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A comparative legal analysis of the fault elements for criminal responsibility in the prosecution of crimes in Nigeria

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Abstract
As it is generally known in criminal law, intention, recklessness, strict liability and negligence are forms of mental elements that fall under mens rea for criminal liability. One insists that negligence is a fault, and when qualified as gross or inadvertent negligence, it is a fault in the standard we expect. However, intention and negligence stand to each other as two poles in opposite direction, and between them is recklessness. Some authors have postulated that one who causes death recklessly falls between two extremes of liability. Some of these authors asserts that he/she is less culpable than the intentional killer but more culpable than a merely negligent agent. It is argued by this writer that both the intentional and the reckless agent's behaviours are in relation to a specified harm, which they choose to bring about. In examining the culpability level of one who acted with intention, recklessly and negligently, this paper makes a comparative analysis of the fault elements for criminal responsibility in Nigeria with some cases in some common law jurisdictions. The comparative analysis should help to improve the Nigerian criminal jurisprudence.

Keywords: culpability, negligent, recklessness, intention, strict-liability, resonable

1. Introduction

The principle that a man is not criminally liable for his conduct unless the proscribed state of mind is also present is frequently stated in the form of a Latin maxim: *actus no facit reum nisi mens sit rea* -- "an act does not make a man guilty of a crime, unless his mind be also guilty." Thus, it is not the *actus* that is *reus* - *not* the act that is the thing, but the man and his mind respectively. The mental element in crime is traditionally described as the *mens rea* and other elements (over performance) as *actus reus*. The *mens rea* is the mental fault; the agent must have willed the event which occurred as a result of his *actus reus*. This 'will' is the *mens rea* – the intent which is, in other words, called the mental element. But where the event or result occurred independently of the exercise of the will of the accused [1], the mental element is thereby vitiated and the accused becomes free and not liable or responsible for his alleged criminal act or omission

A person is not generally criminally liable unless he possesses the proscribed state of mind. '*Mens rea'* is used to designate the collection of mental elements in crime (intention, recklessness and negligence) that bear on criminal responsibility. The claim that is proffered in the doctrine of *mens rea* is that liability to conviction for serious crimes is made dependent not only on the offender having done those outward acts which the law forbids, but on his having done them in a certain frame of mind or with a certain will. The Supreme Court of Nigeria has held in *Shodiya v the State* [2] that "gross negligence or strong negligence is always evidence that a man is not acting honestly." However not every carelessness or negligence would constitute criminal intent. Thus, recklessness or negligence may constitute a particular frame of mind, which is *mens rea* [3]. Since many states of mind are grouped under *mens rea*, it has to be noted that *mens rea* is not a homogeneous term intended to impose a spurious unity on mental antecedents in crimes. This is part of Hart's claim in his earliest article, *The Ascription of Responsibility and Rights*, that *mens rea* does not designate the presence or absence of one single element. In *DPP v Morgan* [4], Lord Hailsham reiterated the point that *mens rea* in criminal liability is not a homogeneous concept, when he declares:

The beginning of wisdom in all '*mens rea*' cases, as was pointed out by Stephen J in *R v Tolson* [5], is that 'mens rea' means a number of quite different things in relation to different crimes. Sometimes it means an intention, e.g. in murder, 'to kill or to inflict really serious injury.' Sometimes it means a state of mind or knowledge, e.g. in receiving or handling goods 'knowing them to be stolen.' Sometimes it means both an intention and a state of mind, e.g. 'dishonestly and without a claim of right made in good faith with intent permanently to deprive the owner thereof.' Sometimes it forms part of the essential ingredients of the crime without proof of which the prosecution, as it were, withers on the bough. Sometimes it is a matter, of which, though the 'probative' burden may be on the crown, normally the 'evidential' burden may usually (though not always) rest on the defence, e.g., 'self-defence' and 'provocation' in murder, though it must be noted that if there is material making the issue a live one, the matter must be left to the jury even if the defence do not raise it. In statutory offences the range is even wider since, owing to the difficulty of proving a negative, Parliament quite often expressly puts the burden on the defendant to negate the

[1] Section 24 of the Nigerian Criminal Code Act, 1990.
[2] (2013) LPELR-20717 (SC).
[3] (1992) 3 NWLR, 457 at 461.
[4] (1975) 2 All ER, 347.
[6] (1889) 23 QBD at 185.

guilty state [6].

Courts have always resisted any line of reasoning that ignores the multiple characters of grounds for determining criminal responsibility. *Mens rea* means different things in different crimes.

Nigerian courts have reflected this character of *mens rea* in various judicial decisions. In *Akpan v State* [7], the Supreme Court held, affirming conviction of murder, that a confessional statement by an accused person is inadmissible if it is direct and positive and relates to his own acts, knowledge or intentions, stating or suggesting the inference that he committed the crime charged. This decision relates to a clear intention to kill; but where the character of the *mens rea* is in the form of knowledge, as in *Young v COP* [8], the Appeal Court observed and held that the place and way a stolen article or thing is kept may be evidence upon which an inference may be drawn that an accused knew or had reason to believe the alleged motor vehicle was stolen.

The garage in which the alleged motor vehicle was parked was dark; its door was closed and blocked with another motor vehicle. The court held that "the reasonable inference which may be drawn from the facts is that the appellant knew or had reason to believe that the motor vehicle was stolen." *Mens rea* may exist in the form or character of intention and state of mind, that is, acting dishonestly and without claiming of right. In *Regina v Mudashiru Sule* [9], an Ibadan High Court found that the "pretence was false to the knowledge of the accused," that the money had been paid to the accused by reason thereof the accused had made false representations with the intention of obtaining the money by deceit and "with knowledge that he had no right to it."

The accused was convicted of obtaining money by false pretences under Sections 418 and 419 of Nigerian CC Cap 42. These sections are the same with the provisions of sections 418 and 419 of Nigeria CCA Cap 77. *Mens rea* could form part of an essential ingredient of an offence. Section 220 (b) Penal Code Law Cap 89 Laws of Northern Nigeria (1963) provides that "whoever causes death by doing an act with knowledge that he is likely by such act to cause death" commits the offence of culpable homicide. Section 220 of the just quoted code is similar to Section 299 of the Pakistan Penal Code and Section 246 of the Sudan Penal Code. In *Effiong v State* [10], the High Court of Borno State sitting at Bama convicted the prisoner under Section 220 and sentenced him to death by hanging under Section 221 (b) of Penal Code for causing the death of Isaac Onoli on or about 23-06-82 at the Tandari Ward by stabbing the deceased on the stomach with knowledge that death would be the probable consequence of his act. An appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court, the dismissal was upheld and conviction affirmed. *Mens rea* components in crime include intention, recklessness and negligence.

2. Intention

It is to be recalled that between 1960 and 1986, in England, one of the mental elements of the crime of murder, namely, 'intention' was examined in a series of cases. In *DPP v Smith*, the House of Lords, reversing the decision of the Court of Appeal set an objective test for intention: "Not what the accused in fact contemplated as the probable result or whether he ever contemplated it at all, but what the ordinary man would, in all the circumstances of the case, have contemplated as the natural and probable result [11]. It was not long before the Parliament realised that there was something wrong with the ruling in *DPP v Smith.* Thus in the Criminal Justice Act 1967 s. 8, Parliament, intending to overrule *DPP v Smith*, laid down a general principle that the test of intention and foresight in the criminal law should be subjective (what did the defendant actually intend or foresee), and not objective (what would a reasonable person in his situation have foreseen).

In the minds of some judges, the 1967 Act did not clear the doubt as to what constituted the mental element for murder. In *DPP v Hyam* [12], Mrs Hyam (the appellant) intending to frighten out B, her rival for the affections of a man, poured petrol through B's letterbox and then ignited it by the means of a newspaper and a match, causing the death of two of B's children. It was held by a majority that the jury had been rightly directed to conclude that Mrs Hyam was guilty of murder if she knew it was highly probable that her act would cause serious bodily harm. One recalls that this kind of reasoning was the one overruled by the 1967 Criminal Justice Act.

The two dissenting judges in *Hyam* thought that foresight of probable consequence was not enough to constitute murder, that an intention to endanger life was required. In the authoritative cases (of *Moloney* (1985) AC 905, *Hancock* (1986) AC 455, and *Nedrick* (1986) AC 3, (1986), All ER, 1), *Hyam* was 'overruled.' It was held that foresight of probable consequences was not intention. It was rather established that if the jury was satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention to result from his voluntary act then that was a fact from which they may infer that the defendant intended to kill or do serious bodily harm, though he may not have had any desire to achieve the result. In *R v Moloney* [13] however, the view taken by the majority in *Hyam* was said to be overturned' and the House of Lords 'seemed' to have vindicated the view that Lord Hailsham was arguing for in *Hyam*. Thus, Lord Bridge of Harwich argues that the notion of 'intent' employed in *Hyam* in directing the jury was unsatisfactory. He suggests:

The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding [14].

Lord Bridge thinks that foresight of consequence is not a definition of intention in the substantive law but has relevance to the law of evidence, when he declares:

I am firmly of the opinion that foresight of consequence, as an element bearing on the issue of intention in murder, or

[6] Ibid at 361
[7] (1992) 6 NWLR, 439 at 444.
[8] (1990) 5 NWLR 103 at 106.
[9] (1959) NWLR, 25.
[10] (1998) 59 LRCN, 3960 at 3970.
[11] (1960) AC, 290.
[12] (1975) AC 55.
[13] (1985) AC, 905.
[14] *R v Moloney* (1985) A. C. 905 at 926.

indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence. Here again I am happy to find myself aligned with my noble and learned friend, Lord Hailsham of St. Marylebone L. C., in *Reg. v. Hyam* (1975) A. C. 55, where he said, at p. 65: 'Knowledge or foresight is at the best material which entitles or compels a jury to draw the necessary inference as to intention.' A rule of evidence which judges for more than a century found of the utmost utility in directing juries was expressed in the maxim: 'A man is presumed to intend the natural and probable consequences of his acts [15].

Delivering the decision in *Moloney*, Lord Bridge gives the following guidelines to be used by the jury in order to infer if a consequence was intended:

In rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence [16].

So, the jury has to look for facts that will help the court infer that a particular act has been intended. Foresight of probable consequence, in the court's assessment, is then not intention but is relevant to evidence as to whether one intended one's act. However, Lord Bridge's explanation does not seem to repudiate the view that intention is foresight of probable consequence, which was wrongly held in *Hyam*. If after consideration, with reference to foresight of consequences, the jury answer yes to the two questions proposed by Lord Bridge, then according to Lord Bridge, the proper inference to be drawn is that such a foresight constitutes intention. An analysis of Lord Bridge's guidelines would really reveal that Lord Bridge does not seem to have brought the law away from the decision held in *Hyam*.

In any case, in *R v Hancock and Shankland* [17] it was acknowledged that *Moloney* was authoritative on what intention is, and further that Lord Bridge clarified the law. Lord Scarman agrees with the Court of Appeal's decision that probability of a consequence is a factor of sufficient importance to which the attention of the jury must specifically be drawn. He says:

The best guidance that can be given to a trial judge is to stick to his traditional function, i. e., to limit his direction to the application of rule (or rules) of law, to emphasise the incidence and burden of proof, to remind the jury that they are the judges of fact, and against that background of law to discuss the particular questions of fact which the jury have to decide, indicating the inferences which they may draw if they think it proper from the facts which they have established. Should not appellate guidance emphasise the importance of particular facts and avoid generalisation? This is a question to be considered. The facts of this case would appear to indicate an affirmative answer [18].

On the other hand, it is to be noted that in Nigeria the Justices of the Supreme Court do not sit with the jury. In the High Court, the judge makes the finding of fact and applies the rule or law; he does not rely on the jury to make finding or judgment of facts.

In the case of *Alhaji Rauph O. Gaji v The State*, the trial judge of court of first instance whose judgement was affirmed on appeal by the Supreme Court of Nigeria had this to say: "… but the offence proved is greater than that in section 225 of the Penal Code because death was a likely consequence of the accused's acts and in all circumstances I cannot doubt that a man of the accused's intellect and background must have known it. I find the accused not guilty of the offence charged but guilty of the offence of culpable homicide under Section 220(b) Penal Code …"

It is a trite law in Nigeria that a man intends the probable, natural and reasonable consequences of his act. Hence, when a man raped a 13 year old girl who bled to death as a result of injuries to her private parts caused by the act of intercourse, he was charged with murder but convicted of manslaughter [19] on the ground that medical evidence showed that it was usual in Nigeria for a 13 year old girl to have intercourse and death results that death does not result; death is not a natural consequence. In all these cases, the test has been that of the standard of a reasonable man, and objective test, not subject or standard of the person of the accused even though in Alhaji Gaji's case, the court seemed to import the standard of the accused when it referred to the accused's intellect and background.

It is noted that this test is not particular to the accused but applied objectively to persons of his standard and background. However, in *R v Okoni* [20], the court did not make specific reference to the education and background of the accused who burnt a woman to death when they set a house in which they were cooking on fire. The court said that "the act was of such a nature as to be likely to endanger human life" and "this is implicit in the finding that the fatal burning of Yesago, an inmate of the dwelling-house, was a reasonable or a probable consequence of setting fire to the house." The approach of the 'reasonable man' was adopted in the case of *Lama Kumbin v Bauchi Native Authority* [21], where Reed, Ag. S. P. J., delivering the judgement of the court in a charge of culpable homicide punishable with death, said:

In applying the 'reasonable man' test the court must take into consideration the background, education and worldly (sic) knowledge of the individual; a person from remote background or part of the country might well differ in this respect from an educated person. After the court has given due consideration to the person's way of life and ask himself if such a person must have known that death was something which might well follow the act – that he could not have been surprised that death followed the act. If the answer is in the affirmative the consequence of death is 'likely' and the person is guilty of culpable homicide.

The provisions of the Sudan Penal Code are similar to those of the Penal Code of Northern Nigeria. The court in the Sudan has a similar approach to this reasonable man's test. On *Sudan Government v Kenyi Jelo* [22]. Abu Rannat C J says: "When a reasonable man says that a certain consequence is 'probable' he will be surprised if it does not

[15] Ibid., at 928.
[16] Ibid., at 929.
[17] (1986) AC, 455 at 468.
[18] Ibid., at 469.
[19] R v Nameri (1951) 20 NLR, 6.
[20] (1950) 13 WACA, 30.
[21] (1963) NNLR, 49.
[22] (1960) SLJR, 60.

happen. But if he says that a certain consequence is 'likely' he is not surprised if it does happen and surprised if does not." His Lordship, therefore, thought that that in the particular circumstances of this case that the accused can be taken to have known that death was a 'likely' consequence of his act. One can suggest that the Jelo case favoured the application of the subjective test but could be applied objectively within the class of people to which the accused belonged.

3. Negligence

The understanding of 'negligence' revolves around the presence of capacity. A negligent person has the capacity to conform to the law. He is held responsible for the capacity he failed to use or exercise when he should have. What is needed for responsibility is capacity: that the person was in control and could have acted differently. The absence of capacity negates responsibility. The negligent person is blamed for not being careful; otherwise, he would not have acted negligently. Hart affirms:

After all, a hundred times a day person are blamed outside the law courts for not being more careful, for being inattentive and not stopping to think; in particular cases, their history or mental or physical examination may show that they could not have done what they omitted to do. In such cases they are not responsible; but *if* anyone is *ever* responsible for *anything*, there is no general reason why men should not be responsible for such omissions to think, or consider the situation and its dangers before acting [23].

The morale for including negligence in *mens rea*, according to Hart, rests on the conviction that a grossly negligent person could be held responsible for not taking some elementary precautions, though he may not have acted deliberately [24]. There is a standard of conduct the negligent person is expected to meet, a standard he failed to meet (although he had the capacity to do so) because he had been culpably careless [25]. The Law Commission says: "A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise [26]. Drafters of the American Penal Code proposed:

A person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failures to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care a reasonable person would observe in the actor's situation [27].

Hart argues for the responsibility of a negligent person on the basis of a certain objective standard based on our common-sense notion of reasonableness, which is approximated in the legal sphere. We expect normal human beings to behave in certain ways. There are certain expectations regarding people's conduct. Very often it is said that a reasonable man is supposed to behave in such and such a way. Surely, we blame people when they have acted negligently. But the issue Hart does not seem to raise is whether it is morally justified to elevate the common-sense expression of moral blame for the negligent conduct to the level of criminal liability [28]. Some would think that it is morally wrong to punish someone for ordinary carelessness.

As Clarkson and Keating indicate, "negligence is not widely employed as a basis of criminal liability in English law, the most widely notable exception being careless driving contrary to the Road Traffic Act 1988 [29]. So, it is not every time that we blame and punish someone for a negligent act. However, a simple lack of care or mere inadvertence, which may create civil liability, is not sufficient to attract criminal responsibility. Judges in England have tried epithets like 'culpable,' 'criminal,' 'wicked,' 'clear,' 'gross,' 'complete,' to determine the degree of negligence which amounts to criminality. The case of *Bateman* [30] has prescribed the standard thus: "… whatever epithet be used and whether epithet be used or not in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard as to amount to a crime against the state and conduct deserving punishment." Exceptionally, ordinary negligence forms part of the *mens rea* of some statutory offences as in Road Traffic Act 1988 [31]. In cases of gross negligence, the law holds someone liable for negligent conduct. In *R V. Prentice*, Lord Taylor explained:

Without purporting to give an exhaustive definition, we consider proof of any of the following states of mind in the defendant may properly lead a jury to make a finding of gross negligence: (a) indifference to an obvious risk of injury to health; (b) actual foresight of the risk coupled with the determination nevertheless to run it; (c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction; (d) inattention or failure to advert to a serious risk which goes beyond 'mere inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address [32].

In any case, a critical reading of the states of mind for negligence will show that Lord Taylor has merged the state of mind of a reckless person -- unjustifiable advertence to an obvious risk -- with that of a negligent person. In fact, the tendency to equate recklessness with negligence was already present in *Lawrence*, where it was held, in relation to reckless driving, that the defendant did not care whether any risk existed or not. Such a state of mind includes a situation where he could not care less or manifests an attitude of indifference [33]. In *Adomako*, the House of Lords upheld the view that there is manslaughter by gross negligence. It was held that everyone is under a duty not to do acts endangering the lives of others [34].

The Nigerian judicial attitude towards gross negligence is to make criminal of those found wanting. It was held in *R v*

[23] Ibid., 151-152.
[24] Ibid., 147.
[25] Ibid., 152-153.
[26] Law Commission, Working Paper No. 31, 57.
[27] American Law Institute, Model Penal Code, Proposed Official Draft, 1962, s. 202(2)(d). See also Clarkson and Keating, *Criminal Law: Texts and Materials*, 188-189.
[28] American Law Institute, Model Penal Code, Proposed Official Draft, 1962, s. 202(2)(d). See also Clarkson and Keating, *Criminal Law: Texts and Materials*, 188-189.
[29] Ibid., 178.
[30] (1925) 133 LT 730 at 732.
[31] Section 3 of the Road Traffic Act 1972.
[32] R v Prentice (1994) 98 Cr App. R., 262.
[33] (1982) AC, 510.
[34] (1994) 2 All ER, 79.

Omenihu [35] that in every case of medical negligence, reckless conduct must be proved. However, it has been argued that under Section 303 of the Criminal Code Act, a lack of reasonable care is the degree of negligence required and is less than what is required by English Law. The West African Court of Appeal rejected this argument and held that death resulting from mere negligence may be an accident for which there is no criminal liability as this is excused under Section 306 [36]. Furthermore, it was held that negligence, which may result in manslaughter, must be such criminal negligence as is required by English law.

In relation to motor drivers, it has been held that to drive a car with defective steering and useless brakes and to mount a pavement without apparent reason killing a girl amounted to a reckless disregard for life and safety of others; the driver was found guilty of manslaughter [37]. In *R v Adedoyin*,38 it was held that to drive fast and in a zigzag form along the road in a building area by night and at a time pedestrians and other vehicles are all over the place shows complete and criminal disregard for life and the safety of others, thus one is guilty of gross negligence.

4. Strict liability

Liability is said to be 'strict' because the prosecution is relieved of the necessity of proving *mens rea*. In *Woodrow* [39] which is regarded as the first modern case of strict liability, for example, the defendant was accused of selling adulterated milk. It was sufficient to prove that the milk was adulterated and that he was selling it; his mistake that he had thought the milk was pure was irrelevant. But is punishment in such a case justified?

Some have tried to justify strict liability on utilitarian grounds by claiming that the interests of the public require that people engaged in certain forms of conduct exercise the highest possible standards of care. This, on utilitarian terms, is the greater good to be achieved by occasionally convicting someone who may have taken all reasonable care to abide by the law and could not be achieved to the same extent, if, for example, the defence of reasonable mistake were available. In the *United States v Dotterweiech* [40]. Dotterweich, the president of a pharmaceutical company, was convicted of introducing into interstate commerce drugs that were disbanded. Despite his lack of knowledge of this, his conviction was upheld in an appeal. The court rules "the purposes of this legislation thus touch phases of lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." In strict liability legislations, penalties serve as effective means of regulation.

Such legislations dispense with the conventional requirement for criminal conduct; that is, an awareness of some wrongdoing. Thus, in the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. Also, the imposition of strict liability may be to encourage people engaged in certain activities, particularly those affecting public welfare, to take extra care in not infringing the law [41].

5. Recklessness

Recklessness is a component of *mens rea*. A vast number of crimes in English law can be committed intentionally or recklessly. Indeed, the Draft Criminal Code (1989), proposes that recklessness should be the basic fault element for all offences (unless otherwise stated). For all these crimes the distinction between recklessness and negligence is unimportant.

In articulating what recklessness is in English law, judges have vacillated between understanding recklessness as "gross negligence," (as an objective major deviation from the standards of the reasonable person), and/or whether it should be limited to cases where the defendant subjectively realised that there was a possibility of the consequences occurring (or the circumstances existing) but carried on recklessly. In other words, two species of recklessness have come to be noted, popularly called Cunningham recklessness and Caldwell/Lawrence recklessness.

(i)*Cunningham Recklessness - The Subjective test*: In *R v Cunningham* [42] in the course of stealing money from a gas meter, the defendant damaged a gas pipe causing gas to seep through a wall into an adjourning flat where people were residing. The defendant was charged with maliciously administering a noxious substance (s.23 Offences against the Person Act 1861). The judge directed the jury that they could convict if they found that the defendant's actions were "malicious in the sense of being wicked." The defendant successfully appealed to the Court of Appeal.

In this case Byrne J reasoned that 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 an actual intention to do the particular kind of harm that in fact was done or interpreted as actual intention or recklessness as to the occurrence of harm. The accused was reckless in the sense that he had foreseen that the particular kind of harm might be done and yet had gone on to take the risk of it. This appeal was taken as the accurate statement of the law. It is held that the word 'maliciously' in a statutory crime postulates foresight of the consequence; it is incorrect to say that the word "malicious" in a statutory offence merely means wicked; hence, the appeal was allowed and the conviction quashed.

In *Cunningham*, the Court of Criminal Appeal interpreted the word 'malicious,' a word used in older statutes embracing both intention and recklessness as requiring that the defendant adverted to the risk of harm, which might be caused by his actions. If he had not done this, he would not be liable. This is a subjective test. By the late 1970s, following the leading decision of *Cunningham*, the subjective meaning of recklessness had clearly been approved. Recklessness entailed the conscious running of an unjustifiable risk.

(ii) Caldwell and Lawrence Recklessness - The Objective test: In *R v Caldwell* [43], the House of Lords had to consider the meaning of the term 'Reckless in the Criminal Damage Act 1971, where they re-affirmed the view that recklessness included conscious risk taking in *Cunningham* sense; but

[35] (1963) 7 ERNLR, 134.
[36] R v Akereke (1941) 7 WACA, 56. However Okonkwo and Nash write that the finding of criminal negligence in this case was reversed by the Privy Council. See footnote on page 254 of their book – *Criminal Law in Nigeria*, 2d.
[37] R v Kojo (1958) LLR, 69.
[38] (1956) WNLR, 69.
[39] (1846) 15 B ER, 907.
[40] 320 (1943) 277 at 284-285.
[41] Okonkwo, C. O & Nash, *Criminal Law in Nigeria* 2d., 61.
[42] (1957) 2 QB, 396.
[43] (1982) AC, 341.

they went further. The facts of the case were: following dismissal from his job at a hotel, the defendant became drunk and set fire to the hotel. There were people resident in the hotel at the time, but the defendant said that because he was drunk, he had given no thought to them or the risk of harm to which his actions might be subjecting them. He was charged, *inter alia* under Section 1 (2) Criminal Damage Act 1971. The trial judge directed the jury that his self-induced intoxication meant that he had no defence to this charge, involving as it did an allegation that he was reckless as to whether life would be endangered by his actions. The Court of Appeal allowed his appeal. The House of Lords had to consider the nature of recklessness under the Criminal Damage Act 1971 and the effect of intoxication or charges under the Act.

6. Conclusion

Intention, strict liability, recklessness and negligence are forms of mental elements that fall under *mens rea*. Intention and negligence stand to each other as two poles in opposite direction. And between them is recklessness. As R. A. Duff says, one who causes death recklessly falls between these two extremes of liability. He is less culpable than the intentional killer, more culpable than a merely negligent agent [44]. Both the intentional and the reckless agent act in relation to a specified harm, which they choose to bring about. But recklessness is a lesser specie of fault than intention: whereas the reckless agent chooses only to take the risk of causing harm, the intentional agent chooses actually to cause harm. This makes the difference in the character of their choices; hence, the reckless agent is less culpable than the intentional agent. On the other hand, the negligent agent (if is culpable at all) is taken to be less culpable than the reckless agent because he/she is unaware of the risk he/she creates; he/she does not choose either to cause harm or to risk causing it [45].

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[45] Ibid., 154.