note in the Manual of Air Force law, affirmed that 'blameworthiness' has no place in the definition of *mens rea*.

Lord Taylor's *dictum* was certainly too wide. Othello, you may remember, was induced by the strategem and fraud of Iago to strangle Desdemona; but he was surely guilty of murder. Othello was deceived by Iago, into believing that his wife, whom he dearly loved had been unfaithful to him, and killed her while overwhelmed by jealousy.

Of course, an intention to do that which the criminal law forbids - killing, wounding, taking or damaging property belonging to another - nearly always is, in the estimation of ordinary people, a blameworthy intention. But it is not always so, even in the gravest of all crimes, murder. A so-called mercy-killer may act entirely out of motives of love and compassion, which many reasonable people would regard as praiseworthy rather than blameworthy; but this is an intentional, and usually a premeditated killing and is, at common law, undoubtedly murder unless the killer is suffering from an abnormality of mind amounting to diminished responsibility.

Blameworthiness comes into play at the sentencing stage. Kingston's condition, though no bar to conviction, was, one would

---

[2] [1995] 2 AC 355, HL.

[3] [1998] 2 Cr App R 38.

have thought, a powerful mitigating factor, though the judge, Potts J, sentenced him to 5 years imprisonment. History does not appear to record what happened on his appeal against sentence. English law generally prescribes a maximum sentence for a particular offence but, in my opinion, wisely, no minimum, because it is recognised that the blameworthiness and dangerousness of a person properly convicted of that offence may range from very great to negligible. So a judge's discretion in some crimes ranges from a sentence of life imprisonment to an absolute discharge. A significant exception to this rule - until recently the only significant exception in English law - is murder where the law imposes a mandatory sentence of life imprisonment. The trial judge has no discretion.

For some crimes, nothing less than an intention to cause the forbidden result - the *actus reus* - is a sufficient *mens rea*, but for others a lower degree of culpability may be enough. Many crimes may be committed by acting recklessly - which, for the moment, I will ask you to accept, is deliberately taking an unreasonable risk of causing the *actus reus*. Still other crimes are satisfied by proof of negligence - simply failing to take that reasonable degree of care which would have avoided the forbidden result. In a crime of negligence, it is immaterial whether or not the accused foresaw that he might cause the forbidden result, *actus reus*. It is sufficient that he ought to have foreseen it. Finally, the law also recognises strict liability - where no fault, not even negligence, need be proved as to one or more elements of the offence. As Lord Edmund - Davies said, '...an offence is regarded - and properly regarded - as one of strict liability, if no *mens rea* need be proved as to a single element in the *actus reus*.'[4]

So defined, strict liability is much wider than is generally recognised. Even murder is a crime of strict liability in English law because an intention to cause grievous bodily harm is a sufficient *mens rea*. It is immaterial that the defendant who intends to cause grievous bodily harm does not foresee any risk of death, and even that death

[4] *Whitehouse* v *Lemon* [1979] 1 All ER 898 at 920, citing Smith & Hogan's *Criminal Law* (7th ed) 99-100.

was not reasonably foreseeable. If death occurs, he is guilty of murder. Consequently murder was criticised by Lords Mustill and Steyn as a 'constructive crime' and an anomaly *in A-G's Reference (No 3 of 1994)*[5] and *Powell*[6]. The word 'anomaly,' however, implies a general rule to which the anomaly is an exception. There is no such general rule in modern English law. The Law Commission's draft Criminal Code,[7] cl. 20 would supply one. It provides :

> ***General requirement of fault:*** Every offence requires a fault element of recklessness with respect to each of its elements other than fault elements unless otherwise provided.

If this were the law, it would still be open to the legislature to impose strict liability but there would be a presumption against it. The general rule would be that it would have to be proved that the defendant was, at least, aware of the risk of causing every element of the offence. Cl. 20, however, is an aspiration, not yet recognised by the law.

Subjective and objective tests

There is a long-standing and continuing debate about the relative roles of subjective and objective tests of criminal liability. A subjective test requires proof of the actual state of mind of the accused person. An objective test judges a person by an external standard - the standard of the reasonable man - without regard to his actual state of mind.

There were formerly two pillars of the objective approach in English law.

1. It was thought there was a rule that a person is conclusively presumed to intend the natural and probable consequences of his

---

[5][1997] 3 All ER 545, HL.

[6][1997] 4 All ER 545.

[7]See Law Com No. 177(1989)

act. If the result in question was a natural and probable result of what he did, he was held to have intended it, whatever his actual state of mind might be. This rule was most authoritatively expressed in the notorious decision of the House of Lords, *DPP* v *Smith*[8] a case of the murder of a police officer. Smith, who was carrying stolen goods in his car, stopped at a traffic light where he aroused the suspicions of the officer. He drove off at high speed in order to avoid detection while the officer was clinging to the side of the car. He was thrown off and killed. It was, in the opinion of the jury, a natural and probable consequence of his act that the officer would be killed or seriously injured, so Smith was guilty of murder, whether or not he realised there was any risk of death or serious injury.

2. The second, closely associated, rule was that a mistake of fact would excuse only if it was a reasonable mistake. A perfectly honest, but unreasonable mistake would not excuse.

The first rule, that in *DPP* v *Smith*, was abolished by s.8 of the Criminal Justice Act 1967:

> 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.

[8][1961] AC 290.

The second rule was exemplified by *Tolson*[9] (1890) - Mrs T's husband was reported lost in a shipwreck. More than six years later, believing herself to be a widow, Mrs T remarried. Then, her husband turned up, alive and well. It may seem astonishing that, not only was Mrs T prosecuted and convicted of the serious offence of bigamy, but that five judges of the Court for Crown Cases Reserved voted to uphold her conviction. That extraordinary fact can be explained only by the peculiar wording of the section under which she was charged. Happily, nine other judges took a different view. Mrs T's honest belief that her husband had been drowned in a shipwreck was held to be a defence to bigamy, but only because it was a reasonable belief. If, say, a week after her husband's disappearance, she had consulted a fortune teller, who gazed into her crystal ball and told Mrs T that her husband was dead, and she had then re-married, she would probably have been convicted, however sincere her belief in fortune tellers and however strong her conviction that her husband was dead. Yet her only fault would have been her undue credulity, not an intention to flout or disregard the sanctity of marriage.

Tolson was for many years regarded as authority for a general principle, applicable not only to bigamy but throughout the criminal law, that only a reasonable mistake will excuse. *Tolson* has never been overruled; but its authority is probably now limited to the offence of bigamy which, in England, is rarely prosecuted today. *Tolson* was said in the important House of Lords decision in *Morgan* (1976)[10] to be 'a narrow decision on the construction of a statute which *prima facie* created an absolute offence.' Two of Morgan's friends had sexual intercourse with Morgan's wife at his invitation. Morgan has told them, untruly, that she was willing. In fact she did not consent. The question of law was whether a man who honestly, but unreasonably,

[9](1890) 2 QBD 168, CCR.

[10][1976] AC 182, HL.

believes that a woman consents to intercourse, is guilty of rape. The House decided that he is not. Such a man believes he is having intercourse with consent; and that is not an intention to commit any crime. Though the case caused much controversy, it should not be forgotten that the convictions were upheld because it was quite plain that the jury had found that the men had no such honest belief as they claimed.

Morgan decided two things. First, it settled the *mens rea* of the crime of rape at common law. If a man honestly believed that a woman was consenting to sexual intercourse, he was not guilty of rape, even if he was mistaken, and even if his mistake was an unreasonable one. If, however, he realised that she might not be consenting, and went ahead regardless, then he would be guilty. Recklessness was enough. Rape has since been defined by statute, confirming the common law as stated in *Morgan*; and that aspect of the decision is no longer important in English law. But *Morgan* decided, secondly that,

> Where a state of mind is an element of an offence, a mistake of fact inconsistent with the existence of that state of mind is an answer to the charge.

You may say that this is self-evident, so blindingly obvious as to be hardly worth saying. If the law requires the prosecution to prove a particular state of mind and that state of mind is not proved, the prosecution must fail. To that I could only respond that the courts, by asserting that only a reasonable mistake would excuse, had been saying the contrary for many years, and the trial judge and the Court of Appeal in *Morgan* itself were saying so.

Status of *Morgan*

So ingrained was the reasonable mistake rule that some lower courts were unable or unwilling to accept that it was no longer the law. They were inclined to say that *Morgan* was a decision on the law of rape and nothing more - like *Tolson*, a narrow decision. For a time, then,

there was thought to be 'a retreat from *Morgan*.'[11] The Criminal Law Revision Committee in their Fourteenth Report on Offences against the Person (Cmnd 7844, para 243) in 1980 assumed that *Morgan* did not apply where a person, making a mistake of fact, used force in self-defence or the prevention of crime. If he had no reasonable grounds for his belief that it was necessary to use force, he would be guilty of an offence. They recommended that the law should be amended to provide that 'a person may use such force as is reasonable in the circumstances *as he believes them* to be in defence of himself or any other person.' Then in *Gladstone Williams*[12] (1983), the Court of Appeal, overruling a long line of *dicta*, held that the CLRC's recommended rule was already the common law. There was no need to wait for legislation. A person who uses force in self-defence or prevention of crime does not commit an offence, if the force is reasonable in the circumstances as he believed them to be. This may have been an *obiter dictum* but it was soon followed by actual decisions and received the approval of the Privy Council in *Beckford*.[13] Lord Griffiths said -

> Looking back, *DPP* v *Morgan* can now be seen as a landmark decision in the development of the common law, returning the law to the path on which it might have developed but for the inability [until 1898] of an accused to give evidence on his own behalf.

So, in place of the two pillars of objectivism, we now have two pillars of subjectivism:

1. Section 8 of the Criminal Justice Act 1967: where the law requires intention or foresight of a result, the actual intention or foresight of the defendant must be proved.

---

[11] See *David Cowley* [1982] Crim LR 198.

[12] (1983) 78 Cr App R 276.

[13] [1988] AC 130, PC.

2. *Morgan*: where the law requires knowledge of the existence, or possible existence of facts or circumstances, actual knowledge on the part of the defendant must be proved.

These propositions, however, get us nowhere unless the law does require intention or foresight, or knowledge, as the case may be. In many crimes it is settled that these states of mind must be proved. In murder, still a common law offence in England, the decisions of the courts have now made it clear that nothing less than intention - though not necessarily an intention to cause death - an intention to cause grievous - really serious - bodily harm is enough - must be proved. There has been a long standing difficulty in determining the borderline between intention and recklessness. In a series of decisions, the House of Lords has been pushed slowly and sometimes reluctantly towards what I would regard as the right rule. On one thing, however, everyone has always agreed. If it was the defendant's purpose to cause a result, if he was acting in order to bring about that result, then he intended it. It does not matter that he knew his chances of success were small. But the meaning of intention in the law is somewhat wider than that. In *Hyam*[14] Mrs Hyam's purpose was not to kill or injure anyone, but to frighten away from the neighbourhood, Mrs Booth, her rival in love. To do that, she stuffed blazing newspaper through the letter box of Mrs Booth's house. In the ensuing fire Mrs Booth's two children died. Ackner J instructed the jury that if Mrs Hyam realised that it was highly probable that her action would cause grievous bodily harm to someone, then she was guilty of murder. The House of Lords held that this was a proper direction. A consequence foreseen as highly probable, or, according to some judges, merely as probable, was, in law, an intended consequence. Later decisions ruled that the defendant must have realised that the result was not merely probable, but virtually certain. That is how the Court of Appeal put it in *Nedrick*,[15] a case with facts indistinguishable from those in *Hyam*. Strangely, however,

[14] [1975] AC 55.

[15] [1986] 3 All ER 1.

it was said that foresight of virtual certainty was not in itself intention, but only evidence from which the jury might 'infer' intention. Intention thus remained undefined and some courts continued to assert that awareness of a substantial risk that a result would occur was sufficient evidence of an intention to cause it. Such directions persisted, perhaps because the House had previously been unwilling to recognise that *Hyam* (in so far as it applied the 'highly probable' test) could not stand with the later cases. Their lordships have often been unnecessarily - and dangerously - coy about declaring that their brethren or predecessors have got it wrong. Now the very recent case of *Woollin*[16] draws a firm line between intention and recklessness. Woollin lost his temper with his three year old son and threw him on a hard surface. The child sustained a fractured skull and died. The jury were directed that if Woollin realised that there was a substantial risk that he would cause serious injury, it was open to them to find that he intended to cause serious injury and that he was guilty of murder. His conviction was quashed by the House of Lords. A person intends a result where he knows that it is virtually certain to occur, that it is something that will happen in the ordinary course of events, as a result of his act. Foresight of a substantial risk, or high probability, is not intention. It constitutes a high degree of recklessness but that is insufficient for murder. Lord Steyn now recognises the truth about *Hyam*. The facts were not materially different from *Nedrick*; and in *Nedrick* the conviction was rightly quashed; so the law has moved on and *Hyam* must be regarded as wrongly decided.

The direction to the jury proposed in *Nedrick* was approved in *Woollin*, with one important modification. The Nedrick direction tells the jury that 'they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty ... and that the defendant appreciated that such was the case.' Lord Steyn and Lord Hope agree that the substitution of 'find' for 'infer' would be an improvement. Indeed, it will and should get away

[16] [1998] 4 All ER 103.

from the strange and much criticised notion of inferring one state of mind from another. The implication, however, appears to be that, even now, a jury which is satisfied that the defendant foresaw the consequence of his act - say, death - was virtually certain, is not bound to find that he intended it. The jury is entitled so to find, says Lord Steyn, but why is it not bound? At one point Lord Steyn says of *Nedrick* - 'The effect of the critical direction is that a result foreseen as virtually certain is an intended result.'

If that is right, the only question for the jury is, 'Did the defendant foresee the result as virtually certain?' If he did, he intended it. That, it is submitted is what the law should be; and it now seems that we have at last moved substantially in that direction. The words 'entitled to find', (not 'must find') seem to hint at the existence of some ineffable, apparently undefinable, notion of intent, locked in the breasts of the jurors.

Recklessness

It is in the sphere of recklessness that the fiercest battles between the objectivists and subjectivists have occurred. Here for some years everything seemed to be going the subjectivists' way. In *Cunningham*[17] the Court of Criminal Appeal decided that, where a statute uses the word 'maliciously' - and the definitions of some very important crimes still use that unfortunate word - an intention to cause the relevant result, or the *deliberate* taking of a risk of causing it must be proved. As the court, quoting Professor Kenny put it, '*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.' That is the rule that the Law Commission intended to incorporate in the Criminal Damage Act 1971, but in modern language. Instead of saying 'maliciously,' the Act says 'intentionally or recklessly.' It was a great misfortune that the Commission did not go on to define recklessly in the subjective sense in which they undoubtedly intended it. But at first, all went well. In *Stephenson*[18]

[17] [1957] 2 QB 396, CCA.

[18] [1979] QB 695.

a tramp sheltered in a hollow in a haystack. Feeling cold, he lit a fire in the hollow and, unsurprisingly, the haystack went up in smoke. Any reasonable person would have been aware of the risk that this would happen, but Stephenson was suffering from schizophrenia and may not have been aware of it. Because this was not clearly left to the jury, the Court of Appeal quashed his conviction. He was guilty only if he, the schizophrenic Stephenson, was aware of the risk. But then in 1981 came the decisions of the House of Lords in two cases, *Caldwell* and *Lawrence*[19] [1982] AC 341 which overruled *Stephenson* holding that a person was reckless if he created an obvious risk, *without giving any thought to the possibility of any such risk.* As later cases made clear, this meant that the risk would have been obvious to the ordinary reasonable person, who stopped to think, not necessarily obvious to the particular defendant. The risk was not, or may not have been, obvious to the schizophrenic Stephenson, but it would certainly have been obvious to ordinary people, so he was reckless and properly convicted. His conviction should not have been quashed. Lord Diplock gave two principal reasons for his decision in *Caldwell.*

The first was that the only person who knows what the accused's mental processes were is the accused himself. But if that were a good reason, we should abandon the whole of the doctrine of *mens rea.* That doctrine assumes that it is possible to prove beyond reasonable doubt what was a person's state of mind at a particular time. That is, in my view, an entirely reasonable assumption. The total abandonment of the doctrine of *mens rea* is unthinkable and Lord Diplock surely cannot have meant that. It would empty the criminal law of moral content. So I would reject Lord Diplock's first reason.

His second reason is that, where the risk is an obvious one, there is no difference in culpability between one who has given no thought to the possibility that there might be a risk, and one who knows there is a risk and decides to take it. But is this true?

---

[19][1982] AC 341, HL.

My favourite illustration is a case of no legal authority, but vivid facts.[20] In 1982 a bus driver in South Wales attempted to drive his fourteen feet high double-decker bus under a bridge only ten feet high, killing six people and injuring others. He had driven the route regularly for 10 years but had never taken a double-decker on it before. He followed the route to which he was accustomed. When he hit the bridge, he said, he thought, 'My God, a double-decker.' He knew he was driving a double-decker because two stops before the crash, he told passengers boarding the bus, 'Plenty of room upstairs' - probably sending them to their deaths. But, as he approached the bridge, he had apparently forgotten that he was driving a double-decker. If he had remembered, he would have taken a different route.

The risk of killing someone could hardly have been more obvious to the reasonable man who stopped to think. The DPP did not, however, charge the bus driver with reckless driving, but only with the much less serious offence of driving without due care and attention. Yet this was surely as plain an example of Caldwell recklessness as it would be possible to find.

Compare that unfortunate driver, however, with another, hypothetical, driver, who, aware that he is approaching a low bridge, muses to himself. 'Am I driving a double-decker today? I really can't remember. Well, we'll see in a moment,' and keeps his foot on the accelerator. Is there not all the difference in the world between the culpability of the real and the hypothetical driver?

Shortly afterwards there occurred the case of Fight-Lieutenant Lawrence[21] of our Royal Air Force who, while flying his Phantom aircraft on an exercise over Germany, fired a sidewinder missile and shot down one of our own Jaguar aircraft. When he fired the missile Lawrence had completely forgotten that his aircraft was armed with live weapons. He had taken part in many similar exercises in unarmed aircraft and, like the bus-driver, he was behaving in a way to which

[20]The Times, 7/10/82, 2/11/82 and 13/1/83.

[21]The Times, 13/1/83.

he had become accustomed. It is a common condition, known to psychologists as 'environmental capture.' Of course Lawrence was very much to blame; but compare his culpability with that of a hypothetical pilot, who asks his co-pilot, 'Fred, have we got live ones on today?' and Fred replies, 'I really don't know' whereupon the pilot, with the Jaguar nicely in his sight, responds, 'We'll see in a moment,' and puts his finger on the button. That, unlike the act of the real pilot, would be a wicked act.

I suggest that there is a vital difference in responsibility between the person who is aware of the risk and deliberately decides to run it; and the person who is unaware of the risk, even if we think he ought to have been aware of it. The one chooses to run the risk; the other does not.

The effect of all this is that English law currently recognises two types of recklessness - subjective or advertent, 'Cunningham' recklessness (because this was confirmed by the House of Lords in *Parmenter*[22]) which applies in offences against the person, and objective or inadvertent, 'Caldwell' recklessness which applies in criminal damage cases. But the sphere of operation of Caldwell recklessness has been gradually diminished. It applied at first to the crime of reckless driving - that was the decision in *Lawrence*. Reckless driving has since been abolished and replaced by dangerous driving, an offence expressly defined as one of negligence. Caldwell recklessness was also at first applied by the courts to manslaughter, but they have had second thoughts[23] about this and it no longer does so. Caldwell recklessness has also been rejected in rape.[24] Recklessness whether the victim is consenting is a sufficient *mens rea* for rape but it requires actual awareness by the accused that his victim may not be consenting to his act. He is guilty of rape only if he knows he is taking a risk that his

[22] [1992] 1 AC 699, HL.

[23] *Adomoko* [1995] 1 AC 171, HL.

[24] *Satnam* (1983) 78 Cr App R 149.

partner may not be consenting, and, in fact, she is not. Caldwell recklessness, however, remains firmly established as the test in criminal damage offences and may apply to some other statutory offences. The relative spheres of operation of the two kinds of recklessness is a continuing source of uncertainty and anomaly.

You will have had no difficulty in discerning that I am a subjectivist. Sir Rupert Cross once remarked that some of his academic colleagues were, as he put it, 'in total bondage to the subjectivist bug.' He named no names but his remark was certainly aimed at his two academic colleagues on the Criminal Law Revision Committee - Glanville Williams and Glanville's disciple, myself. Ms Celia Wells wrote[25] in 1982, that Smith & Hogan's *Criminal Law* 'subscribes almost evangellically to the subjectivist approach.'

However, even the most bug-ridden subjectivist does not argue that objective standards have no part to play. On the contrary, the starting point in determining criminal liability is that there has been a failure to comply with an objective standard of conduct, an *actus reus*. A defendant must be proved to have done something objectively wrong. A person is not to be judged reckless unless he has taken an unreasonable risk - one that a prudent, reasonable man would not take. It is the business of the law to lay down standards. In the example of self-defence, the defendant is to be judged on the facts, as he honestly believed them to be, whether reasonably or not; but he may use only such force as is reasonable in those supposed circumstances. It is not for him to decide what degree of force is permissible[26] in the circumstances he believes to exist. The law, as represented by the court or jury, not the defendant, determines what degree of force is reasonable.

---

[25] [1982] Crim LR 209.

[26] *Owino* (1995) Cr App R 128. "explaining" *Scarlett* (1994) 98 Cr App R 290. In *DPP* v *Braun*, The Times, October 26, 1998, the Divisional Court said that the question whether force used in self-defence was reasonable "should be assessed in an objective sense as to whether it was reasonably necessary in the circumstances as the defendant subjectively believed them to be."

Most subjectivists, including me, would also agree that negligence is properly recognised as a sufficient fault where the public interest demands criminal penalties to deter particularly dangerous conduct, as in the offence of dangerous driving. The motorist fails to comply with the standard of care required by the law at his peril. Manslaughter is a crime which may be committed recklessly - we now know, as *Woollin*'s case illustrates, that even a high degree of recklessness whether death or grievous bodily harm be caused is not a sufficient *mens rea* for murder, but, if death is caused by such recklesness, it is obviously manslaughter. Such is the respect of the sanctity of human life that the law does not stop there. A person who did not foresee any harm whatever may be guilty of manslaughter in English law if he causes death by a high degree of negligence - gross negligence. The law recognises the fact that there are degrees of negligence, so that a higher degree must be proved for manslaughter than for dangerous driving and other statutory offences. It was held in *Adomoko*[27] that it is for the jury to say whether the negligence was bad enough to constitute that offence. Adomoko was an anaesthetist who was assisting at an operation. A tube carrying oxygen from the ventilator to the patient became disconnected. He failed to notice for six minutes and the patient died. Adomoko was unaware of the risk to the patient's life. But the expert medical evidence was that this was a gross dereliction of care. It was held that he was rightly convicted of manslaughter. This decision has been heavily criticised by some of my academic colleagues, particularly on the ground that it leaves to the jury a question of law, but, if we are to have an offence of homicide by negligence - an offence which may be committed in an infinite variety of circumstances - I see no way of determining what degree of negligence is sufficient, except leaving it to the jury to say whether it was bad enough to constitute that offence. Whether grossly negligent killing ought to be the same offence as a reckless killing - as is at present the case - is another matter. I agree with the Law Commission proposal[28] that there should be two offences, reckless homicide attracting

---

[27] [1995] 1 AC 1, HL.

[28] Law Com No. 237 (1996).

a higher penalty than grossly negligent killing, thus recognising that the culpability of the person who deliberately takes a risk is materially different from that of the person who fails to foresee the risk, even when he most certainly ought to do so.

If, as Celia Wells suggested, I am an evangelist, then you have been listening, patiently, to the gospel according to Smith. I trust you have found it of some interest and, perhaps, not irrelevant to the problems of your own criminal law.

Sir John Smith*

* CBE, QC, LLD, FBA
Emeritus Professor
University of Nottingham