4

Omissions

4.1 Introduction

The criminal sanction is, as we have noted, the most serious censure the State can impose on an individual and the imposition of the criminal sanction for doing nothing therefore sounds bizarre. In this chapter we examine the circumstances in which a person can be held criminally liable for not acting as well as for acting. The defendant’s failure to act might not always be so easily described as ‘doing nothing’, and there are many situations in which the imposition of the criminal sanction is appropriate. The difficulties in this area of law are numerous and complex. They include:

- drawing distinctions between positive acts causing a prohibited result and failures to prevent a prohibited result;
- identifying circumstances in which it is appropriate to place a person under a duty to act on pain of criminal sanction for failure to do so; and
- establishing how D’s failure to act can have caused a prohibited result.

At common law, criminal liability for pure omissions is exceptional. The generally accepted definitions of most offences include a verb like ‘kill’, ‘assault’, ‘damage’ or ‘take’ which (at first sight, at least) requires an action of some kind. There are exceptions in Dytham [1979] 3 All ER 641, a police officer, D, was on duty at 1 am when he saw a man, V, being ejected from a nightclub and being kicked and beaten by a number of bouncers. D took no steps to intervene. V died. D was charged with misconduct whilst acting as an officer of justice in that he deliberately failed to carry out his duties as a police constable by wilfully omitting to take any steps to preserve the peace or to protect V or to arrest or otherwise bring to justice the assailants. The conviction was upheld. (On misconduct in public office see more recently A-G’s Reference (No 3 of 2003) [2004] EWCA Crim 868.)

In contrast to the position at common law, many statutes make it a specific offence to omit to do something, for example, a motorist who fails to give his name and address after an accident or a company which fails to make a prescribed return under the relevant Companies Acts may be guilty of an offence. These offences, although they provide that D is liable for a criminal offence by omission are uncontroversial. Most of them are of a regulatory nature. They seem to respect the principles of fair labelling and fair warning since the conviction is explicitly for the failure to act not for its consequences. Liability for omissions (though exceptional) is not limited to crimes expressly defined by statute as omission offences.

The more controversial question is whether, and if so how, the criminal law should impose liability for omissions in relation to general offences such as murder, manslaughter and assault. The debate is a long-standing one, raising some fundamental questions about the extent to which the criminal law should infringe upon the autonomy of the individual.
4.2 General criminal liability for omissions

Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’
(1989) 105 LQR 424

Although the paradigm of criminal liability is a prohibition on the culpable doing of a certain act, all systems of criminal law seem to include offences of omission. Some will have been drafted expressly so as to penalise an omission, e.g. ‘failing to . . . ’, usually in the context of an undertaking or activity such as running a business or driving a motor vehicle. There may be other offences worded in a way which leaves open the possibility that they may be committed by omission as well as by acts. References to omissions not, of course, be taken to imply that we may be said to omit to do everything that we do not do each day. The term ‘omission’ is properly applied only to failure to do things which there is some kind of duty to do, or at least things which it is reasonable to expect a person to do (on the basis of some relationship or role).

What the scope of such duties should be is therefore a major question for the legislature when considering criminal law reform and for the courts when developing the common law or interpreting statutes. Two contrasting positions may be identified, the ‘conventional view’ and the ‘social responsibility view.’ They are not polar opposites, and in a practical sense the difference between them is a matter of the extent of the duties recognised. But the two views do proceed from different theoretical foundations, and these are important when considering reasons for and against particular instances of criminal liability for omissions. What it is proposed to call the ‘conventional view’—though one cannot be sure how settled or how prevalent it is—maintains that the criminal law should be reluctant to impose liability for omissions except in clear and serious cases. It is accepted that there are many activities in modern society which must, to some extent, be regulated by criminal offences, of which some will properly be offences of omission; it is also accepted that citizens have duties to support the collective good by paying taxes, etc., and that such duties may be reinforced by offences of omission; but the distinctive argument is that our duties towards other individuals should be confined to duties towards those for whom we have voluntarily undertaken some responsibility. Whereas we owe negative duties (e.g. not to kill or injure) to all people, it is right that we should owe positive duties (e.g. to render assistance, to support) only to a circumscribed group of people with whom there exists a special relationship. When supporters of the conventional view are pressed to justify this limitation, they might tend to argue that there is moral distinction between acts and omissions, maintaining that failure to perform an act with foreseen bad consequences is morally less bad than performing an act with the identical foreseen bad consequences.

... Adherents to the ‘social responsibility view’ would draw attention to the co-operative elements in social life, and would argue that it may be fair to place citizens under obligations to render assistance to other individuals in certain situations. This does not commit them to the view that the criminal law should enforce general duties to help all persons at all times. But it leads them to doubt whether the existence of some relationship or voluntary undertaking should be regarded as a precondition of criminal omissions liability. And it may also lead them to attack the argument that there is a general moral distinction between failing to perform an act with foreseen bad consequences and performing an act with identical bad consequences. All types of offence vary in their seriousness, of course, and even if it were true that on the whole omissions are less culpable than acts, it would not follow that omissions are less suitable for criminal prohibition than acts. On the ‘social responsibility view,’ then, there is no reason to accept the limitation imposed on omissions liability by the ‘conventional view.’

... The conventional view embodies a minimalist stance on criminal liability for omissions. It accepts that criminal law is the sharpest end of a legal structure which aims to ensure both that respect for social values is enforced and that essential social needs are provided for. It therefore accepts criminal liability for such omissions as non-payment of taxes. But it regards it as exceptional, and as requiring...
special justification, for the criminal law to impose duties to assist other individuals. Apart from special relationships (such as parent-child) and other voluntarily undertaken duties, there should be no criminally enforceable duties to assist others or to perform socially useful acts.

The main buttress is an argument from individual autonomy and liberty. Each person is regarded as an autonomous being, responsible for his or her own conduct. One aim of the law is to maximise individual liberty, so as to allow each individual to pursue a conception of the good life with as few constraints as possible. Constraints there must be, of course, in modern society: but freedom of action should be curtailed only so far as is necessary to restrain individuals from causing injury or loss to others. Setting these outer limits to freedom of action is, however, much more acceptable than requiring certain actions of a citizen, especially at times and in circumstances which may be inconvenient and may conflict with one’s pursuit of one’s personal goals. To impose a duty to do X at a certain time prevents the citizen from doing anything else at that time, whereas the conventional prohibitions of the criminal law leave the citizen free to do whatever else is wanted apart from the prohibited conduct. Moreover, the criminal law should recognise an individual’s choices rather than allowing liability to be governed by chance, and the obligation to assist someone in peril may be thrust upon a chance passer-by, who may well prefer not to become involved at all. If I am driving to a concert 50 miles away which is to feature a soloist who is being heard for the last time in this country, should I be obliged to stop and render assistance to the victims of a road accident in which I was not involved, at the risk of missing part or the whole of the concert? It is no argument to say that such a journey is always open to the possibility of chance happenings, such as engine failure in the car, a road blocked by a fallen tree, and so on, because in the case of the accident victims I am physically free to drive on to my destination whereas the other happenings amount to physical prevention, and render me incapable of reaching my destination on time. Thus it is no argument to say that all arrangements are vulnerable to chance, since the law can strive to minimise its effect and to keep individual choice as wide as possible. There is a choice whether to stop and offer assistance or to continue on my way to the concert, but an offence requiring a citizen to stop and render assistance would effectively foreclose that choice, coercing me to sacrifice the pursuit of my own interests in favour of alleviating the misfortunes of others to whom I have not voluntarily assumed any duty. By its ‘chance’ nature, the incidence of such a duty reduces the predictability of one’s obligations and impinges on the liberty to pursue one’s conception of the good life. On the conventional view, then, I deserve moral praise if I stop to assist the accident victims and thereby lose the opportunity to attend the (whole) concert, but it does not follow that I deserve blame if I do not stop. Praise may be appropriate for an act of ‘saintliness’ going beyond duty, whereas the duties themselves require only the basic conditions of peaceful co-existence. Stopping to help is part of the morality of aspiration, not the morality of duty.

In thus equating individual autonomy with negative liberty (i.e. liberty not to do certain acts), the conventional view rejects broad duties to others as paternalistic, and as failing to respect each individual’s right to self-determination. Any obligation to help others in peril begs the question of who is to decide what ‘peril’ is. Individuals may choose to engage in amateur boxing or in motor cycle racing, knowing of the high risk of injury but deciding that it is worth the risk in order to enjoy the excitement of the sport. Are these boxers or motor cyclists ‘in peril’? Few would extend a citizen’s obligation to intervene (where it exists) to these cases, probably because the individual’s decision to engage in the sport may be assumed to be an informed and settled decision. Self-determination, a value closely entwined with individual autonomy, would be impaired by the intervention of others. But what about the person who decides to commit suicide and jumps from a bridge into the River Thames? Should the passing citizen be obliged to alert the emergency services or, if the conditions are favourable, to mount a rescue attempt? The passing citizen is unlikely to know about the potential suicide’s state of mind. It is known that some attempts at suicide proceed from an unbalanced state of mind, and some are merely attempts to draw attention to the person’s problems rather than to relinquish life. On the conventional view these possibilities for paternalistic intervention should not be made the basis of any legal duty. If a citizen sees what appears to be an attempted suicide, the citizen’s freedom from
non-voluntary obligations together with the potential suicide’s right to self-determination are sufficient to conclude the case against a duty to intervene.

A third argument looks to the social consequences of the opposite, ‘social responsibility’ view. Its effect in requiring each citizen to offer assistance to others in peril might on the one hand reduce the autonomy and privacy of others in pursuing their own objectives and enjoyment, however dangerous it may appear to others, and might on the other hand make citizens into busybodies who believe that they must be constantly advising others to avoid risk and danger. In other words, it might be too intrusive and too onerous—both tendencies which go against the maximisation of liberty which is the keynote of the conventional view.

Fourthly, there is the argument that the ‘social responsibility’ view is unpractical because it would require each of us to avert or alleviate large numbers of situations which we know about. One strand of this argument calls attention to the problem of setting limits to the individuals duties on the social responsibility view: must I sell my car and my house, live at subsistence level and devote all my surplus earnings and time to preventing so many people from ‘sleeping rough’ in London, or to provide towards the relief of starvation in Africa? In what way do perils of these kinds differ materially from the accident victims or the person who jumps into the River Thames? A second strand of the argument is that the ‘social responsibility’ view may lead to the inculpation of large numbers of people, e.g. all the members of a crowd who witness someone being beaten up by others. It is excesses of this nature, in the depth and breadth of the obligations imposed, which are seen as sufficient to condemn the ‘social responsibility’ view as an unworkable moral or legal standard.

A fifth argument draws strength from the principle of legality: it maintains that citizens are so unaccustomed to thinking in terms of legal duties to act (as distinct from the well-known prohibitions) that it is unfair to impose such burdens except in circumstances which are well-defined and well-publicised. Protagonists might add that few provisions on general liability for omissions attain these standards, and that the obligation to take reasonable steps to assist a person in peril is much too uncertain to meet these standards. The social consequence is likely to be that ignorance of the law is a frequent occurrence, which cannot be good either for society or for the individuals concerned. Wide conceptions of social responsibility must therefore be rejected as a basis for criminal legislation: the conventional view, with its few well-known and voluntarily assumed duties to others, is the preferable approach.

The individualism of the conventional view doubted

The arguments for the conventional view may appear strong and practical, but they depend on a narrow, individualistic conception of human life which should be rejected as a basis for morality and (although this raises further issues) as a basis for criminal liability. Let us look again at the arguments, in turn.

The first argument, based on individual autonomy and freedom, is altogether too pure. To the extent that the conventional view relies on ‘social fact’ for some of its justifications, it is worth pointing out that rarely is individual autonomy promoted as a supreme value throughout a moral or legal system. For example, paternalistic considerations are taken to outweigh it when imposing a duty to wear a seat belt in the front seat of a car: this restricts individual liberty and self-determination, and it may be justified by reference to the known dangers of travelling without a seat-belt, combined with the relatively large benefit (in the social costs of health care) reaped from such a comparatively minor infringement of freedom of action. Systems of criminal law typically include a wide range of offences which impose duties to act, in relation to taxation, motoring and business activities . . .

The second and third arguments for the conventional view establish, however, that limits must be set to the obligations to others if the ideal of individual autonomy is not to be submerged beneath a welter of duties imposed on each person. The resolution of these conflicts of theory and practice is no easy matter, but the ‘social responsibility’ view would at least start from the assumption that duties to others are not necessarily alien to individual autonomy, and would have to reconcile this with the
The desirability of individuals safeguarding their own interests too. This dilemma, which also underlies the fourth argument for the conventional view, demonstrates the need for principled debate about the extent of social co-operation necessary to realise individual autonomy. Those who advocate ‘social responsibility’ bear the heavy burden of formulating defensible and workable criteria for the imposition of duties to act. Indeed, as the fifth argument showed, attention is also necessary to the promulgation of such rules. In so far as it is true that people do not consider that they have legal duties to assist others, any legislation to introduce such duties must be phrased as precisely as possible, and must be supported by a programme of education and information. These represent considerable challenges for the ‘social responsibility’ view on criminal liability for omissions.

…On the ‘social responsibility’ view there are arguments for imposing certain obligations on individuals as citizens. These arguments are not founded on a simple benefit/burden calculation, that whoever takes the benefits of living in a certain society must in fairness expect to have to submit to its burdens. Such an approach leaves many unanswered questions about the quantum of burden which must be borne in order to have access to certain benefits. The reasoning is rather that the imposition of certain minimal duties shows a concern for the rights of other members of the community and therefore for the community itself, and so tends to promote the maximisation of liberty. However, the idea of maximum liberty relates to each individual as a member of the community rather than to each individual in isolation. Thus an apparent diminution of the freedom of one citizen (by requiring that citizen to take reasonable steps to prevent a harm or to call the emergency services) may be justifiable by reference to the augmentation of the freedom of another citizen (who is under attack or otherwise in danger), and such justification is in the context of striving towards a community in which the liberty of each and all can be maximised.

Once the case for imposing some citizenship duties is made out, there remain difficult questions about the proper extent and scope of these duties. Duties towards the collective good such as the duty to pay taxes may be established fairly easily, but duties towards other individuals who are strangers require further justification. It is thought that the arguments above establish the case for a duty to take steps to save other citizens in peril. It is true that this duty must be hedged about with qualifications, so as to ensure that the obligations are neither too dangerous nor too onerous for the citizen upon whom they fall. . . .

Questions

1. Do you agree that there should be a general offence of failing to save citizens in peril?
2. V is sleeping in a shop doorway. It is a bitterly cold night and V looks very pale. D is walking past the doorway and notices V. D eyes the empty vodka bottle at V’s side, fears an angry and violent response if he gets involved so decides to walk by. Should D be guilty of a criminal offence if V dies? Of what offence?

Glanville Williams, ‘Criminal Omissions—The Conventional View’ (1991) 107 LQR 86

…Ashworth says that there is no moral difference between (i) a positive act and (ii) an omission when a duty is established. But even if this is so, he has already conceded a difference between the two when he says that an omission is culpable only when there is duty to act. The duty requirement sometimes involves considerations that are irrelevant to crimes of commission. Of course, every crime is a breach of legal duty not to commit the crime, but this is part of the meaning of the word ‘crime.’ The point is that no requirement of a particular duty not to act (over and above the specification of the crime) applies to wrongs of commission.
...First, ... omissions liability should be exceptional, and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a genuine implication to this effect—not the perfuncory and fictitious implication that judges use when they are on the lawpath instead of the purely judge-path. Thirdly, maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be rethought in each case.

The case for the conventional view

The arguments for this philosophy may be briefly stated. (I would have thought them too obvious to need statement.) First, society’s most urgent task is the repression of active wrongdoing. Bringing the ignorant or lethargic up to scratch is very much a secondary endeavour, for which the criminal process is not necessarily the best suited.

Secondly, our attitudes to wrongful action and wrongful inaction differ. There may be instances where our blood boils at the same temperature on account of both, but these are very exceptional. The only likely instance that comes to my mind is that of parents who are charged with killing their baby (i) by smothering it or (ii) by starving it to death. In this instance we are likely to feel more angry and sad about the slow starvation (an omission) than about the comparatively merciful infliction of death with a pillow. But on other occasions we almost always perceive a moral distinction between (for example) killing a person and failing to save his life (the former being the worse); and similarly between other acts and corresponding omissions.

This moral distinction, which we express in our language, reflects differences in our psychological approach to our own acts and omissions. We have much stronger inhibitions against active wrongdoing than against wrongfully omitting. This again is coupled with the fact that it is in every way easier not to do something (personal needs apart) than to do it. Also, a requirement to do something presupposes the ability to do it (the physical ability, and often the financial and educational ability as well), whereas almost everyone has the ability to refrain from ordinary physical acts.

Thirdly, serious crimes of omission can usually be formulated merely by stating the forbidden conduct, but laws creating crimes of omission are rarely directed against the whole world. They are intended to operate only against particular classes of person (and sometimes only for the protection of particular classes), in which case these persons must be singled out in the statement of the crime. To take an example: the courts can, in theory, punish everyone (with exceptions) who knowingly kills, but they cannot punish everyone who fails to save life, without some minimum specification of whose lives are to be saved. I cannot be made criminally responsible when I knowingly fail to save (and do not even try to save) the lives of unfortunate inhabitants of the Ganges delta who are drowned in floods; yet I could do something to help them by selling my house and giving the money to a suitable charity. Ashworth meets the point by saying that the requirement of duty ‘establishes moral responsibility and delineates in time and space the number of people who may be said to have omitted’... Very well, but this looks like translating law into morals rather than morals into law. Anyway, Ashworth does not propose that everything that may be regarded as a moral duty should automatically become a legal duty. So when we propose to punish omissions we are left with the problem of defining the scope of legal duty.

Fourthly, when crimes are expressed with the use of verbs implying action, it is a breach of the principle of legality to convict people of them when they have not acted; and it is unfair ‘labelling’ (Ashworth’s expression) to convict non-doers of acts under the name of doers.

Fifthly, and perhaps most important of all, the law enforcement agencies (including the courts) have their work cut out to deal with people who offend by active conduct. The prisons, it is scarcely necessary to recall, are packed with them. To extend the campaign by attempting to punish all (or large groups of) those who contribute to the evil result by failing to co-operate in the great endeavour of producing a happier world would exceed the bounds of possibility.
Ashworth says of the conventional view that the supporting arguments ‘depend on a narrow, individualistic conception of human life which should be rejected as a basis for morality and (although this raises further issues) as a basis for criminal liability’ … I leave it to the reader to judge whether the arguments as I have formulated them deserve this stricture.

In justifying the conventional view I have made no reference to the philosophy of individualism or to the autonomy principle, both of which Ashworth (erroneously I think) regards as the foundation of the conventional view. How far the State should provide financial succour and social services for those in need has nothing to do with the question whether individuals should be criminally punishable for not providing others with these advantages. To bring these considerations based on general social policy into the discussion simply muddies the waters. The same remark applies to Ashworth’s support for legislation requiring the wearing of seat-belts, support which is now platitudinous, as well as being irrelevant to his attack on ‘the conventional view.’ The argument against treating omissions in the same way as positive acts does not go to the extent of saying that omissions running contrary to the public interest should never be punishable. Those who oppose seat belt legislation (among whom I am not to be counted) do so on the ground that it unjustifiably restricts bodily liberty, not on the ground that it wrongly punishes omissions. The legislation forbids one to drive in a car without belting up, and the forbidden conduct is a hybrid act/omission, which is legally classified as an act, not an omission.

**Question**

Do you find Williams’ view more convincing than Ashworth’s?

### 4.3 The present law

The courts’ approach to the imposition of liability for omissions requires consideration of four issues:

1. Is D’s conduct properly categorized as an omission, or as an act? If it can possibly be categorized as an act, the courts are likely to seek to do so to avoid complication.
2. If the conduct of the accused is regarded as an ‘omission’ it is necessary to ask whether the particular offence is one for which an omission will be capable of grounding liability?
3. If an omission is a basis for liability under the offence, the question is whether D was under a duty to act? In result crimes, the result has occurred, so no one prevented it from occurring but, clearly, not everyone in the jurisdiction of the court (ie England and Wales for most offences) is liable for failing to do so. What are the criteria for selecting the culprit?
4. Where the definition of the crime requires proof that D ‘caused’ a certain result, can he be said to have caused that result by doing nothing?

#### 4.3.1 Act or omission?

As many of the cases in this chapter reveal, a distinction between acts and omissions is often tenuous and certainly too fine to bear the strain of distinguishing between circumstances in which there is no criminal liability and where there is liability in full measure. Some of the most striking examples of the difficulty in distinguishing acts and omissions arise in the medical context.
4.3.1.1 Act or omission—killing or failing to continue to keep alive

Questions

V is on a life support machine which is keeping V’s heart and other vital organs working. Dr X switches the machine off. V dies almost instantly.

Dr Y leaves the machine running but discontinues feeding V. V dies from starvation several days later.

Dr Z’s machine is on a timer and needs to be restarted every 24 hours. Dr Z does not restart the machine and V dies almost instantly.

Has any of the doctors killed V? Assuming they had the necessary intent, could any be guilty of murder?

Dr Arthur’s case

John Pearson was born at 7.55 am on 28 June 1980. It was immediately recognized that he was suffering from Down’s syndrome. When his mother was informed, she rejected the baby. Dr Arthur, a highly respected consultant paediatrician, saw the parents at noon. There was a discussion as to whether the mother should keep the child. Following that discussion, Arthur wrote in his case notes: ‘Parents do not wish the baby to survive. Nursing care only.’ This meant that the child would be given water but no food. He entered on the treatment chart a prescription for a drug, dihydrocodeine (DF118), to be given ‘as required’ at four-hourly intervals by the nurse in charge. Dr Arthur was alleged to have said to a police officer ‘[DF118] is a sedative which stops the child seeking sustenance’. In a later written statement he said that the purpose of the drug was to reduce suffering. The baby died at 5.10 am on 1 July 1980, 57¼ hours after birth. The cause of death was stated to be broncho-pneumonia as a result of Down’s syndrome.

Following an allegation that the baby had been drugged and starved to death there was a police investigation and Arthur was charged with murder before Farquharson J and a jury at Leicester Crown Court. The prosecution alleged that death was caused by DF118 poisoning but, following defence evidence that the child might have died from inherent defects from which it was suffering before birth, the murder charge was dropped and replaced by one of attempted murder. In the course of a lengthy summing up Farquharson J directed the jury:

…the prosecution must prove not only an act which you as a jury decide is an attempt to cause the death of John Pearson, but an act accompanied by an intent that the child should die at the time the act was carried out.

[The defence say that] Arthur was not committing an act, a positive act, at all; he was simply prescribing a treatment which involved the creation of a set of circumstances whereby the child would peacefully die, and that there is all the difference in the world between the one and the other…

The prescription of that drug, dihydrocodeine, is a matter that is of consequence in this case. The importance that you attach to it is—and I must repeat—something for you to say as to whether the prosecution have, (a) proved that there was an attempt here or (b) that there was an act properly so-called on the part of Dr Arthur, as distinct from simply allowing the child to die…

Not only is it a possibility but it is a real possibility, say the defence, that in the ensuing days as [the mother] becomes more in control of herself and recovers from the trauma of giving birth to the child she could change her mind. This is a very vital part of the case because one of the main contentions of the defence here is that what was being done by Dr Arthur in prescribing this treatment had no sort
of finality; it was in the nature . . . of a holding operation. If the mother had changed her mind then
different treatment and management would have been given to the child . . .

However serious the case may be; however much the disadvantage of a mongol or, indeed, any
other handicapped child, no doctor has the right to kill it . . .

But what has been perhaps the most agonizing part of this case is that it has become very clear, you
may think, that it is a very difficult area to decide precisely where a doctor is doing an act, a positive
act, or allowing a course of events or a set of circumstances to ensue . . .

If a child is born with a serious handicap—the instance we have been given is duodenal atresia
where a mongol has an ill-formed intestine whereby the child will die of the ailment if he is not oper-
ated on—a surgeon may say: as this child is a mongol, handicapped in the way I have already been
discussing with you, I do not propose to operate; I shall allow (and you have heard this expression sev-
eral times) nature to take its course.

No one could say that the surgeon was committing an act of murder by declining to take a course
which would save the child.

Equally, if a child not otherwise going to die, who is severely handicapped, is given a drug in such an
excessive amount by the doctor that the drug itself will cause his death and the doctor does that inten-
tionally it would be open to the jury to say: yes, he was killing, he was murdering the child . . .
[Dr Arthur did not give evidence. He was acquitted by the jury.]

Questions
1. Is the duty owed to a newly-born severely handicapped child different from, and of a lower
order than, that owed to any other child? Consider the cases where parents and a surgeon
agree that an operation to rectify an illness which would save the child’s life shall not be per-
formed (i) on a severely handicapped child, (ii) on a normal healthy child.
2. Is withholding food properly equated with not performing a surgical operation?
3. Is any of the following a ‘positive act’? (i) withholding food; (ii) instructing others to with-
hold food; (iii) administering a drug; (iv) instructing others to administer a drug.

Consider the following evidence of expert witnesses, of which the judge reminded the
jury.

Professor Campbell: ‘There is an important difference between allowing a child to die and taking
action to kill it. Withholding food is, I think, a negative, not a positive act.’

Dr Dunn: ‘I regard it as a negative act, withholding food . . . Many respected members of the profes-
sion regard the not giving of food as allowing nature to take its course . . . I know of no paediatrician
who withholds treatment in the sense which we are talking [that is, withholding food] who regards
what he has done as killing the child.’

Questions
1. If Dr Arthur had prescribed a course of treatment which would result in the child’s death,
what was the relevance of the fact that it was revocable, ‘a holding operation’, and that, if the
mother had changed her mind in time, he expected that the child could have been fed and its
life saved?
2. Should a doctor leave it to the mother to decide, in effect, whether such a child should live
or die?

For discussion of Arthur’s case, see M. Gunn and J. C. Smith, ‘Arthur’s Case and the Right to Life
**Bland**

What is the relevance of the fact that eminent paediatricians do not regard the withholding of food as a ‘positive act’? Who determines the scope of the criminal law? Consider the implications of these questions in the context of the next case.

**Airedale National Health Service Trust v Bland**  
[1993] 1 All ER 821, House of Lords  
(Lords Keith of Kinkel, Goff of Chieveley, Lowry, Browne-Wilkinson and Mustill)

In 1989, Anthony Bland, then aged 17, was injured in the Hillsborough Stadium disaster suffering irreversible brain damage and thereafter was in a persistent vegetative state (PVS)—no cognitive function, no sight, hearing, capacity to feel pain, move his limbs, or communicate in any way. Being unable to swallow, he was fed by naso-gastric tube. Repeated infections were treated by antibiotics. The consensus of medical opinion was that there was no hope of his improvement or recovery.

On the application (with the support of Bland’s parents) of the Airedale NHS Trust, in whose hospital Bland was a patient, Sir Stephen Brown P granted a declaration that the Trust might lawfully (1) discontinue all life-sustaining treatment including ventilation, nutrition, and hydration by artificial means and (2) discontinue medical treatment except for the purpose of enabling Bland to die peacefully with the greatest dignity and least distress. The Court of Appeal (Bingham MR, Butler-Sloss and Hoffmann LJJ) dismissed an appeal by the Official Solicitor who appealed to the House of Lords. He submitted that the withdrawal of artificial feeding would constitute murder. The House, though accepting that their decision in this civil action would not be legally binding on a criminal court, unanimously dismissed the appeal.

[Lord Keith made a speech dismissing the appeal.]

**Lord Goff:** Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die may not act unlawfully and will not do so if he commits no breach of duty to his patient? Professor Glanville Williams has suggested (see Textbook of Criminal Law (2nd edn, 1983) p 282) that the reason is that what the doctor does when he switches off a life support machine ‘is in substance not an act but an omission to struggle’ and that the ‘omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case’.

I agree that the doctor’s conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition: and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient. I also agree that the doctor’s conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient’s life, and such conduct cannot possibly be categorized as an omission … If the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the treatment may, and
Indeed ultimately should, be discontinued where it is no longer in his best interests to provide it. The question which lies at the heart of the present case is, as I see it, whether on that principle the doctors responsible for the treatment and care of Anthony Bland can justifiably discontinue the process of artificial feeding upon which the prolongation of his life depends.

It is crucial for the understanding of this question that the question itself should be correctly formulated. The question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient’s life. The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: should a doctor be entitled to switch it off, or to pull the plug? And then it is asked: can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient’s death? Such an approach has rightly been criticized as misleading, for example by Professor Ian Kennedy (in his paper in Treat Me Right, Essays in Medical Law and Ethics (1988)), and by Thomas J in Auckland Area Health Board v A-G [1993] 1 NZLR 235 at 247. This is because the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.

The correct formulation of the question is of particular importance in a case such as the present, where the patient is totally unconscious and where there is no hope whatsoever of any amelioration of his condition. In circumstances such as these, it may be difficult to say that it is in his best interests that the treatment should be ended. But, if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued, that question can sensibly be answered to the effect that it is not in his best interests to do so.

[Lords Lowry and Browne-Wilkinson made speeches dismissing the appeal.]

Lord Mustill: After much expression of negative opinions I turn to an argument which in my judgment is logically defensible and consistent with the existing law. In essence it turns the previous argument on its head by directing the inquiry to the interests of the patient, not in the termination of life but in the continuance of his treatment. It runs as follows. (i) The cessation of nourishment and hydration is an omission not an act. (ii) Accordingly, the cessation will not be a criminal act unless the doctors are under a present duty to continue the regime. (iii) At the time when Anthony Bland came into the care of the doctors decision had to be made about his care which he was unable to make for himself. In accordance with v v West Berkshire Health Authority [1989] 2 All ER 545, [1990] 2 AC 1 these decisions were to be made in his best interests. Since the possibility that he might recover still existed his best interests required that he should be supported in the hope that this would happen. These best interests justified the application of the necessary regime without his consent. (iv) All hope of recovery has now been abandoned. Thus, although the termination of his life is not in the best interests of Anthony Bland, his best interests in being kept alive have also disappeared, taking with them the justification for the non-consensual regime and the correlative duty to keep it in being. (v) Since there is no longer a duty to provide nourishment and hydration a failure to do so cannot be a criminal offence.

My Lords, I must recognise at once that this chain of reasoning makes an unpromising start by transferring the morally and intellectually dubious distinction between acts and omissions into a context where the ethical foundations of the law are already open to question. The opportunity for anomaly and excessively fine distinctions, often depending more on the way in which the problem happens to be stated than on any real distinguishing features, has been exposed by many commentators, including in England the authors above-mentioned, together with Smith and Hogan Criminal Law (6th edn, 1988) p 51, Beynon ‘Doctors as murderers’ [1982] Crim LR 17 and Gunn and Smith ‘Arthur’s case and the right to life of a Down’s syndrome child’ [1985] Crim LR 705. All this being granted, we
are still forced to take the law as we find it and try to make it work. Moreover, although in cases near the borderline the categorisation of conduct will be exceedingly hard, I believe that nearer the periphery there will be many instances which fall quite clearly into one category rather than the other. In my opinion the present is such a case, and in company with Compton J in Barber v Superior Court of Los Angeles County 147 Cal App 3d 1006 at 1017 (1983) amongst others I consider that the proposed conduct will fall into the category of omissions.

I therefore consider the argument to be soundly based. Now that the time has come when Anthony Bland has no further interest in being kept alive, the necessity to do so, created by his inability to make a choice, has gone; and the justification for the invasive care and treatment together with the duty to provide it have also gone. Absent a duty, the omission to perform what had previously been a duty will no longer be a breach of the criminal law.

Questions

1. Is there really a difference between the questions:
   (a) ‘is it in the best interests of the patient that he should die?’ and
   (b) ‘is it in the best interests of the patient that his life should be prolonged by this treatment?’

2. ‘How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them?’—per Lord Browne-Wilkinson—who thought this was ‘undoubtedly the law’. Have you an answer?

In Re A (children) [2001] Fam 147, the case of the conjoined twins, below, p 482, Johnson J, the trial judge, held that the reasoning in Bland could be applied to that case. He thought that the course proposed by the doctors was not a positive act but merely the withdrawal of Mary’s blood supply. It was as if Jodie stood in the same relation to Mary as the various machines did in relation to Bland. But none of the judges in the Court of Appeal agreed—though Robert Walker LJ did say at one point that, following separation, Mary ‘would die because tragically her own body, on its own, is not and never has been viable’. Ward LJ went so far as to say that the distinction between act and omission was irrelevant: ‘It is important to stress that it makes no difference whether the killing is by act or by omission. That is a distinction without a difference.’ He referred to the speeches of Lords Lowry, Browne-Wilkinson and Mustill in Bland. But was not the distinction between act and omission the foundation of the decision in Bland, unhappy though their lordships were with it? If Mary were not being kept alive by Jodie, it seems clear that it would not have been unlawful to omit to take steps which might briefly have prolonged her life. Yet Johnson J’s conclusion was not justified. Bland was materially different. This was not a case of discontinuing treatment. Mary was not receiving treatment. The operation would be a positive act. It would involve the use of the scalpel and ‘a number of invasions of Mary’s body…before the positive step was taken of clamping the aorta and bringing about Mary’s death’.

In R (on the application of Pretty) v DPP [2002] 1 All ER 1, HL, P was suffering from motor neurone disease, a progressive degenerative disease from which she had no hope of recovery. The disease had deprived her of the capacity to commit suicide but her intellect and capacity to make decisions were in no way impaired. Her husband was willing to assist her to kill herself, provided that the DPP would undertake not to prosecute him under s 2(1) of the Suicide Act 1961,
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Mr B was suffering from a progressively degenerative disorder that would require his treatment for hunger and thirst, and wished to be assured that before his condition reached its final stage, his condition would be lawfully withdrawn. He applied to the European Court of Human Rights under the Convention. It was held that it did not. P's application to the European Court of Human Rights was unsuccessful. But, where a Miss B was kept alive only by life-support machines, Butler-Sloss P held in Re B [2002] 2 All ER 449 that, since B had full capacity to make decisions, she had a right to require the support to be withdrawn, so that she would die. Professor Sullivan, in a letter to The Times (29 March 2002) criticizes the distinction drawn between the two cases.

Yet the distinction drawn is doubtful. The removal of life support will require acts to be carried out by medical personnel. Were life support to be removed without the consent of a sentient patient, we would clearly be confronted with a case of an act ending life. Yet the presence of consent does not change the involvement of doctors and nurses from acts into omissions.

What, of course, changes is the moral quality of the intervention when consent is present. In Miss B's case patient autonomy is respected: in Mrs Pretty's case it is denied. This differential treatment can only be justified, it it is justifiable at all, in terms of relevant moral differences between the two cases. It cannot be justified by spurious manipulation of the distinction between acts and omissions.

Questions
Is the distinction between P's case and B's any different from that acted on by the House of Lords in Bland? Is there a moral distinction between the two cases? Is there a moral difference between letting nature take its course—where that will result in death—and killing by a positive act?

In R (on the application of Burke) v General Medical Council [2004] EWHC 1879 (Admin), B was suffering from a progressively degenerative disorder that would require his treatment by way of artificial nutrition and hydration (ANH) as his condition worsened. He sought clarification from the courts as to when treatment could lawfully be withdrawn and applied for judicial review of the guidance issued by the defendant (GMC) on withholding and withdrawing of life prolonging treatments. He took proceedings because he did not wish to die of hunger and thirst, and wished to be assured that before his condition reached its final stage, artificial nutrition and hydration would not be withdrawn. The Court of Appeal held the guidance given in the General Medical Council's document Withholding and Withdrawing Life-prolonging Treatment: Good Practice in Decision Making (2002) was lawful. Lord Phillips MR stated that:

32. So far as ANH is concerned, there is no need to look far for the duty to provide this. Once a patient is accepted into a hospital, the medical staff come under a positive duty at common law to care for the patient. ... A fundamental aspect of this positive duty of care is a duty to take such steps as are reasonable to keep the patient alive. Where ANH is necessary to keep the patient alive, the duty of care will normally require the doctors to supply ANH. This duty will not, however, override the competent patient's wish not to receive ANH. Where the competent patient makes it plain that he or she wishes to be kept alive by ANH, this will not be the source of the duty to provide it. The patient's wish will merely underscore that duty.

33. Insofar as the law has recognised that the duty to keep a patient alive by administering ANH or other life-prolonging treatment is not absolute, the exceptions have been restricted to the following situations: (1) where the competent patient refuses to receive ANH and (2) where the patient is not competent and it is not considered to be in the best interests of the patient to be artificially kept alive. It is with the second exception that the law has had most difficulty. The courts have accepted that where life involves an extreme degree of pain, discomfort or indignity to a patient, who is sentient but
not competent and who has manifested no wish to be kept alive, these circumstances may absolve the doctors of the positive duty to keep the patient alive. Equally the courts have recognised that there may be no duty to keep alive a patient who is in a persistent vegetative state (‘PVS’). In each of these examples the facts of the individual case may make it difficult to decide whether the duty to keep the patient alive persists.

34. No such difficulty arises, however, in the situation that has caused Mr Burke concern, that of the competent patient who, regardless of the pain, suffering or indignity of his condition, makes it plain that he wishes to be kept alive. No authority lends the slightest countenance to the suggestion that the duty on the doctors to take reasonable steps to keep the patient alive in such circumstances may not persist. Indeed, it seems to us that for a doctor deliberately to interrupt life-prolonging treatment in the face of a competent patient’s expressed wish to be kept alive, with the intention of thereby terminating the patient’s life, would leave the doctor with no answer to a charge of murder.

4.3.2 Offences capable of being committed by omission

If the conduct of the defendant is regarded as an omission, the question arises whether the offence with which he is charged is one for which a conviction can be secured on the basis of an omission rather than an act. Some offences would appear not to be capable of commission by omission—as, for example, with attempts where the Criminal Attempts Act 1981 states that D’s conduct is ‘an act more than merely preparatory’ to the commission of the crime. Several factors will be of assistance in determining whether the offence is one capable of commission by omission.

4.3.2.1 Statutory interpretation

One striking example of a statutory offence turning on the word ‘act’ is in relation to attempts (below, p 588). The Criminal Attempts Act 1981 makes it an offence to do ‘an act more than merely preparatory’ to the commission of the full offence. It seems strange then to contemplate an offence of attempt by omission. In R v Nevard [2006] EWCA Crim 2896, D seriously injured his wife by striking her with an axe and a knife. He then forced her to abandon her attempt to dial 999 to call for assistance. The emergency services rang back on the number she had used, but D took the call and told them that his grandchildren must have been fooling around with the phone. The police remained suspicious so attended the scene and found D’s wife, whose injuries were not fatal. D was charged with wounding with intent and with attempted murder. He pleaded guilty to the wounding. Having been directed by the judge as to the elements of attempted murder, the jury asked: ‘Can you clarify whether an attempt to withhold care/emergency services constitutes attempted murder, knowing he has pleaded guilty to wounding with intent.’ The trial judge’s answer was:

Obviously if a person comes across somebody who is seriously injured in the street and fails to call the emergency services, they could not be charged with attempted murder ... the straight answer to the question is ‘yes’ and it is necessary for me to elaborate upon that. To be sure of attempted murder you must be sure that he did an act or acts with the intention of killing Mrs Nevard ... The Crown’s case is that he struck the blows with the axe or the axe handle. When that did not work he went and got a knife and stabbed her with that kitchen knife ... and also that he slashed her arms with a Stanley knife and that when he did those acts, his intention was that she should die. Now, where the withholding of the emergency services may help you is as to what his intention was ... In other words, by seeing what he did after the event you may get an insight as to what his intention was.

Nevard appealed against conviction. The Court of Appeal upheld the conviction, but suggested that the judge should have made explicit to the jury that attempting to divert the emergency services could not in itself constitute attempted murder.
Questions
Was not D’s conduct in taking the return call and lying a sufficient act? He took positive steps to prevent the emergency services responding to his wife’s call. If V dies because D prevents the emergency services from reaching him, or from helping him if they do arrive (eg by keeping them away at gunpoint), that must make D a substantial cause of V’s death, even if D was not the one who inflicted the original injuries. If D takes such positive measures to prevent the emergency services arriving, but despite his best efforts V lives, D must surely have attempted to cause V’s death. Why should D not be guilty of attempted murder?

The language of the Criminal Attempts Act seems clear, with other offences the position is less clear cut. Professor Glanville Williams suggested that a criminal code should state that enactments creating offences in words primarily referring to ‘acts’ are not to be interpreted to include mere omissions unless the enactment expressly so provides. If Parliament wishes to penalize omissions it must direct its mind to the subject and make its meaning clear. (See (1987) 7 LS 92 at 97, ‘What should the Code do about Omissions?’.) Professor Williams concedes that ‘some words can legitimately be held to “specify” both acts and omissions, even though they refer expressly to neither’, instancing the word ‘neglect’ (at 97).

Questions
Some words certainly do describe conduct which can be performed by act or omission, as e.g. with ‘obstruct’? If I am standing in a narrow passage blocking your way, and I refuse to move, does not my omission ‘obstruct’ you? And is not ‘obstruction’ a result crime, rather than a conduct crime?

In considering the following series of cases ask whether the statutory words really provide a definitive basis for concluding that the offence is one capable of commission by omission or not.

In Shama [1990] 2 All ER 602, [1990] 1 WLR 661 a conviction for falsifying a document required for an accounting purpose contrary to the Theft Act 1968, s 17(1)(a), was upheld although D had entirely omitted to fill in a form which it was his contractual duty (as an employee of British Telecom) to complete. Where a person makes an account or record or document he may, as s 17(2) makes clear, falsify it by omitting material particulars. There is no difficulty about that: he has made a false document and is liable for that act. But in Shama D made no document; the case was one of pure omission.

Question
Can the words, ‘falsifies any document’ fairly be read to include that case?

In Firth (1989) 91 Cr App R 217, [1990] Crim LR 326 a doctor was held to have deceived a hospital contrary to the Theft Act 1978, s 2(1) (now repealed by the Fraud Act 2006), by failing to inform the hospital that certain patients were private patients, knowing that they had been admitted as NHS patients and that he would not be billed for services for which he should have been charged.
**Question**
Can he fairly be said to have 'deceived' the hospital by his inactivity?

In *Ahmad* (1986) 84 Cr App R 64, [1986] Crim LR 739 it was held that the words 'does acts' in the Protection from Eviction Act 1977 were not satisfied by proof of an omission. D commits an offence if he 'does acts' likely to interfere with the peace or comfort of a residential occupier with intent to cause him to give up occupation of the premises. D having done such acts without any such intent, omitted with the specified intention to rectify the situation he had created.

However, even the use of the word 'act' does not always exclude liability for omissions. Thus in *Speck* [1977] 2 All ER 859 it was held that a man 'commits an act of gross indecency with . . . a child', contrary to the Indecency with Children Act 1960 by totally passive submission to an act done by the child.

**Particular problems in offences against the person**

Some take the view that the offences against the person are crimes of action—wounding, assaulting, battering—and should not be capable of commission by omission (see for example, Wilson, *Central Theories*, p 101).

The Criminal Law Revision Committee (CLRC) in its Fourteenth Report on Offences Against the Person identified those of its proposed offences against the person which were to be capable of being committed by omission—murder, manslaughter, causing serious injury with intent, unlawful detention, kidnapping, abduction, and aggravated abduction. Other offences against the person, for example, assault, would not be capable of being committed by omission. The Code team included in their Bill (LC 143) a clause to give effect to this recommendation: an offence was to be capable of being committed by omission only if the enactment creating it so specified and the Code specified the chosen offences against the person. These provisions have no place in the current Draft Code. The Law Commission was persuaded by an article by Professor Glanville Williams ((1987) 7 LS 92) that it would make important changes in the law on which there had been no consultation (and which indeed had not been foreseen) and which, therefore, could not be justified. Williams pointed out that in a number of cases statutory offences had been held to be capable of being committed by omission, although there was no express provision that they might be so committed. The Code team’s proposals would have reversed those cases; and no consideration had been given as to whether they ought to be reversed. The Draft Code does not specify which offences may be committed by omission. It leaves that question, as under the present law, to the courts. But cl 17(1) makes it clear that, under the Code, results ‘may be caused’ by omission and defines offences against the person in terms of ‘causing’ death (rather than ‘killing’) or other relevant harm. Some other offences (notably offences of damage to property) are also defined in terms of ‘causing’ so as to leave it fully open to the courts to decide that the offence should be capable of commission by omission if they think it appropriate.

In the Law Commission’s Report No 218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993), which deals with only non-fatal offences against the person, the Law Commission specifies which of those offences should be capable of commission by omission. It broadly follows the approach of the CLRC and specifies intentionally causing serious injury, torture, unlawful detention, kidnapping, abduction, and aggravated abduction. As in the Draft Code, the draft Non-Fatal Offences Against the Person Bill makes no attempt to specify who is under a duty to act. Clause 19(1) provides:

> An offence to which this section applies may be committed by a person who, with the result specified for the offence, omits to do an act that he is under a duty to do at common law.
Clause 19(1) does not apply to cl 3 (recklessly causing serious injury, which would replace s 20 of the Offences Against the Person Act 1861), cl 4 (intentionally or recklessly causing injury which would replace s 47 of the Offences Against the Person Act 1861) or cl 6 (assault) so, if the draft Bill were enacted, it would be settled that these offences could not be committed by omission. The draft Bill annexed to the Home Office Consultation Paper of February 1998 is to the same effect.

**Question**

Consider the following case which was much discussed in the CLRC. D, a cleaner, puts polish on the floor and then, in breach of his duty, omits to display the notice with which he has been provided warning users of the building of the dangerous state of the floor. V slips on the polish and falls. Was it a mere omission?

This floor polish example was put to the CLRC as a case of omission and was so treated by them. But one member of the committee, Glanville Williams, had second thoughts ((1987) 7 LS at 92) about this: ‘in such circumstances of act/omission the total conduct could and should be regarded as an act, so the cleaner could be guilty of the offence of causing injury recklessly …’ If D put the polish on the floor with intent that V should fall on it, there is no difficulty in saying that D has caused the fall by an act; but what if he spread the polish with no thought of anyone falling and then either decided, or forgot, to place the notice? Does not the fault then lie purely in omitting? But even if Williams is right, the problem may be salvaged because he recognizes that, if it was the duty, not of the cleaner but of the janitor, to place the notice on polishing days, it could not be said that the janitor had caused the injury by an act, for he did no act whatever. Williams would convict the cleaner in the original case but acquit the janitor in the alternative version. He would be prepared to tolerate this fine distinction because, as he rightly says, all legal rules are capable of producing fine distinctions. This is all right if the distinction is sound in principle; but is the distinction between act/omission and omission sound? Cf Miller [1983] 1 All ER 978, below, p 101.

Let us consider further the case which is acknowledged to be an omission: the janitor (J) does not display the notice, V falls and (i) suffers no injury, (ii) suffers slight injury, (iii) suffers serious injury, or (iv) is killed. If J is charged with assault or causing injury (less than serious, injury), the prosecution under the Code (and perhaps under the existing law) will fail because there is no actus reus; but if he is charged with murder, manslaughter or intentionally causing serious injury, the prosecution will not fail for this reason. J will, prima facie, be guilty of any of these offences for which he has the appropriate mens rea.

**Questions**

Can these distinctions be justified? How would the current law deal with these cases?

**Homicide**

At common law it is established that there can be liability for murder and manslaughter (gross negligence) by an omission: Gibbons and Procter (1918) 13 Cr App R 134 below (murder); Stone and Dobinson below (manslaughter).

**4.3.3 Who is under a duty to act?**

Though an offence is capable of being committed by omission, it does not follow that everyone is under a duty to act. The courts have recognized a number of categories in which a duty to act arises, each of which is discussed below (4.3.3.1–4.3.3.6). For discussion see L. Alexander,

4.3.3.1 Contract

In Pittwood (1902) 19 TLR 37 D, a gatekeeper on a railway line, had a contractual duty to his employer to keep the gate closed. D opened the gate and forgot to close it. V, assuming that the way was safe as the gate was open was then killed by a passing train. D’s counsel argued that D only owed a duty to his employers under his contract, but the court held that a man might incur criminal liability arising from such a contract.

Questions
1. What types of contract will give rise to such a duty? Is it only contracts involving a protective or ‘health and safety’ based purpose?
2. Does a lecturer owe a duty to the students in his lecture—to protect against injury from defective premises? From attack by homicidal lecture gatecrashers?
3. Aside from the difficulty of which contracts are sufficient to establish a duty, there is the question of the content and scope of the duty. If D is a lifeguard employed by Leeds Council, does his duty to save a drowning stranger in the council’s pool apply when D has formally clocked off work for the day? Does D’s liability under contract depend on V’s knowledge that D is under contract with X (for example, the council or the railway company)?

4.3.3.2 Voluntary undertakings

In Instan [1893] 1 QB 450 D lived with and maintained V, her aunt aged 73. For the final few days before her death V was completely incapacitated. D bought food with her aunt’s money, but failed to give her any. Nor did D summon medical help. Death ensued from exhaustion and gangrene. D was convicted of manslaughter. The court affirmed her conviction. Coleridge LCJ concluded that a there was a duty—a ‘legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement’.

See further, G. Mead, ‘Contracting into Crime: A Theory of Criminal Omissions’ (1991) 11 OJLS 147 at 168, arguing that a person who has voluntarily undertaken responsibility ought to be under a duty because:

First he is more likely to be aware that a person may be in a position of peril and in need of assistance. He will know of the vulnerability of the victim in a way that others may not. Second, he may be more capable of carrying out the required task than will a third party. We might assume that, in most cases where D undertakes to do a particular thing, he feels he has the ability to do it, whereas a third party, who has not given such an undertaking will not necessarily possess the required skills to do what is needed in order to avert danger to V. The third point is that if other people are aware of the undertaking they might feel it unproductive for them to get involved as well. They might reasonable think that they would be simply getting in the way and hinder the completion of the task in question.

Questions
1. Was D’s duty, in Instan, a result of her voluntary undertaking? Her relationship? Her cohabitation? Her being paid by her aunt?
2. Is the existence of a moral duty a sufficient basis for the imposition of criminal liability?
3. If D assumes some responsibility for V, it seems less objectionable for the law to impose liability for his subsequent omissions. But what of the objections based on principles of fair labelling and fair warning? Is the scope of the duty and its content sufficiently clearly prescribed to satisfy these principled concerns?
4.3.3.3 Special relationships

Many of the cases involving relationships also involve a voluntary undertaking by the party, and it is unclear to what extent the courts would impose a duty on the basis of a relationship per se.

The most obvious type of relationship in which it has been held that a duty to act arises is that between parent and child. This is supported by the statutory obligations such as the Children and Young Persons Act 1933, s 1. The failure of parents to feed and care for their children has given rise to liability for manslaughter and even in one case for murder: Gibbons and Proctor (below, p 112). It remains unclear which other categories of relationship will give rise to such a duty.

In Stone and Dobinson [1977] 2 All ER 341, [1977] QB 354, CA, S and D—S’s mistress—allowed S’s sister, Fanny, to lodge with them. The sister became infirm while lodging with them and died of toxaemia from infected bed sores and prolonged immobilization. S and D had made only half-hearted and wholly ineffectual attempts to secure medical attention for the sister. Upholding the convictions of S and D for manslaughter, the court said:

There is no dispute, broadly speaking, as to the matters on which the jury must be satisfied before they can convict of manslaughter in circumstances such as the present. They are: (1) that the defendant undertook the care of a person who by reason of age or infirmity was unable to care for himself; (2) that the defendant was grossly negligent in regard to his duty of care; (3) that by reason of such negligence the person died. It is submitted on behalf of the appellants that judge’s direction to the jury with regard to the first two items was incorrect.

At the close of the Crown’s case submissions were made to the judge that there was no, or no sufficient, evidence that the appellants, or either of them, had chosen to undertake the care of Fanny.

That contention was advanced by counsel for the appellant before this court as his first ground of appeal. He amplified the ground somewhat by submitting that the evidence which the judge had suggested to the jury might support the assumption of a duty by the appellants did not, when examined, succeed in doing so. He suggested that the situation here was unlike any reported case. Fanny came to this house as a lodger. Largely, if not entirely due to her own eccentricity and failure to look after herself or feed herself properly, she became increasingly infirm and immobile and eventually unable to look after herself. Is it to be said, asks counsel for the appellants rhetorically, that by the mere fact of becoming infirm and helpless in these circumstances, she casts a duty on her brother and Mrs Dobinson to take steps to have her looked after or taken to hospital? The suggestion is that, heartless though it may seem, this is one of those situations where the appellants were entitled to do nothing; where no duty was cast on them to help, any more than it is cast on a man to rescue a stranger from drowning, however easy such a rescue might be.

This court rejects that proposition. Whether Fanny was a lodger or not she was a blood relation of the appellant Stone; she was occupying a room in his house; Mrs Dobinson had undertaken the duty of trying to wash her, of taking such food to her as she required. There was ample evidence that each appellant was aware of the poor condition she was in by mid-July. It was not disputed that no effort was made to summon an ambulance or the social services or the police despite the entreaties of [neighbours]. A social worker used to visit [Stone]. No word was spoken to him. All these were matters which the jury were entitled to take into account when considering whether the necessary assumption of a duty to care for Fanny had been proved.

This was not a situation analogous to the drowning stranger. They did make efforts to care. They tried to get a doctor; they tried to discover the previous doctor. Mrs Dobinson helped with the washing and the provision of food. All these matters were put before the jury in terms which we find it impossible to fault. The jury were entitled to find that the duty had been assumed. They were entitled to conclude that once Fanny became helplessly infirm, as she had by 19 July, the appellants were, in the circumstances, obliged either to summon help or else to care for Fanny themselves...
Marriage is a sufficient basis for a duty (Hood [2004] 1 Cr App R (S) 431), so the question surely cannot be based on blood relationships. Is the true basis of the relationship duty one of interdependence?

### Questions

1. Should a strong 14-year-old owe a duty to his ailing mother? Should a duty extend between siblings? Does a student D owe a duty to his anorexic flatmate, V to call for medical treatment for her? To feed her?
2. What is the extent of a duty imposed by relationships? Is it a duty to do what is reasonable? What D believes to be reasonable? That which is necessary to avert the danger from V?

Note the offence under s 5 of the Domestic Violence, Crime and Victim Act 2004 relating to carers’ responsibilities for death or serious injury to a child.

#### 4.3.3.4 Creation of a dangerous situation or ‘supervening fault’

The principle for determining liability where D creates a dangerous situation was pronounced by the House of Lords in the following case.

**R v Miller**

[1983] 1 All ER 978, House of Lords

(Lords Diplock, Keith, Bridge, Brandon and Brightman)

The defendant lay on a mattress in a house in which he was a squatter and lit a cigarette. He fell asleep and woke to find the mattress on fire. He went into the next room and fell asleep. The house caught fire and £800 worth of damage was done. He was charged with arson, contrary to s 1(1) and (3) of the Criminal Damage Act 1971, in that he ‘damaged by fire a house … intending to do damage to such property or recklessly as to whether such property would be damaged’. He was convicted and his appeal to the Court of Appeal was dismissed. He appealed to the House of Lords. Note that at the time of this decision the mens rea for the offence was governed by the test of recklessness in *Caldwell* (below, p 140).

**Lord Diplock:** The first question is a pure question of causation; it is one of fact to be decided by the jury in a trial on indictment. It should be answered No if, in relation to the fire during the period starting immediately before its ignition and ending with its extinction, the role of the accused was at no time more than that of a passive bystander. In such a case the subsequent questions to which I shall be turning would not arise. The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal; and if it ever were to do so there would be difficulties in defining what should be the limits of the offence.

If, on the other hand the question, which I now confine to: ‘Did a physical act of the accused start the fire which spread and damaged property belonging to another?’, is answered ‘Yes’, as it was by the Jury in the instant case, then for the purpose of the further questions the answers to which are determinative of his guilt of the offence of arson, the conduct of the accused, throughout the period from immediately before the moment of ignition to the completion of the damage to the property by the fire, is relevant; so is his state of mind throughout that period.
Since arson is a result-crime the period may be considerable, and during it the conduct of the accused that is causative of the result may consist not only of his doing physical acts which cause the fire to start or spread but also of his failing to take measures that lie within his power to counteract the danger that he has himself created. And if his conduct, active or passive, varies in the course of the period, so may his state of mind at the time of each piece of conduct. If, at the time of any particular piece of conduct by the accused that is causative of the result, the state of mind that actuates his conduct falls within the description of one or other of the states of mind that are made a necessary ingredient of the offence of arson by s 1(1) of the Criminal Damage Act 1971 (ie intending to damage property belonging to another or being reckless whether such property would be damaged), I know of no principle of English criminal law that would prevent his being guilty of the offence created by that subsection. Likewise I see no rational ground for excluding from conduct capable of giving rise to criminal liability conduct which consists of failing to take measures that lie within one’s power to counteract a danger that one has oneself created, if at the time of such conduct one’s state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of ‘actus reus’, suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failure to act cannot give rise to criminal liability in English law.

No one has been bold enough to suggest that if, in the instant case, the accused had been aware at the time that he dropped the cigarette that it would probably set fire to his mattress and yet had taken no steps to extinguish it he would not have been guilty of the offence of arson, since he would have damaged property of another being reckless whether any such property would be damaged.

I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged, provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.

My Lords, in the instant case the prosecution did not rely on the state of mind of the accused as being reckless during that part of his conduct that consisted of his lighting and smoking a cigarette while lying on his mattress and falling asleep without extinguishing it. So the jury were not invited to make any finding as to this. What the prosecution did rely on as being reckless was his state of mind during that part of his conduct after he awoke to find that he had set his mattress on fire and that it was smouldering, but did not then take any steps either to try to extinguish it himself or to send for the fire brigade, but simply went into the other room to resume his slumbers, leaving the fire from the already smouldering mattress to spread and to damage that part of the house in which the mattress was.

The recorder, in his lucid summing up to the jury (they took 22 minutes only to reach their verdict), told them that the accused, having by his own act started a fire in the mattress which, when he became aware of its existence, presented an obvious risk of damaging the house, became under a duty to take some action to put it out. The Court of Appeal upheld the conviction, but its ratio decidendi appears to be somewhat different from that of the recorder. As I understand the judgment, in effect it treats the whole course of conduct of the accused, from the moment at which he fell asleep and dropped the cigarette onto the mattress until the time the damage to the house by fire was complete, as a continuous act of the accused, and holds that it is sufficient to constitute the statutory offence of arson if at any stage in that course of conduct the state of mind of the accused, when he fails to try to prevent or minimize the damage which will result from his initial act, although it lies within his power to do so, is that of being reckless whether property belonging to another would be damaged.

My Lords, these alternative ways of analysing the legal theory that justifies a decision which has received nothing but commendation for its accord with common sense and justice have, since the publication of the judgment of the Court of Appeal in the instant case, provoked academic controversy. Each theory has distinguished support. Professor J C Smith espouses the ‘duty theory’ (see
[1982] Crim LR 526 at 528; Professor Glanville Williams who, after the decision of the Divisional Court in *Fagan v Metropolitan Police Commr* [below] appears to have been attracted by the duty theory, now prefers that of the continuous act (see [1982] Crim LR 773). When applied to cases where a person has unknowingly done an act which sets in train events that, when he becomes aware of them, present an obvious risk that property belonging to another will be damaged, both theories lead to an identical result; and, since what your Lordships are concerned with is to give guidance to trial judges in their task of summing up to juries, I would for this purpose adopt the duty theory as being the easier to explain to a jury; though I would commend the use of the word ‘responsibility’, rather than ‘duty’ which is more appropriate to civil than to criminal law since it suggests an obligation owed to another person, i.e., the person to whom the endangered property belongs, whereas a criminal statute defines combinations of conduct and state of mind which render a person liable to punishment by the state itself.

[Lords Keith, Bridge, Brandon and Brightman agreed.]

Appeal dismissed

### Questions

1. Was the defendant held liable for damaging the house by falling asleep while smoking? Or for damaging the house by failing to take reasonable steps to put out the burning bed?
2. What if the defendant had found that his nine-year-old child had set the bed on fire and had left it to burn? Or the fire had originated in an electrical fault in the wiring of the house when he switched on his electric blanket?
3. What if the defendant’s fellow squatter had (i) sustained grievous bodily harm or (ii) died in the fire?

Compare the approach taken by the Divisional Court in the following case.

**Fagan v Metropolitan Police Commissioner**

[1968] 3 All ER 442, Queen's Bench Division

(Lord Parker CJ, Bridge and James JJ)

The defendant was directed by a constable to park his car close to the kerb. He drove his car on to the constable’s foot. The constable said, ‘Get off, you are on my foot.’ The defendant replied, ‘Fuck you, you can wait’, and turned off the ignition. He was convicted by the magistrates of assaulting the constable in the execution of his duty and his appeal was dismissed by Quarter Sessions who were in doubt whether the driving on to the foot was intentional or accidental but were satisfied that he ‘knowingly, unnecessarily and provocatively’ allowed the car to remain on the foot.

James J [with whom Lord Parker CJ concurred] . . . An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although ‘assault’ is an independent crime and is to be treated as such, for practical purposes today ‘assault’ is generally synonymous with the term ‘battery’, and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case, the ‘assault’ alleged involved a ‘battery’. Where an assault involved a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand on another, and the action does not cease to be an assault if it is a
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stick held in the hand and not the hand itself which is laid on the person of the victim. So, for our part, we see no difference in principle between the action of stepping on to a person’s toe and maintaining that position and the action of driving a car on to a person’s foot and sitting in the car while its position on the foot is maintained.

To constitute this offence, some intentional act must have been performed; a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault; they can only shed a light on the appellant’s action. For our part, we think that the crucial question is whether, in this case, the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot, or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment, a distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of actus reus and mens rea must be present at the same time. The ‘actus reus’ is the action causing the effect on the victim’s mind: see the observations of Parke B, in R v St George ([1840] 9 C & P 483 at 490, 493). The ‘mens rea’ is the intention to cause that effect. It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed on an existing act. On the other hand, the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.

In our judgment, the justices at Willesden and quarter sessions were right in law. On the facts found, the action of the appellant may have been initially unintentional, but the time came when, knowing that the wheel was on the officer’s foot, the appellant (i) remained seated in the car so that his body through the medium of the car was in contact with the officer, (ii) switched off the ignition of the car, (iii) maintained the wheel of the car on the foot, and (iv) used words indicating the intention of keeping the wheel in that position. For our part, we cannot regard such conduct as mere omission or inactivity. There was an act constituting a battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant’s argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

Bridge: I fully agree with my lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of actus reus and mens rea must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully; but I have been unable to find any way of regarding the facts which satisfied me that they amounted to the crime of assault. This has not been for want of trying, but at every attempt I have encountered the inescapable question: after the wheel of the appellant’s car had accidentally come to rest on the constable’s foot, what was it that the appellant did which constituted the act of assault? However the question is approached, the answer which I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant’s fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver’s seat nor that he switched off the ignition seem to me to be of any relevance. The constable’s plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly, I can get no help from the suggested analogies. If one man accidentally treads on another’s toe or
touched him with a stick, but deliberately maintains pressure with foot or stick after the victim pro-
tests, there is clearly an assault; but there is no true parallel between such cases and the present case.
It is not, to my mind, a legitimate use of language to speak of the appellant ‘holding’ or ‘maintaining’
the car wheel on the constable’s foot. The expression which corresponds to the reality is that used by
the justices in the Case Stated. They say, quite rightly, that he ‘allowed’ the wheel to remain.

With a reluctantly dissenting voice, I would allow this appeal and quash the appellant’s conviction.

Appeal dismissed. Leave to appeal to the House of Lords refused

Questions
1. Was there a ‘continuing act’ in Miller or in Fagan?
2. D, a motorist, without fault on his part skids on an oil-covered surface and injures V. D
stops and sees that V is unconscious and bleeding. He could easily drive V to a nearby hos-
pital. He drives off leaving V by the roadside. V bleeds to death. His life could have been saved
had he been driven to the hospital. Is D liable to conviction for (i) manslaughter or (ii) causing
death by dangerous driving according to R v Miller? Should it be different if D injured V by
(iii) careless driving or (iv) dangerous driving?

In Santana–Bermudez [2003] EWHC 2908 (Admin) S-B, a drug user, had assured a police
officer about to search him that he was carrying no ‘sharps’. The officer stabbed her finger on a
syringe needle in his pocket during the search. Applying Miller, Maurice Kay J said:

…where someone (by act or word or a combination of the two) creates a danger and thereby exposes
another to a reasonably foreseeable risk of injury which materialises, there is an evidential basis for the
actus reus of an assault occasioning actual bodily harm. It remains necessary for the prosecution to
prove an intention to assault or appropriate recklessness.

Question

Does the Miller principle apply in a case in which D has created the dangerous situation as a
result of a justifiable act, rather than one of inadvertence? (See State ex rel Kuntz v Montana
Thirteenth District Court 995 P 2d 951 (Mont) (2000). D stabbed V in self-defence but then
failed to call the emergency services).

4.3.3.5 Dangerous pursuits

In Khan and Khan [1998] Crim LR 830, the appellants abandoned a 15-year-old girl when she
was distressed by taking an excessive quantity of drugs which they had supplied to her and
she died. Quashing their conviction for manslaughter ‘by omission’, that is, by a grossly
negligent omission, the court said:

To extend the duty to summon medical assistance to a drug dealer who supplies heroin to a person
who subsequently dies on the facts of this case would undoubtedly enlarge the class of person to
whom, on previous authority, such a duty may be owed. It may be correct to hold that such a duty
does arise. However before that situation can occur, the judge must first make a ruling as to whether
the facts as proved are capable of giving rise to such a duty and, if he answers that question in the
affirmative, then to give an appropriate direction which would enable them to answer the question
whether on the facts as found by them there was such a duty.
The judge had made no such ruling or given any such direction. But in Gurphal Singh [1999] Crim LR 582 in a summing up which the Court of Appeal described as ‘a model of its kind’ the judge directed the jury that, as a matter of law, the defendant owed a duty to V, an occupant of the lodging house in which he worked as a ‘maintenance man’, in respect of the safety of the gas fire. V died from carbon monoxide poisoning from the defective fire. The conviction for manslaughter was upheld. The jury must have found that a reasonably prudent person would have known that there was a serious and obvious risk of death and that D’s negligence was a substantial cause. See further below, p 721.

Sinclair
[1998], unreported, 21 August, Court of Appeal, Criminal Division

(The assistance of Mr Peter Carter QC for providing further details is greatly appreciated)

Sinclair (S), a methadone user and his close friend Coleman, who had limited experience of taking methadone, went to J’s flat to buy drugs. Earlier S and Coleman had been drinking and taking other drugs supplied by Smith. S and Coleman each injected themselves there with the methadone they had bought. Ten minutes later Coleman became unconscious. He never regained consciousness and died the next morning. Following his collapse, Smith and J went out to purchase more drugs. J expressed concern about Coleman’s condition and injected him with a saline solution in the hope of restoring consciousness. Other ineffective attempts to bring Coleman round, including slapping him and pouring cold water over him failed. S and J were charged with manslaughter.

At the conclusion of the prosecution’s case, submissions were made on behalf of both defendants that there was no case to go to the jury. This was on the basis first that the Crown had failed to prove that either of the defendants owed a duty of care to the deceased and secondly that there was no sufficient evidence that the omissions of either defendant were such as to be a substantial cause of death. It was conceded that the court was bound by the decisions of the Court of Appeal, in relation to duty by Stone & Dobinson [1977] 1 QB 354, and in relation to causation by R v Cato [1976] 1 WLR 110. A considerable number of authorities were referred to. The judge ruled that it was for the jury to decide whether the defendants had voluntarily assumed the care of the deceased so as to assume a legal duty of care to him and that there was sufficient evidence on causation to be left to the jury.

The judge’s ruling and summing up in relation both to duty of care and causation were at the heart of the appeals of both appellants.

On behalf of Sinclair, Mr Peter Carter QC submitted that there is no authority in which a duty of care has been held to exist in circumstances such as the present. The distinction between acts and omissions is an important one in the law of manslaughter. A doctor has a duty to act and to act appropriately in a non-negligent fashion but the criticism of Sinclair was based solely on omission. It is important for people to know where they stand in relation to the Criminal Law and, to this end, concepts of liability should be clear…

Mr Carter submitted that the effect of the judge’s direction about which he complained, . . . was to cast . . . on the jury the sole responsibility of determining whether a legal duty of care existed. The judge should have directed the jury that, if they found proved such facts as he identified, they should find there was a legal duty of care. In the present case there were no facts justifying such a finding and therefore the case should have been withdrawn from the jury at the close of the prosecution. Acts done benevolently rather than maliciously should not found liability in manslaughter. On seeing that Coleman was unconscious Sinclair could have turned on his heels and gone home without incurring criminal liability. If, out of humanity, he stayed with his friend and tried to do what he could, that did
not give rise to a legal duty of care. The court should set the hurdle for establishing a legal duty at a higher level.

Mr Cassel [Counsel for J] further submitted that there is no authority in England which imposes a duty of care on a medically unqualified stranger following a relationship of only a few hours duration. Authorities in other jurisdictions point to a contrary conclusion. He referred to The People v Beardsley 118 North Western Reporter 1128 (1907) a decision of the Supreme Court of Michigan where the presence of a woman friend in the defendant’s house when both took liquor and the woman took drugs was held not to create a legal duty such as exists in the case of husband and wife. Mcalvay CJ, giving what appears to have been the judgment of the court, at page 1131 said:

‘Had this been a case where two men under like circumstances had voluntarily gone on debauchery together and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion.’

Mr Cassel also referred to a decision of the New South Wales Supreme Court in Tak Tak [1988] NSWLR 226 which emphasised, as a pre-condition for a legal duty of care to arise, the need for the disabled person to be secluded by the defendant to prevent others from affording aid. In the present case, he submitted, Johnson did not undertake to provide necessities for the deceased nor did he confine him. He distinguished Stone & Dobinson because, in that case, the deceased had lived with the appellant for 3 years and, as is apparent from page 357B of the report, the prosecution case was put on the basis that, during that period, the appellant had assumed responsibility for the deceased, prior to the final days of neglect.

Accordingly, submitted Mr Cassell, the judge was wrong to reject the submission of no case to answer on Johnson’s behalf. He failed to make a ruling as to whether the facts proved were capable of giving rise to a legal duty [see per Swinton Thomas LJ in R v Khan & Khan, above, p 105]. Alternatively, if he was right to leave the matter to the jury, he should have explained to them what facts would need to be proved for them to find that Johnson had a legal as well as a moral duty of care. They should have been directed that only if they felt sure that Johnson had, by words or actions undertaken to provide V with the necessities of life and knew that he alone was responsible for Coleman well being could he have been under a legal duty.

Mr Cassel further submitted that the judge failed to put Johnson’s defence in particular that he had only met Coleman once before and was not responsible for selling drugs to him and that no duty of care resulted from their relationship.

On behalf of the Crown, Mr Corkery QC . . . submitted that the law has to remain uncertain and that there can be a deliberate assumption of care on the spur of the moment. If, as Mr Cassell had submitted, seclusion of the disabled person is a requirement for a duty to exist this would defeat the public interest in preserving life. He relied on Stone & Dobinson as showing that seclusion is not an element of English Law, because in that case there were 3 others, apart from the defendants, with access to the house.

In the present case, he submitted, Sinclair owed a duty of care because he had been a friend of the deceased for 13 or 14 years, they had lived together for 18 months to 2 years, they were described as ‘like brothers’ and Sinclair himself had said ‘I wouldn’t walk away and leave him: he is my friend’. Pegler [a visitor] had advised that an ambulance be called and, between 7 and 9pm, according to McKie, Sinclair had been to his house because of his concern about Coleman. All these factors pointed to the voluntary assumption by Sinclair of a duty of care. As to Johnson, his flat was a recognised place for acquiring and injecting methadone. Needles and syringes were provided. He knew that Coleman had taken methadone. He had prepared and administered saline injections to him and had put him to bed knowing that serious efforts had been made, by face slapping and throwing water, to revive him.
But, in deference to the arguments which have been addressed to us in relation to the existence of a legal duty of care, we propose to say something on this aspect of the matter without embarking on an exhaustive review of the authorities. . . .

So far as Johnson is concerned, there is no English authority in which a duty of care has been held to arise, over a period of hours, on the part of a medically unqualified stranger. Beardsley and Tak Tak are both persuasive authorities pointing away from the existence of any such duty, although we do not accept, in the light of Stone and Dobinson, that the concept of seclusion is in, English Law, a necessary pre-requisite to the existence of a legal duty of care. But Johnson did not know the deceased. His only connection with him was that he had come to his house and there taken methadone and remained until he died. Others were coming and going in the meantime. The fact that Johnson had prepared and administered to the deceased saline solutions does not, as it seems to us, demonstrate on his part a voluntary assumption of a legal duty of care rather than a desultory attempt to be of assistance. In our judgment, the facts in relation to Johnson were not capable of giving rise to a legal duty of care and the judge should have withdrawn his case from the jury for this further reason.

Sinclair was in a different position. The evidence was that he was a close friend of the deceased for many years and the two had lived together almost as brothers. It was Sinclair who paid for and supplied the deceased with the first dose of methadone and helped him to obtain the second dose. He knew that the deceased was not an addict. He remained with the deceased throughout the period of his unconsciousness and, for a substantial period, was the only person with him. In the light of this evidence, there was in our judgment material on which the jury properly directed, could have found that Sinclair owed the deceased a legal duty of care. The judge was therefore correct to leave Sinclair’s case to the jury on this aspect. We do accept however, that there is force in Mr Carter’s submission that, in the law of manslaughter, it is important to distinguish between acts of commission and omission and that, even if it is appropriate, in criminal as well as civil law, for the circumstances in which a duty of care exists to expand incrementally, it is undesirable there should be such elasticity in that expansion that potential defendants are unaware until after the event whether their conduct is capable of being regarded as criminal . . .

Appeals against conviction for manslaughter allowed; third appellant’s appeal against sentence allowed

Questions
Should the existence of a duty be a question of law or of fact? What criteria could a jury apply? Would not juries reach inconsistent results if the issue was for them?

4.3.3.6 A general duty of rescue?
Proposals have often been made for the imposition of a general duty, particularly to save others from death or serious injury. A famous early example was the proposal by Edward Livingston for his Draft Code (never enacted) for Louisiana. It was to the effect that a person shall be guilty of homicide who omits to save life which he could save ‘without personal danger or pecuniary loss’. This seems at first sight to be an attractive solution to the ‘child in the shallow pool’ case. The Commissioners who in 1838 reported on the Indian Penal Code thought the proposal open to serious objection (Macaulay, Works, vol 7, 494.) If this were the only test of a duty it would certainly be quite inadequate; the common law duty quite properly requires the person owing it to incur ‘pecuniary loss’.
A parent may be unable to procure food for an infant without money. Yet the parent, if he has the means, is bound to furnish the infant with food, and if, by omitting to do so, he voluntarily causes its death, he may with propriety be treated as a murderer. [ibid, 494–495]

As a test for an additional duty its defects are less obvious; but it would, apparently, have been unacceptable to the Commissioners. They put the case of a surgeon, the only person in India who could perform a certain operation. If the operation is not performed on a particular patient he will certainly die. The surgeon could perform the operation without personal danger or pecuniary loss—in fact he will be well paid. But, for personal reasons it is extremely inconvenient for him to do so—he wishes to return to Europe or has other plans incompatible with the performance of the operation. The Commissioners thought it self-evident that he should not be guilty of murder. The example is an unusual one, highly unlikely to arise in practice, but not easy to distinguish in principle from the ‘shallow pool’ case. The difference, if there is one, seems to lie in the immediacy of the impending death in the shallow pool case. If Macaulay’s surgeon were to witness an accident and, knowing that he was the only doctor present and that only immediate medical assistance could save an injured man’s life, were to pass on because it was inconvenient to stop, it would seem less extravagant to convict him of an offence.

Macaulay excused what he thought might appear to be the excessive leniency of the Commissioners’ proposals on the following grounds:

It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstances which marks them out as peculiarly fit objects of penal legislation.

Not everyone accepts this point of view. Professor Millner (Negligence in the Modern Law, (1967) p 33), writing in the context of the civil law of negligence, stated:

There is, however, nothing absolute about this immunity from liability, and no reason why changing attitudes should not bring some of the more callous types of indifference within the reach of the law, at least in cases where inaction amounts to calculated indifference to the fate of others, as in the case where an injured pedestrian is left to lie in the path of oncoming traffic by those who know of his plight and could remedy it; or where a person is allowed, without warning, to cross thin ice or a crumbling bridge by one who is aware that the other, in his innocence is courting disaster; or where a person who, being in a position to take some action, yet allows a helpless and solitary invalid to starve to death. It is hard to imagine that anyone would be affronted if the law in such cases were to raise a duty of care in favour of the victim of this kind of callous indifference to the fate of one’s fellows.

For a powerful supporting argument for such liability see Ashworth (above, p 83). There is a wealth of literature on this topic, see especially J. Feinberg, Harm to Others (1984), Ch 4. See also M. Menlove, ‘The Philosophical Foundations of a Duty to Rescue’ and A. McCall Smith, ‘The Duty to Rescue and the Common Law’ in M. Menlove and A. McCall Smith (eds), The Duty to Rescue: The Jurisprudence of Aid (1993).

There is also the option of creating a specific statutory offence of the form found in many jurisdictions which criminalize the failure to take reasonable steps to rescue. Such statutes do not impose liability for the prohibited harm that V suffers (death or injury, etc), but the

4.4 Omisions and causation

Assuming that the offence in question is one which can be interpreted so as to be committed by omission and that there is a relevant category of duty, the question remains, how can D cause any harm by omission? Stephen, in his Digest of the Criminal Law (4th edn, 1887), art 212, stated the general rule for offences against the person as follows: ‘It is not a crime to cause death or bodily injury, even intentionally, by any omission…’

It will be noted that Stephen does not seem to have doubted that death or bodily injury may be caused by omission. He assumes that these results may be so caused, but denies that it is an offence. He gave the following famous illustration: ‘A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.’

Stephen went on to state exceptional cases where A would be guilty of murder—where A is B’s parent for example. If A and a stranger, C, were walking past together it is impossible to say, as a matter of fact, that A has, and that C has not, caused the death of the child. Either could have saved him equally easily and each deliberately refrained from doing so. The difference is that, in law, A has a duty to act but C does not.

It has been argued (Brian Hogan, ‘Omissions and the Duty Myth’ in Criminal Law Essays, p 85) that it is not true that results can be ‘caused’ by omission and that it ought to follow that no one should be liable for a ‘result crime’ because of a mere omission.

If grandma’s skirts are ignited by her careless proximity to the gas oven, the delinquent grandson cannot be said to have killed her by his failure to douse her. No sensible doctor would enter as the cause of her death, say, failure to telephone the fire brigade. . . . [Professor Hogan continues:]

If any proposition is self-evident (and, arguably, none is) it is that a person cannot be held to have caused an event which he did not cause. Hence my delinquent child cannot sensibly be said to have caused the death of his grandmother simply by a failure to take steps (which may or may not have been successful anyway) to prevent that death. To say to the child, ‘You have killed your grandmother’ would simply be untrue.

This is not to say that I am against liability for omissions. There would be nothing in principle objectionable in Parliament enacting a law which made it an offence for a member of a household to fail to take steps reasonably available to him to prevent or minimize harm to other members of the household. There are of course numerous instances where Parliament (and a handful where the common law) has penalised omissions but what is noteworthy is that the defendant is penalised for the omission but not visited with liability for the consequences of that omission. . . .

So in no sense am I against liability for omission. I would ask only two conditions of a law punishing omissions. One is that it be clearly articulated and the other is that it seeks to punish the defendant for his dereliction and does not artificially treat him as a cause of the event he has not brought about by his conduct. . . .

Thus far I have discussed cases where by no stretch of the imagination can it be said that the defendant has caused a result by his inaction. The question then arises whether a result may ever be caused by inaction. My answer is: No. On the other hand a result may be caused by the defendant’s conduct and the totality of the defendant’s conduct causing a result may properly include what he has not done as well as done. In such cases I doubt whether it is very, or at all, helpful to analyze each phase
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of the defendant’s conduct as one of omission or commission. The question is simply: did the defendant’s conduct cause the result?

Take a simple example. X, driving his car, sees Y beginning to cross the road ahead. X realizes that unless he takes some action, such as removing his foot from the accelerator to the brake or turning to left or right, he will run down Y. In fact he takes no action whatsoever and runs down Y. Charged with an offence in relation to the harm done to Y, X would surely be laughed out of court if he said: ‘I did not do anything to cause harm to Y. We would not have the slightest difficulty in saying that X ran down Y and was the cause of the harm to Y. R v Miller (above, p 101) holds, and with respect rightly, that one who inadvertently (or otherwise faultlessly, presumably) starts a chain of events causing harm may be properly held liable if, having become aware that he was the cause, he fails to take steps reasonably available to him to prevent or minimize the damage that will ensue. A tortiori the driver X. There is nothing inadvertent about his causing of harm to Y. X chooses to stay with a course of conduct which he knows will cause harm to Y.

Compare the views of A. Leavens, ‘A Causation Approach to Criminal Omissions’ (1888) 76 Cal LR 547.

Such a view of causation is flawed because its inquiry is too limited. It depends on a definition of the status quo as the existing physical state of affairs at the precise time of the omission. . . . Our everyday notions of causation, however, are not so limited because we understand that the status quo encompasses more than the physical state of affairs at a given time. Indeed, in everyday usage the status quo is taken to include expected patterns of conduct, including actions designed to avert certain unwanted results. When, for example, a driver parks a car on a steep hill, it is normal to set the parking brake and put the car in gear. If the driver forgets to do so and the car subsequently rolls down the hill, smashing into another car, we would say that the failure to park properly was a departure from the status quo. This failure, not the visibly steep hill or the predicate act of pulling the car to the curb, was the cause of the collision. Once we realize that a particular undesirable state of affairs can be avoided by taking certain precautions, we usually incorporate these precautions into what we see as the normal or at rest state of affairs. A failure to engage in the preventative conduct in these cases can thus be seen as an intervention that disturbs the status quo. When such a failure to act is a necessary condition (a ‘but for’ cause) of a particular harm, then that failure fairly can be said to cause that harm. In the above example, the driver’s failure to park the car in a proper manner caused the accident as surely as if he had actually driven his car into the other . . .

Question
Does D kill his grandmother by failing to put out her blazing skirt?

In Morby (1882) 15 Cox CC 35 D was convicted of manslaughter of his son, a child under the age of 14. D knew that the child was suffering from smallpox. D did not summon a doctor because he was one of the ‘Peculiar People’ who did not believe in medical aid but trusted in prayer and anointment. The child died of smallpox. In the Court for Crown Cases Reserved (Lord Coleridge CJ, Grove, Stephen, Mathew and Cave JJ) D’s counsel admitted that he could not contend that D was not guilty of breach of a statutory duty but argued that death was not caused by breach of that duty. Lord Coleridge CJ said:

We are all clearly of opinion that the conviction cannot be supported. The jury may have thought that, as there had been a neglect of his duty by the parent, it was right to mark their sense of it by their verdict. Nothing could be more cautious than the answers given by the medical witness to the questions put to him. It was not enough to sustain the charge of manslaughter to show that the parent had neglected to use all reasonable means of saving the life of his child; it was necessary to show that what
the parent neglected to do had the effect of shortening the child's life. The utmost that the doctor would say, giving his evidence under a strong responsibility, in answer to the question, 'In your judgment, if medical advice and assistance had been called in at any stage of this disease, might the death have been averted altogether?' was, 'I cannot say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say probably might, because I did not see the case during life; had I done so I might have been able to answer the question.' That evidence is far too vague to allow this conviction to stand when all that the skilled witness could say was that probably the life of the boy might have been prolonged if medical assistance had been called in.

Questions
1. Was the court in Morby right? If so, is this an answer to cases like Hogan’s example of the incinerated granny? The steps omitted ‘may not have been successful anyway’—proof that they would have been successful would rarely, if ever, be possible. But what if the child, observing that granny’s skirt was beginning to scorch had deliberately refrained from telling her, in the expectation—or even the hope—that it would burst into flames? But for the child’s omission to warn, Granny’s life would have been saved. Is it then unreasonable to say that the child caused her death?

2. V has a heart attack and reaches for the pills which would save his life. (i) D, a stranger, pushes the bottle out of his reach. (ii) The bottle is just out of V’s reach. D could easily give it to him but does nothing. In both cases D wants V to die and V in fact dies. In (i) D is guilty of murder. In (ii) he apparently commits no offence. Are the cases morally distinguishable? Is one more deserving of punishment than the other? Should the law distinguish between them? Can D be said to have caused death in (i) but not in (ii)?

R v Gibbins and Proctor
(1918) 13 Cr App R 134, Court of Criminal Appeal
(Darling, McCardie and Salter JJ)

Walter Gibbins and Edith Proctor were living together with Gibbins’ daughter, Nelly, aged seven, and other children. The children were healthy except for Nelly, who was kept upstairs apart from the others and was starved to death. There was evidence that Proctor hated Nelly and cursed and hit her, from which the jury could infer that she had a very strong interest in Nelly’s death. Gibbins was in regular employment, earning good wages, all of which he gave to Proctor. According to Gibbins’s counsel, it was his duty to provide the money; it was Proctor’s to provide the food. When Nelly died, Proctor told Gibbins to bury her out of sight which he did, in the brickyard where he worked. Gibbins and Proctor were tried together and convicted of murder of Nelly. They appealed, inter alia, on the ground of misdirection.

[Darling J, delivering the judgment of the court:]

… the misdirection here complained of is on a crucial matter, where [the judge] told the jury what they must find in order to convict either prisoner of murder. He said, ‘The charge against the prisoners is, in the first place, that they killed this child Nelly, or caused her death, by malice aforethought. That means they intended she should die and acted so as to produce that result.’ If that is a misdirection it is one in favour of the prisoners…. ‘If you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury, as the result of which she died, it is not necessary for you to find that she intended or he intended to kill the child then and there. It is enough if you find that he or she intended to set up such a set of facts by withholding food or anything as would in the ordinary course of nature lead gradually
but surely to her death.’ In our opinion that direction amply fulfils the conditions which a judge should observe in directing the jury in such a case as this. . . .

‘If the omission to provide necessary food or raiment was accompanied with an intention to cause the death of the child, or to cause some serious bodily injury to it, then it would be malicious in the sense imputed by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death.’ The word used is ‘contemplated’, but what has to be proved is an intention to do grievous bodily injury. In our opinion the judge left the question correctly to the jury, and there is no ground for interfering with the convictions for those reasons.

It has been said that there ought not to have been a finding of guilty of murder against Gibbins. The court agrees that the evidence was less against Gibbins than Proctor, Gibbins gave her money, and as far as we can see it was sufficient to provide for the wants of themselves and all the children. But he lived in the house and the child was his own, a little girl of seven, and he grossly neglected the child. He must have known what her condition was if he saw her, for she was little more than a skeleton. He is in this dilemma; if he did not see her the jury might well infer that he did not care if she died; if he did he must have known what was going on. The question is whether there was evidence that he so conducted himself as to shew that he desired that grievous bodily injury should be done to the child. He cannot pretend that he shewed any solicitude for her. He knew that Proctor hated her, knew that she was ill and that no doctor had been called in, and the jury may have come to the conclusion that he was so infatuated with Proctor, and so afraid of offending her, that he preferred that the child should starve to death rather than that he should be exposed to any injury or unpleasantness from Proctor. It is unnecessary to say more than that there was evidence that Gibbins did desire that grievous bodily harm should be done to the child; he did not interfere in what was being done, and he comes within the definition which I have read, and is therefore guilty of murder.

The case of Proctor is plainer. She had charge of the child. She was under no obligation to do so or to live with Gibbins, but she did so, and receiving money, as it is admitted she did, for the purpose of supplying food, her duty was to see that the child was properly fed and looked after, and to see that she had medical attention if necessary. We agree with what Lord Coleridge CJ said in Instan [1893] 1 QB 450: ‘There is no case directly in point, but it would be a slur upon, and a discredit to the administration of, justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty.’ Here Proctor took upon herself the moral obligation of looking after the children; she was de facto, though not de jure, the wife of Gibbins and had excluded the child’s own mother. She neglected the child undoubtedly, and the evidence shews that as a result the child died . . .

Appeals dismissed

Questions

1. Was Gibbins held liable for an omission upon an omission?—that is, because he failed to interfere to prevent Proctor’s failure to feed Nelly?

2. Proctor was not related, in blood or in law, to Nelly. Why was she under a duty to feed Nelly?

3. Can it be seriously argued (cf above, p 110) in such a case as this that death is not caused by an omission? Or might the case be put on the ground that preventing Nelly from having
access to the food which was sufficient to keep the other children in good health was not a mere omission but a continuing act or series of acts?

4. Does it follow from the decision that, if Nelly had not died but had sustained grievous bodily harm, the appellants would have been guilty of causing gbh with intent contrary to s 18 of the Offences Against the Person Act 1861?

In A (children) (conjoined twins: surgical separation) [2001] Fam 147, [2000] 4 All ER 961, below, p 482, Mary’s heart and lungs were too deficient to keep her alive. She lived only because Jodie was able to circulate sufficient oxygenated blood for both of them. The evidence was that, if they were not separated, both would die. Separation would kill Mary but give Jodie a good chance of a normal life. The parents, Roman Catholics, refused their consent to the operation on religious grounds.

Ward LJ: I know there is a huge chasm in turpitude between these stricken parents and the wretched parents in R v Gibbins (1918) 13 Cr App R 134 who starved their child to death. Nevertheless I am bound to wonder whether there is strictly any difference in the application of the principle. They know they can save her. They appreciate she will die if not separated from her twin. Is there any defence to a charge of cruelty under s 1 of the Children and Young Persons Act 1933 in the light of the clarification of the law given by R v Sheppard [1980] AC 394 and in turn throws doubt on the correctness of Oakey v Jackson [1914] 1 KB 216? Would it not be manslaughter if Jodie died through that neglect? I ask these insensitive questions not to heap blame on the parents. No prosecutor would dream of prosecuting. The sole purpose of the inquiry is to establish whether either or both parents and doctors have come under a legal duty to Jodie, and if so, to procure and to carry out the operation which will save her life. If so then performance of their duty to Jodie is irreconcilable with the performance of their duty to Mary. Certainly it seems to me that if this court were to give permission for the operation to take place, then a legal duty would be imposed on the doctors to treat their patient in her best interests, i.e. to operate upon her. Failure to do so is a breach of their duty. To omit to act when under a duty to do so may be a culpable omission. Death to Jodie is virtually certain to follow (barring some unforeseen intervention). Why is that not killing Jodie?

**Question**

If the parents had prevented the operation by abducting the twins and both had died, would this have been murder or manslaughter of both twins, or only of Jodie, or of neither?

**FURTHER READING**


2. Glazebrook, ‘Criminal Omissions: The Duty Requirements in Offences Against the Person’ (1960) 76 LQR 386


