

‘Critically consider the relative merits of subjective and objective tests of recklessness within the criminal law. What are the strengths and weaknesses of each approach? Which version should the criminal law use?’

This essay will discuss the efficiency of subjective and objective tests of ‘mens rea’, with relevant application to cases in which a defendant is considered to have acted recklessly and, further, whether these approaches are a sufficient means of measuring a defendant’s level of guilt by looking at issues that potentially arise from such and, finally, which of these approaches is most apt for judging a defendant’s criminal liability.

A primary division of mens rea is ‘intention’ and ‘recklessness’. These are distinguished between a defendant that both intended their actions and the prohibited consequence, from a defendant that foresaw a level of said risk occurring, perhaps not the particular consequence that occurred, and continued to act regardless. The decision as to whether a subjective or objective test should be applied to a defendant that was said to have foresaw the risk of their reckless behaviour has been subject to much debate. On one hand, a defendant’s personal characteristics could be considered to have negated their ability to foresee said consequences occurring, for example, due to impaired mental capacity. This would allow the courts to make exceptions from these defendants, against those of sound perception that foresaw a risk. In contrast, an objective test is far easier to enforce. It allows the courts to measure a defendant’s culpability against general standards of human behaviour. By looking, objectively, at the actions or surrounding elements of said behaviour, it may be found a reasonable man would have foreseen a prohibited consequence occurring.

There are various definitions of the term ‘recklessness’, one of which is ‘advertent recklessness’, that focuses primarily on the existence of mens rea in the form of D’s awareness of ‘*the risk of the prohibited consequence occurring*’.¹ A key case that defined this is that of *Cunningham*² in which the definition of the term ‘malicious’ harboured elements of both intention and recklessness as to mens rea. Here, it was held that recklessness involves a defendant that ‘*has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it*’.³ This definition has provided three vital elements required of advertent recklessness, the first of which, requires D to have been aware of a risk, and thus, considered reckless as to the specific result, satisfying the requirement of mens rea for

¹ Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP, 2013) ch 5.4; page 176

² [1957] 2 QB 396

³ *Vide* footnote 2