Criminal Liability and the Duty to Remove Danger

As a general principle the criminal law does not impose sanctions for failures to act, preferring to confine liability to acts (1). Thus, to draw on the time-honoured example, no liability attaches to the able-bodied adult who stands by and watches a helpless infant drown in a shallow pool; indeed, the idle adult is permitted a malicious grin with impunity. Several reasons may be advanced for this preference. First, whilst it is relatively easy to define the prohibited occurrence in terms of an act, it becomes more difficult to define such occurrence in terms of a failure to act (2). In short, criminal omissions can lead to problems of vagueness. Related to this is the problem of identifying those who are, or ought to be, liable. Recourse to the principles of causation is of limited assistance, as, in one sense, we all failed to prevent the evil against which the sanction is directed. Thus, some factor other than causation must be incorporated into the rule which makes an omission criminal. The rule punishing inaction must define its scope, something which is necessarily implicit in the rule which punishes action. Second, it is generally felt that the function of the criminal law is to prohibit the doing of wrong, not to require the doing of good. To require good of a person who merely wishes to be left alone is seen as being unnecessarily burdensome. That task is delegated to other normative systems, such as morals, social mores, or etiquette. In the law the Bad Man is no less noble or virtuous than the Good Samaritan (3).

To this general principle there are, however, exceptions. First, certain common law offences are defined purely in terms of omissions, the most


(2) It should be noted that in some cases an occurrence is ambiguous and it is difficult to label it as being either an act or an omission. Acts and omissions do not form discrete categories and the boundaries might overlap. Determining the nature of the occurrence will depend on the perspective adopted. An example is provided by the recent decision in Kaitamaki v. The Queen [1980] 1 N.Z.L.R. 59, [1984] 2 All E.R. 435, where the appellant was held to be guilty of rape in circumstances in which he honestly believed the prosecutrix to be consenting at the moment of penetration but where during intercourse he realised that consent was absent. Had he desisted at that latter stage he would not have been convicted. His persistence can be viewed either as an act of intercourse or as an omission to desist. However, this note is not concerned with that issue and it assumes the acts and omissions are readily identifiable.

(3) An interesting exception arises in Vermont where a general duty to rescue has been created by statute; see Franklin, “Vermont Requires Rescue; a Comment” (1972) 25 Stan. L. Rev. 51.
notable being misprision of felony (4). Second, there is the growing category of statutory offences which impose liability for failing to do a particular act. Familiar examples are driving a motor car without insurance (5), operating unfenced machinery (6), or selling liquor without a licence (7). Whilst each of these offences contains an element of action, liability is imposed by reason of the element of omission. The prohibited occurrence is not having insurance or a licence, or not guarding the machinery. The act committed, namely driving or selling, is in itself criminally neutral. Its criminal character is derived from its being a surrounding circumstance of liability; it is the context in which liability arises.

Greater difficulty is experienced with those offences which normally consist of acts but which can be committed by omission. Including an omission within the scope of such an offence normally rests on the recognition of and enforcement in the criminal context of a duty to act in the circumstances proven. The decisions in this area have been primarily, but not exclusively, concerned with homicides. There is, however, no reason in principle why they should not apply to other offences (8). A word of caution must be expressed with respect to statutory offences. Where the statutory language is in terms which suggest action the courts would be reluctant to extend liability to an omission (9). Thus, "wounding" has connotations of action which would exclude an omission. Indeed, it is difficult to conceive of a case of wounding by omission. However, if in this respect the language is neutral omissions could give rise to liability.

As stated, liability for an omission normally rests on the existence, or judicial creation, of a duty which will be imposed by the criminal law. The point can be taken further in that it can be said that if liability is imposed for an omission a duty to act is thereby created. Thus, whilst no duty to release a dog in pain had previously been recognised the consequence of Green v. Cross (10) has been to create such a duty. However, the more common approach has been to determine whether a duty exists and then to consider whether a failure to act was a culpable breach of that duty. The courts have been innovative in their creation of duties, excising them both from the civil law generally and from contract. Parents have been held to be under a duty to act to prevent the death of

(4) Misprision of treason is now a statutory offence: Treason Act, 1939, s.3. It had been thought that misprision of felony had fallen into abeyance until the House of Lords resurrected the offence in Sykes v. D.P.P. [1962] A.C. 528. A contrasting decision is that in Pope v. State, 284 Md. 309 (1979).

(5) Road Traffic Act, 1961, s.56.

(6) Safety in Industry Act, 1955, ss. 23 and 100.

(7) Intoxicating Liquor (General) Act 1924, s.7.


(10) (1910) 26 T.L.R. 507.
their children (11). Doctors who have undertaken to treat a patient are under a duty to prevent that patient’s death (12). However, consistent with the approach that the law does not require the altruism of the Good Samaritan, the duty is owed only to the child or patient; the parent need not act to save a neighbour’s child nor need the doctor act to save one who is not a patient. A ship’s captain is under a duty to make all reasonable efforts to rescue those of his passengers or crew who have fallen overboard (13), and certain persons who have a public duty are liable in respect of prohibited harm arising from their neglect (14). Apart from duties which arise in respect of well-defined relationships the courts have been prepared to hold that in particular circumstances the accused by his or her conduct had assumed a duty to act (15). The parent who starves his or her child to death can easily be considered to be guilty of either murder or manslaughter. However, where lesser injuries result, problems of mens rea aside, it might be difficult to find an appropriate offence. Could the parent be said to have caused grievous bodily harm or to have committed an assault occasioning actual bodily harm? The difficulty of construing statutory words of action to include inaction must be borne in mind. Nor will the common law offences of assault and battery necessarily have been constituted. The starving infant might not have been put in fear of suffering a battery and the deprivation of food could, only with difficulty, be considered to amount to an application of force (16). Moreover, in R v. Dytham (17) the police officer was liable,


(12) The liability of medical practitioners is fully treated by Benyon, “Doctors as Murderers” [1982] Crim. L.R. 17. An interesting opinion was ventured by Macnaghten J. in R. v. Bourne [1939] 1 K.B. 687, where he suggested that a doctor who refused to terminate a pregnancy, which threatened the life of a patient, would be guilty of manslaughter by negligence, if as a result the patient dies. This in effect means that the doctor would be under a duty to terminate. If the doctor intentionally refused to perform that operation, could he or she be convicted of murder?


(14) See R. v. Curtis (1885) 15 Cox C.C. 746; R. v. Pittwood (1902) 19 T.L.R. 37; R. v. Dytham [1979] Q.B. 772. In Leigh v. Gladstone (1909) 26 T.L.R. 139 a prison officer’s duty to protect the life and health of a prisoner was held to justify the forced feeding of the prisoner. Would the officer be liable for taking a decision not to force feed? The officer’s duty was considered in a different context in The State (C.) v. Frawley [1976] I.R. 366. In Buckoke v. Greater London Council [1971] 2 All E.R. 254 an instruction to firemen to ignore traffic signals, when answering emergency calls, if it was safe to do so was held to be lawful. Are firemen under a duty (apart from their contractual duty of obedience) to ignore traffic signals in such circumstances?


(16) The recent decision of the Court of Appeal in R. v. Williams (1984) 78 Cr. App. R. 276 is of interest in this context. Although the issue of omissions did not arise Lord Lane, in the course of his judgment, stated: ‘‘[O]ne starts off with the meaning of the word ‘assault’. ‘Assault’ in the context of this case, that is using the word as a convenient abbreviation for assault and battery, is an act by which the defendant, intentionally or recklessly, applies unlawful force to the complainant’’.

(17) [1979] Q.B. 772.
not in respect of the injuries suffered by the person to whose aid he omitted to go, but for the separate offence of misconduct in public office. These problems, however, stem from the definitions of the particular offences which constitute the code of non-fatal offences against the person and not from any deficiency in the law’s concept of a duty.

Only in rare cases has the law imposed a duty to act when a danger has been created. One such case was the decision of the United States Supreme Court in Henderson v. Kibbe (18). There the accused, who had robbed an intoxicated man and left him stranded on an unlit road, later to be run over and killed by a truck, was held to be guilty of second degree murder (19). Although the decision concerned the adequacy of the trial judge’s direction on the issue of causation, implicit in his conviction is that the accused was under a duty to remove the deceased from his dangerous location. The duty in that case arose as a consequence of the accused’s having created the danger in circumstances which were criminal. Nothing in the decision suggests that had the danger been created innocently the accused would have been under a duty to act, much less that a passive bystander would have been under such a duty. In Fagan v. Metropolitan Police Commissioner (20) the Divisional Court held that the accused who inadvertently drove his car onto a constable’s foot and subsequently, in the knowledge of this, refused to move it was guilty of assault of a police officer in the execution of his duty (21). The decision was based on the view that the entire incident was a continuous act which constituted the actus reus of the offence charged, rather than on any duty imposed on the accused. Thus the court avoided the issue of attaching liability to an omission and the associated problem of discovering a duty which had been neglected. The closest any court has come to attributing liability to a failure to remove an innocently created danger was in the Massachusetts decision of Commonwealth v. Cali (22). There a direction that a person who accidentally starts a fire and, having formed the requisite intent, takes no steps to extinguish it could be guilty of arson was upheld; it was sufficient that the intent was formed after the ignition of the fire if the accused was in a position to take steps to extinguish it. Although the point was not expressly stated the inference is that the accused was, in the circumstances, under a duty to act.

Developing a duty to remove danger

It is against this background that the English courts had recently to

(19) The offence of second degree murder is committed where a person recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person; New York Penal Law § 125.25(2).
(20) [1969] 1 Q.B. 439, [1968] 3 All E.R. 442. In Kaitamaki the New Zealand Court of Appeal decided the case on the point that sexual intercourse is a continuing act which can be accompanied by mens rea formed after the commencement of the act, [1980] 1 N.Z.L.R. 59.
(21) Contrary to s.51 of the Police Act, 1964.
(22) 247 Mass. 20 (1923).
consider the case of *R. v. Miller* (23). The facts were straightforward and not in dispute. The appellant, a squatter, lit a cigarette whilst in bed and subsequently fell asleep. The bed caught fire, thereby awaking the appellant. He moved to an adjoining room, resumed his slumbers, and ignored the fire. The fire spread through the house and, somewhat unfortunately for the appellant, he was rescued. His conviction of arson was upheld by the Court of Appeal and the House of Lords, in turn. The Court of Appeal accepted the general proposition that, in the absence of specific statutory provision or a common law duty imposed in the criminal context, an omission ought not to attract criminal liability. Moreover, the court stressed that normally the actus reus and the mens rea must coincide (24). However, certain offences occupy a long period of time and in respect of such offences an actus reus can be joined by a previous or subsequent mens rea to complete the offence. In such cases reality and common sense dictate that an unintentional act coupled with an intentional omission should be regarded as constituting in toto an intentional act (25). *Fagan* was one such case, and in *Miller* the conduct of the appellant from the moment of ignition to the burning of the house could be regarded as one act; by his failure to act the appellant adopted the earlier act of ignition (26). Given that at the time he failed to act the appellant had formed the necessary mens rea (27), his conviction was sound. Implicit in the Court of Appeal’s judgment was a reluctance to sever into elements of act and omission a course of conduct which may be regarded as being unitary and involving action.

The House of Lords upheld the Court of Appeal. Lord Diplock, in a speech which enjoyed the concurrence of his brethren, adopted Gordon’s classification of offences as being conduct-crimes or result-crimes (28), and noted that arson is of the latter category. The question which should be asked is whether the appellant did an act which caused the fire. If the answer is in the affirmative all of the appellant’s conduct from just before the moment of ignition until the completion of the damage is relevant; so too is the state of mind throughout the episode. Both the conduct and the state of mind might vary during this period.

(24) [1982] 3 All E.R. 386, 391.
(25) Ibid.
(26) Ibid., 393.
(27) Both courts held that recklessness, as defined in *R. v. Caldwell* [1981] 1 All E.R. 961, constituted sufficient mens rea for the offence of arson. It is by no means certain that the Irish courts would accept *Caldwell* recklessness as being sufficient and, in this respect, *Miller* might not be followed in Ireland. However, that does not detract from the main theme of this note.
(28) [1983] 1 All E.R. 978, 980. Gordon defines a result-crime as being one, the actus reus of which is separable in time and/or place from the criminal conduct creating it and where the law is interested only in the result and not the causative conduct. In conduct-crimes the criminal conduct and the actus reus are inseparable and the nature of the conduct is an essential element of the actus reus. *The Criminal Law of Scotland* (Edinburgh, 1978), p. 63.
There is no ground for excluding liability if at the time of any piece of conduct the appellant acquired the necessary mens rea to constitute the offence. Nor is there any ground for excluding from conduct capable of giving rise to liability, conduct which consists of failing to act to prevent a danger created by the appellant, provided that at the time the necessary mens rea was present (29). Lord Diplock adverted to the different theories (30) advanced to explain the decision and indicated his support for the duty theory for the ease of explanation to the jury. However, he would prefer the term “responsibility” to “duty” (31).

Quite clearly the House of Lords acknowledged that the appellant was under a duty to act, neglect of which duty, coupled with mens rea, gave rise to liability. The House considered the appellant’s failure to take measures to extinguish the fire to be an omission. That omission did not deter the House from attributing liability to the appellant as he had been under a duty to act. The scope of the duty was indicated by the House. It arises where, before the prohibited result is achieved, an accused has become aware of the danger which he or she has created and it lies within his or her powers to take steps to negative that danger. The terms employed in outlining this duty would indicate a willingness to apply it to result-crimes generally. Thus, the person who accidentally knocks a young child into the shallow pool would be guilty of homicide if, having become aware of what has happened, he or she, with mens rea, refuses to effect a rescue and the child dies. The element of causation defines those on whom the duty is imposed; thus, only those who create the danger are bound to act, thereby absolving the passive bystander. Normally this will require an initial act, but significance is attached to the failure to act once the danger has been created; an accused is held to be liable, not on account of the creation of the danger, but because, having created the danger, he or she failed to act. The creation of the danger by an accused is the context in which the duty arises. That context differs from those of other duties to act which have been recognised. Normally duties to act arise from a particular relationship or an assumption of responsibility by an accused, rather than from something done by the accused, albeit inadvertently. However, the relationship, the assumption of responsibility, and the creation of the danger are legal equivalents.

Several questions arise from the decision in Miller. As the appellant did nothing, it was unnecessary to consider the standard of behaviour which is required to satisfy the duty. Presumably all that would be required is that reasonable steps be taken (32). Although this introduces

(30) Ibid., 983. The theories are considered infra, pp. 97-99.
(31) Ibid.
(32) By analogy the duty of the ship’s captain is to take all reasonable measures to effect a rescue; see U.S. v. Knowles, note 13 supra; and a police officer is required to take reasonable measures to assist the victim of a criminal attack; see Dytham, note 14 supra.
an element of uncertainty into the law, reasonableness is a concept with which the courts are familiar in the criminal, as well as the civil, context. Relevant factors would include the presence of fire-extinguishing apparatus and the availability (and condition) of a telephone to contact the fire brigade. Thus, to an extent at least each case would depend on its own facts. A further question is whether the duty would arise where the initial causative act is not merely innocent but is justifiable. Does an accused who shoots an attacker in circumstances which would give rise to a defence of self-defence have a duty to procure assistance for the attacker who, being injured, no longer poses a threat? As formulated by the House of Lords the accused would be under such a duty; the accused has caused the danger, is aware of it, and is in a position to act. A related question arises in regard to cases where the accused is under a different duty and performance of both duties is impossible. Should a policeman who shoots one of two armed felons, whom he has been chasing, abandon his pursuit of the other in order to procure assistance for the first (33)? To an extent the answers to the latter questions will depend on the policy which underlies the duty. The House of Lords did not indicate what that policy is, other than stating that no sensible system of law ought to absolve anyone in the position of the appellant of liability (34). It does not necessarily follow that such a system would attribute liability to the victim of a criminal attack or the policeman in pursuit of felons. The answer to that must await further clarification.

**Duty to act or continuing act?**

Commentators have differed in their analysis of the decision, particularly with respect to its underlying theory (35). It has been argued that the Court of Appeal decision involved a legal fiction, namely, deeming acts to be intentional when in fact they were not, and that in reality the appellant’s conviction was based on his omission to extinguish the fire which he started (36). On this theory the appellant’s guilt could only be based on a failure to act, in circumstances in which a duty arose, coupled with mens rea in that regard. Thus, there is no necessity to attribute fault to the initial causative act (37). As stated, this theory found favour with the House of Lords. The argument in reply, which supports the Court of Appeal’s approach, involves an acceptance of the proposition that, in result-crimes, mens rea conceived after the act, but before the occurrence of the prohibited result, can lead to liability; if

(33) A possible answer is that a policeman enjoys a discretion in the exercise of his powers. It would be permissible for him to assist the injured felon, thereby abandoning his pursuit of the other; see *R. v. Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 Q.B. 118. But would a decision to persist in the chase and to neglect the injured felon be permissible?

(34) [1983] 1 All E.R. 978, 982.


(36) Smith, op. cit.

(37) Ibid.
mens rea is present before the result occurs and if that result is the consequence of the act combined with the accused’s decision not to prevent it, liability is established, provided that the accused’s conduct falls within the scope of the offence (38). The difference rests on the view taken of the events which occurred. The duty theorist considers the act to have been completed on the ignition of the mattress. Anything which happened subsequently, at least in regard to the actus reus of arson, was an omission. The acts of leaving the room and ignoring the conflagration were omissions. The continuing act theorist looks at the episode as a whole from the moment of ignition to the completion of the result, namely the occurrence of a sufficient degree of burning to constitute the actus reus of arson. Thus considered, what occurred was an act and not an omission; Miller burnt the house, he did not merely fail to save it. This theory recognises that result-crimes may be committed by a variety of acts over a period of time and that until the result occurs anything done in respect of it, and which is causative in nature, is an act. The mens rea in respect of the result adopts the prohibited conduct and liability is thereby established. This theory avoids the difficulty which might be associated with the creation by the courts of duties to act where none previously existed and the associated difficulty of ascertaining the extent of the duty. Moreover, by adhering to the traditional approach it provides a rationale for absolving the passive bystander of liability; causation in the active sense is an element of culpability and the bystander has not met that requirement.

In defence of the duty theory it has been argued that the decision did not involve the creation of liability for an omission without statutory authority. Drawing on the analogy of the decision in R. v. Gibbons and Proctor (39), it has been argued that if withholding food from a child until it dies is “killing”, then failing to extinguish a fire can amount to burning. Thus, Gibbons and Proctor could have been convicted of causing grievous bodily harm had the child survived, but with serious injuries. No difficulty is seen in extending this approach to offences involving “damaging”, “destroying”, “wounding”, and “assaulting” (40). However, the caution expressed earlier with regard to construing words of action to include omissions (41) must be reiterated. Nor does the duty theory explain why liability is confined to those whose initial acts caused the prohibited result to occur. The theory sees causation not as an element of culpability but as the context in which the duty to act arises. Given that view of the factor of causation, there appears to be little reason why a duty should be imposed on the causer of the danger and not on the passerby, who might be as well-, if not better, placed to take measures to remove it.

(38) Glanville Williams, op. cit.
(39) (1918) 13 Cr. App. R. 134.
(40) Smith, op. cit.
(41) Supra, p. 92.
A further distinction between the two theories lies in the attitude towards attributing criminal liability to omissions. The continuing act theory is based, in part at least, on a reluctance to attribute liability whereas the duty theorist feels no such inhibition. The respective decisions in *Miller* reflect this difference in attitude. The Court of Appeal accepted as being general the proposition that liability for omissions should not attach in the absence of explicit statutory provision or a recognised duty enforceable in the criminal context (42). In contrast, Lord Diplock felt that there was no difficulty in attaching liability, as the question was simply one of statutory construction in the light of the general principles of criminal law (43). Thus, a provision which is neutral in terms can, if appropriate, be interpreted to include omissions. Inasmuch as it suggested a preclusion of liability for omissions, his lordship expressed a willingness to discard the term “actus reus” and to substitute for it a more neutral “conduct of the accused” (44). This must amount to the strongest indication yet from a common law court of a readiness to abandon what was assumed to be a reluctance to interpret offences to include liability for omissions. Although the Lords did not consider the position of common law offences, their reliance on what they regarded to be the general principles of criminal law would suggest that there is no reason why the approach in *Miller* should not apply generally. Indeed, *Dytham* (45) is an example of a common law offence which was committed by means of an omission.

**Conclusion**

In conclusion, it can be stated that *Miller* has created a duty to remove danger created by the accused. This duty applies to the offence of arson and, presumably, to all result-crimes. It arises in respect of those offences because the law is principally concerned with prohibiting a certain result and not with the species of conduct which brings about that result. The imposition of the duty depends on the accused’s having created a danger which causes the prohibited result. The duty is not imposed on a passive bystander and the position still is that the law does not require the standards of the Good Samaritan.

More generally *Miller* marks a point where a common law court has shed the traditional reluctance to attribute liability to an omission. It could be the first in a series of cases in which offences, which are neutral in terms, are interpreted to include liability for omissions. This would involve the creation of new duties to act in the relevant circumstances. The possibility is that the general proposition stated at the start of this

---

(42) [1982] 3 All E.R. 386, 392.
(43) [1983] 1 All E.R. 978, 980.
(45) [1979] Q.B. 772.
note will have to be revised and that instead the proposition will become that there is no liability for an omission where the prohibition is defined in terms which preclude such liability.

J. PAUL MCCUTCHEON

National Institute for Higher Education,
Limerick