OMISSIONS AND CRIMINAL LIABILITY

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INTRODUCTION

The question of liability for omissions raises issues of profound significance for the criminal law. While discussion thereof might be predominantly theoretical – in practice prosecutors are likely to encounter few omissions cases – it is nevertheless important as it embraces consideration of the proper scope of the criminal law, its function in the prevention of harm and the encouragement of socially beneficial conduct and the practical effectiveness and limits of the criminal sanction. Although it has not been seriously considered by Irish courts the issue has attracted the attention of courts and jurists in other jurisdictions. 1 The Anglo-American tradition is one of reluctance to penalise omissions; to draw on the time honoured example no offence is committed by the able-bodied adult who watches an infant drown in a shallow pool. That gruesome hypothetical is happily improbable, but the general proposition is substantiated by the much-cited decision in People v. Beardsley 2 where it was held that the accused was not criminally answerable for the death from drug use of his ‘weekend mistress’ in circumstances where he failed to take the necessary, and not unduly onerous, steps to save her life. Likewise, the law does not impose a general duty to rescue those who are in peril nor is there a duty to warn a person of impending danger. 3 A passive bystander or witness is not answerable for his failure to act, even where the harm caused is the result of criminal conduct. 4 This general reluctance is evident in the manner in which criminal offences are defined. The criminal law is generally drafted in language which suggests action rather than inaction; it abounds with verbs such as ‘killing’, ‘wounding’, ‘inflicting’ and the like. 5 This can be contrasted


2. 150 Mich. 206 (1907).

3. See State v. Uivinen 313 N.W. 2d 425 (1981) (accused guilty of no offence where she failed to warn her daughter-in-law of her (i.e. the accused’s) son’s plan to kill her, which plan was carried into effect).

4. R v. Clarkson [1971] 3 All ER 344 (mere presence at the scene of a crime does not amount to aiding and abetting); in R v. Coney (1882) 8 QBD 534, 557 Hawkins J stated that ‘it is not criminal to stand by, a mere passive spectator of a crime, even of a murder’; in R v. Allen [1965] 1 QB 130 it was held that it must be established that the accused by some means or another encouraged the participants in order to convict, as otherwise that would be to convict on intent alone.

5. Although these examples are statutory there is support in the authorities for the application of the same proposition to common law offences. For instance, see Archbold (London, 1992)
with the comparatively infrequent employment of terms such as ‘permitting’, ‘facilitating’ and ‘allowing’ which are more susceptible to embracing passivity on the part of the accused.

A number of reasons are offered for this traditional reluctance. The first is that the law places a premium on the value of personal freedom and autonomy. This is achieved by proscribing acts which are calculated or likely to cause harm and which inevitably interfere with or threaten the personal autonomy of those against whom the prohibited acts are directed. For the same reason the law is reluctant to impose duties to act, as that would necessarily interfere with the autonomy of those who become the subject of such duties. Moreover, such duties are apt to arise in casual and often fortuitous circumstances and thus criminal liability might be attracted in situations which are not within the control of the accused. The corollary, of course, is that there is no right to be rescued but that too can be taken to reflect personal autonomy in that it limits paternalistic interference in our lives. A second reason is that the function of the criminal law is to penalise and deter the infliction of harm, not to compel or encourage the doing of good. It might well be socially desirable that we be encouraged to display the humanitarian virtue of the Good Samaritan but the achievement of that is left to other normative systems such as religion, ethics, social mores, education or etiquette. The accepted values of Anglo-American criminal law, summarised by the principle of legality or what in another context Henchy J has termed ‘the fundamental norms postulated by the Constitution’, also support the

19-166 ‘An assault is an act – and not a mere omission to act – by which a person intentionally – or recklessly – causes another to apprehend immediate and unlawful violence’ (emphasis added). Similarly, in R v. Williams (Gladstone) (1984) 78 Cr App R 276 Lord Lane stated: ‘Assault’ in the context of this case, that is using the word as an abbreviation for assault and battery, is an act by which the defendant intentionally, or recklessly, applies unlawful force to the complainant’ (emphasis added).

6. It should be noted that not all traditionalists rely on individual autonomy to support their approach; see, e.g., Glanville Williams, ‘Criminal omissions – the conventional view’ (1991) 107 LQR 86.

7. A variation of this theme is that the right to self-determination of those who wish to expose themselves to risk should be recognised and that they should be protected from the interference of potential rescuers. In this regard a duty to rescue would amount to a charter for busibodies, ‘do-gooders’ and other meddlesome interlopers. In a somewhat different context the courts have expressed a willingness to uphold a patient’s decision to refuse medical treatment, even where that decision is irrational; see Schloendorff v. Society of New York Hospital 105 N.E. 92 (1914); Sidaway v. Bethlem Royal Hospital Governors [1985] AC 871, 904–905. Intervention is justified only in exceptional cases such as where the patient is a minor, has been the subject of duress or undue influence or where the interests of others demand priority to the patient’s right of self-determination; see re W (a minor: medical treatment) [1993] Fam. 64; re T (adult: refusal of medical treatment) [1993] Fam. 95; and S (adult: refusal of medical treatment) [1993] Fam. 123; Eekelaar, ‘White coats or flak jackets? Doctors, children and courts – again’ (1993) 109 LQR 182; Lowe & Juss, ‘Medical treatment – pragmatism and the search for principle’ (1993) 56 MLR 865; Stern, ‘Court ordered caesarian sections; in whose interests?’ (1993) 56 MLR 238.

8. A related point is that the doing of good could probably be better encouraged by positive measures, such as offering rewards, rather than by the negative measure of imposing penalties; but see Woozley, ‘A duty to rescue: some thoughts on criminal liability’ (1983) 69 Virg L Rev 1273.

traditional approach. There are several aspects to this consideration. One involves the principle of strict interpretation of penal laws – offences which are defined in terms which predominantly suggest action should not be artificially extended to include omissions. In the same vein, the recognition, or creation, of duties to act is primarily a legislative function which should not be undertaken by the judiciary. A related difficulty is that a legal requirement to act is more likely to offend the rule against vagueness than a requirement not to act. It is easier, for example, to prohibit killing than it is to require the saving or preserving of life. In any event, the omissions rule articulates a commonly held assumption that doing nothing is less culpable than acting. While some might question the moral validity of that assumption it is reflected in the distinction which is drawn between killing and letting die. That distinction seems to make moral sense and certainly it forms the ethical basis to current medical law and practice. Practical difficulties are also identified as being a hinderance to the penalising of omissions. These include the drafting of omissions offences in sufficiently precise terms, their potentially universal application and the difficulty faced in attributing the cause of a harmful result to an omission. With regard to the last point if the drowned infant is thrown into the pool we can easily conclude that her death was caused by the actor. Indeed, in those circumstances we would enquire no further and the question of the liability of spectators would rarely arise. On the other hand, where the infant’s presence in the water was the result of accident or mishap it is not so easy to attribute her death to the inactivity of the spectators. It might well be that she would not have died had the spectators acted, but can we confidently say that they caused her death?

Acts and omissions distinguished

Despite the general reluctance to penalise omissions there are circumstances where they attract liability. At the outset it must be realised that a difficulty sometimes arises in relation to categorising conduct as being either an act or an omission. The dilemma might have arisen in Kaitamaki v. R where the appellant was convicted of rape. When he penetrated the victim the appellant believed that she consented; shortly afterwards he realised that this was not so but nevertheless he continued to have intercourse. The case is ambiguous in that it could be said that he was convicted either for continuing

12. See Airedale N.H.S. Trust v. Bland [1993] AC 789. But Woolzley, loc. cit, 1295–99 argues that the distinction between acting and omitting is not so simple and that the contrast between doing something and allowing something to happen does not necessarily correspond with that between acting and omitting.
13. This is not helped by confusions in terminology. Omissions are sometimes referred to as ‘negative acts’ or ‘acts of omission’. For clarity, by ‘omission’ I mean a failure to act in relation to a prohibited occurrence or state of affairs.
to have intercourse (an act) or for not desisting (an omission) once he realised the victim's state of mind. Our doubts are partially solved in this case as the New Zealand Court of Appeal invoked the concept of a continuing act to base its decision to uphold the conviction. That seems to reflect common sense; intercourse is after all a continuous act and it is unhelpful to dissect that conduct and categorise each element as either act or omission. The appellant's conduct overall was the act of intercourse and further analysis is unnecessary. On this view all the decision does is to confirm that mens rea need not necessarily be present at the beginning of the offensive conduct provided that there is some temporal coincidence between the two. Nevertheless, it is clear that had he desisted the moment he realised that consent was absent the appellant would not have been convicted and, to this extent, it is difficult to ignore the contribution which that omission made to his liability. Whatever we make of Kaitamaki, and probably too much should not be read into it, the decision is interesting for its reference to the continuing act theory. That theory was first invoked in somewhat different circumstances, in Fagan v. Metropolitan Police Commissioner. There the appellant inadvertently drove onto a police constable's foot and, having had the matter brought to his attention, refused to move his car, leaving it in place for some minutes before driving off. His conviction for assaulting a constable in the execution of his duty was upheld by the Divisional Court on the grounds that he was guilty of a continuing act which merged with the mens rea when he became aware of the policeman's unfortunate predicament. While the continuing act theory conveniently explains the conduct in Kaitamaki the facts of Fagan fit less readily into it. Once the appellant became aware that the car was on the constable's foot he did nothing until he eventually removed the car and terminated the 'continuing act'. Had he so acted immediately he would have avoided liability and the realistic conclusion is that he was convicted for that failure to act. His culpable conduct is better categorised as an omission not an act.

The continuing act theory was based on a fiction and was later to be abandoned in R v. Miller. Indeed given the ridiculous conclusions which could be drawn from it, it was inevitable that its lifespan would be short. But its importance lies in the fact that it allowed the court to punish anti-social harmful conduct without appearing to do violence to the principle that liability is confined to acts. Several other cases display a similarly inventive approach. In R v. Speck a young girl placed her hand on the crotch of the accused's trousers and left it there for several minutes. The accused remained inactive

17. [1983] 2 AC 161. The Court of Appeal's reliance on a continuing act was departed from by the House of Lords which preferred to base its decision on a responsibility theory; see below at notes 73-78.
18. A slight variation to the facts of Fagan demonstrates the preposterousness of the continuing act concept. Suppose the appellant left his car to go about his intended business which was, say, to meet a friend for lunch; by what stretch of the imagination could this convivial conduct be described as engaging in the 'continuing act' of assaulting the constable?
throughout this episode which caused him to have an erection. His conviction of committing an act of gross indecency with a child was upheld by the English Court of Appeal. The court appears to have accepted the general proposition that mere inactivity does not constitute an offence. But it continued somewhat confusingly to state that if the accused had in any way invited the child to act as she did, the mere fact that he remained inactive is no defence. The court seems to have accepted that inactivity can amount to an invitation to the child to undertake the act. In a similar vein is where the English Court of Appeal seems to have accepted that the non-replacement of a tenant’s key could amount to harassment, which is defined by statute as ‘an act calculated to interfere with the peace or comfort’ of the tenant. Some of the court’s language supports that interpretation and while the case is not as clearcut as it is evidence of a judicial willingness to interpret omissions as acts. But while courts are occasionally prepared to stretch the concept of an act, sometimes beyond the point of credulity, to classify an omission as an act is a linguistic slight of hand. It is an attempt to remain faithful to tradition while ensuring that criminal liability is extended, possibly considerably, without due consideration being given to the important question of when it is appropriate to penalise omissions.

20. Under the Indecency with Children Act 1960, s. 1 [Eng.].
23. Protection from Eviction Act 1977, s. 1(3) [Eng.].
24. The court stated that ‘all the jury had to be satisfied was that the continuing refusal of a replacement key was an act “calculated to interfere with the peace or comfort of the occupier” ‘ (1984) 80 Cr App R 55 (emphasis added).
25. See Ashworth, ‘The scope of criminal liability for omissions’ (1989) 105 LQR 424, 438; Jefferson, Criminal Law (London, 1992) p. 88. However, it is not clear that the Court was consciously addressing itself to the question whether the refusal to replace the key should be categorised as ‘an act’; see Smith & Hogan, Criminal Law 6th edn. (1988) p. 49 fn. 4. This point was alluded to in R v. Ahmad (1986) 84 Cr App R 64. But see Kleinig, ‘Criminal liability for failures to act’ (1986) 49 Law & Contemporary Problems 161, 175 arguing that omissions may sometimes be classified as acts.
26. The act/omission distinction was central to the decision in Airedale N.H.S. Trust v. Bland [1993] AC 789 where it was held to be lawful to discontinue the feeding by nasogastric tube of a patient who was in a Persistent Vegative State. The general consensus amongst the Law Lords was that the proposed course of conduct is properly classified as an omission and, thus, would not attract liability; see per Lord Goff at 865–6, Lord Lowry at 875, Lord Brown-Wilkinson at 881–2 and Lord Mustill at 893, 898. This was contrasted with euthanasia which it was accepted is unlawful and was described variously as consisting of ‘active’ or ‘positive’ conduct, citing R v. Cox (unreported, Winchester Crown Court, 18 Sept. 1992). Lords Goff and Brown-Wilkinson cited Glanville Williams’s suggestion that for a doctor to stop a ventilator is ‘in substance not an act but an omission’ – Textbook of Criminal Law 2nd edn. (London, 1983) p. 282. But Glanville Williams also suggests that the switching off of the ventilator by an interloper would be an act; ibid. How can the identical conduct be an act in one case and an omission in the other? The distinction seems to lie in the relationship between the patient and the person who disconnects the machine, which defines the authority of the latter and the duty (if any) which is imposed on him. If that is so then the case might better be analysed in terms of the extent of the duty which a medical practitioner owes to his patient and to acknowledge that in some circumstances at least steps may lawfully be taken with a view to hastening the patient’s death. Of course this proposition
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OMISSIONS OFFENCES

It is pointless, therefore, to deny that the criminal law sometimes penalises omissions. It is better to focus attention on the circumstances in which such liability arises and, in this context, a threefold classification of omission offences can be employed. The first is what might be called pure omission offences, where no act of any type is committed by the accused. These offences are mostly statutory and the duties imposed usually are of a general public nature, such as the duty to pay tax, or are imposed on identified categories of persons, such as parents’ duties under child neglect statutes. A possible common law offence in this category is misprision of felony; another is the offence of refusing to assist a police officer in the preservation of the public peace. The second category consists of hybrid offences which contain elements both of act and omission such as driving without insurance, operating machinery without prescribed safety features and selling liquor without a licence. Some commentators have suggested that these should be classified as act offences and question the point of dividing them into attracts the objection that it authorises euthanasia. Hence the appeal of classifying the conduct as an omission and the implicit reliance on the traditional view that omissions do not attract liability. Kleinig, loc. cit. 167 considers that the question would depend on the circumstances: ‘[i]f the respirator is simply prolonging the dying process, then my turning it off may be characterizable as letting the person die. But if use of the respirator is seen as a temporary measure, an interim device to enable the person’s survival until his functions are restored, then turning off the respirator may be seen not simply as letting him die but as killing him.’ In the Court of Appeal Butler-Sloss and Hoffman LJJ were prepared to overlook the act/omission distinction; instead they preferred to draw a distinction between conduct (whether an act or an omission) which allows causes already present in the body to operate and the introduction of an external agency of death; at 823-4 and 831.

27. This common law offence had been thought to be obsolete but it was resuscitated by the House of Lords in D.P.P. v. Sykes [1962] AC 528 where it was held that the offence was committed when one concealed or failed to report the commission of a felony; see Allen ‘Misprision’ (1962) 78 LQR 40. (Following the enactment in England of the Criminal Law Act 1967 the offence no longer exists there). American courts, on the other hand, have shown a reluctance to interpret the offence as being one of pure omission; they have tended either to require affirmative concealment or some form of compounding – see e.g. Pope v. State 284 Md. 309 (1979) – or have denied its existence altogether – see e.g. People v. Lefkovitz 294 Mich. 263 (1940); see discussion in Frankel ‘Criminal omissions: a legal microcosm’ (1965) 11 Wayne LRev 367, 415–421; also LaFave & Scott, Criminal Law 2nd. edn. (St. Paul, 1986) pp. 600–601. Australian courts have acknowledged the existence of the offence (R v. Crimmins [1959] V.R. 270); but it appears that the prosecution must establish some material gain or benefit on the part of the accused (see per Morris [1955] Crim LR 290, 291–3); and it has been held that silence about an offence on the part of a person who is liable to be suspected of involvement in its commission does not constitute misprision; Petty v. The Queen, Maiden v. The Queen (1991) 65 ALJR 625. No Irish authority exists on the point and the argument could be advanced that the offence was not ‘carried over’ on the establishment of the State; and while the offence was referred to in passing in The People (D.P.P.) v. Quilligan & O’Reilly [1986] IR 495, 507 too much should not be read into that. In any event even if the offence was carried over by Article 50 of the Constitution the courts have yet to define it and it is not clear that they would necessarily follow Sykes. However, the statutory offence of misprision of treason is committed where a person ‘knowing that any act the commission of which would be treason is intended or proposed to be, is being, or has been done does not forthwith disclose the same’ to the appropriate authorities; see Treason Act, 1939, s. 3.

elements of act and omission. The other hand, it has been noted that the omission element is important because legal significance is attributed to the absence of particular prescribed conduct. The law penalises the driver not because of his driving (the act) but his lack of insurance (the omission). This category is conveniently encapsulated in the observation that ‘criminal omissions . . . always prescribe what must be done (or how something must be done) when something else is done or takes place’. But while these hybrid offences can be said to penalise omissions many of the difficulties associated with omissions liability are absent. The act element allows one to determine who is responsible for the omission and compliance with the law can easily be assured by simply not performing the act component. Moreover, as offences of this type are invariably statutory the duties to act are created by the legislature not by the courts. Offences in both these categories, which in the main pursue clearly identified public policy goals, are almost always conduct crimes – liability is imposed because of the nature of the accused’s conduct rather than for any supposed result which might be attributed to it.

The third category consists of offences which are defined in terms of acts but which can attract liability where the prohibited occurrence is attributed to an omission. Greatest difficulty is posed by offences in this category as the considerations which underlie the traditional reluctance to extend omissions liability apply with most force here. Nevertheless, the courts have been active.

31. Gross, A Theory of Criminal Justice (Oxford, 1979) p. 63. Gross bases his analysis on a distinction between conduct which on its face is legitimate and that which on its face is not legitimate. The former, in his view is often subject to omissions liability. It should be noted that he confines his analysis to those (usually statutory) offences which are expressly defined in terms of omissions. He does not consider our third category which is discussed below.
32. An interesting example, in this context, of the difference between statutory act liability and omissions liability is provided by Merchant Shipping Act, 1992, s. 23(2) which provides that a person who

(a) does an act which causes or is likely to cause – (i) the loss or destruction of or serious damage to his vessel or its machinery, navigation equipment or safety equipment, (ii) the loss or destruction of or serious damage to any other vessel or structure, or (iii) the death of or serious injury to any person, or (b) omits to do anything required – (i) to preserve his vessel or its machinery, navigation equipment or safety equipment from being lost, destroyed or seriously damaged, (ii) to preserve any person on board his vessel from death or serious injury, or (iii) to prevent his vessel from causing the loss or destruction of or serious damage to any other vessel or any structure, or the death of or serious injury to any person not on board his vessel, and the act or omission was deliberate or amounted to a breach or neglect of duty

is guilty of an offence. The act offences are defined expressly in terms of a result which is caused or is likely to be caused by the accused’s act. The omissions offences are defined in terms of the conduct which it is expected might, but not necessarily will, have certain consequences in respect of marine safety – the occurrence of a harmful result is not essential to liability for the omissions offences, although experience of the world allows us to predict that that occurrence is highly probable. But where an accused fails to act a bystander’s successful intervention to prevent the loss in question would not absolve the accused.

33. This category could be conveniently described by the expression employed by French lawyers ‘infractions de commission par omission’; see, e.g. Conte & Maistre de Chambon, Droit Pénal Général (Paris, 1990) p. 168.
in this regard and have held that some common law offences can be committed by omission. In *R v. Mavji* 34 it was held that the offence of cheating the revenue does not require a positive act on the part of the accused; any form of conduct which results in the diverting of monies from the revenue suffices. Thus, where the appellant failed to make due tax returns as a result of which the revenue was deprived of income the offence was complete. In *R v. Dytham* 35 it was held that a policeman who stood by while a member of the public was violently assaulted was guilty of the offence of wilful misconduct in public office. The simple omission by the officer was sufficient to constitute the offence and proof of an additional element, such as corruption or fraud on his part, was unnecessary. Other offences which the authorities suggest attract omissions liability include contempt of court and criminal nuisance. 36 These cases are isolated examples each of which can, with greater or lesser conviction, be explained without the traditional approach being threatened or undermined. Some of the offences outlined are based on a breach of a well recognised legal duty (general duty to make tax returns in *Mavji*; an individual’s duty to obey a court order in the case of contempt); others on the accused’s occupying a position of special responsibility (in *Dytham* the public office of policeman creates a responsibility and a public expectation that the office holder will act); while some are anomalous and should be treated as being *sui generis* (as in the case of nuisance). But the law has gone further and there is a considerable body of case law concerning result crimes in which omissions liability has been held to exist. The rationale is that the accused’s failure to perform a duty led to the occurrence of the prohibited result. The key to these decisions lies in the recognition, and enforcement, by the criminal law of a duty to act. But before proceeding to examine the various duties which have been recognised the range of offences which can be committed by omission should be considered.

**Range of omissions liability**

The early cases in which duties were first recognised involved homicide. To that extent, omissions liability was confined to the offences of murder and manslaughter and the issue of such liability for other offences did not arise. But if the victim’s injuries prove not to be fatal can the accused be convicted of a lesser offence on the basis of his failure to perform a duty to act? The issue is partly avoided by the existence of specific offences, such as those contained in child neglect statutes, which were enacted for those eventualities. Nevertheless, the question remains whether a non-fatal offence can be committed by omission. This in part is a question of interpretation but wider policy issues are also involved. As ever, two approaches are available. The

34. [1987] 2 All ER 758.
36. *R v. Watts* (1703) 1 Salk. 357 (permitting a house adjacent to the street to fall into a ruinous state is a nuisance); *R v. Leech* (1704) 6 Mod. 145 (failing to repair the street in front of one’s house is a nuisance); see Frankel, ‘Criminal Omissions: A Legal Microcosm’ (1965) 11 *Wayne L Rev* 367, 411–15; Smith & Hogan, *Criminal Law*, 7th edn. (London, 1992) p. 763.
first, based on the traditional view, is that omissions liability should be confined to homicide – the extensive interpretation of ‘kill’ in murder and manslaughter is, on this view, anomalous. But, that anomaly aside verbs which primarily describe activity, such as ‘assault’, ‘wound’, ‘damage’ and ‘destroy’, should not be interpreted to include omissions. The second approach is that omissions liability can and should apply to all offences of commission, unless the contrary is indicated. This approach, which we might call the expansionist approach, is based on the moral assumption that acts and omissions which lead to harm are equally reprehensible and deserving of condemnation. Thus, little difficulty is seen in interpreting offences sufficiently broadly to include omissions. If ‘kill’ can include passively causing death or allowing to die there is no reason why, for instance, ‘wound’ should not include passively causing a wound or allowing a wound to occur. However, the argument is not solely concerned with linguistic convention or the flexibility of the language employed to define criminal offences – the ‘accidents of linguistic usage or the conventions of drafting’, it is said, should not displace a ‘deeper’ principle that criminal offences be interpreted to include omissions. The preferred approach awaits judicial resolution. In particular, the question whether non-fatal offences against the person can be committed by pure omission has yet to be conclusively determined. There is no authority on the point in England but some American courts have displayed a willingness to attach liability in such circumstances. However, these decisions turned principally on the interpretation of the relevant statutes and the question of the supposed ‘deeper’ principle was not considered.

It has also been held that arson is committed where the accused fails to take steps to extinguish a fire which he has accidentally started. Finally, a number of statutory offences have been held to be capable of being committed by omission, but again no consistent approach is discernible.

41. *State v. Walden* 306 N.C. 466 (1982) (mother held guilty by omission of assault as an aider and abettor where she failed to prevent friend from unlawfully beating her child); *State v. Williquette* 129 Wis. 2d 239 (1986) (mother held guilty by omission of ‘subjecting’ child to cruel maltreatment where she failed to prevent her husband’s acts).
43. See e.g. the contrasting decisions on the Cruelty to Animals Act, 1849, s.2 – *Powell v. Knight* (1878) 38 LTR 607 (‘passive’ cruelty not an offence); *Green v. Cross* (1910) 26 TLR 507 (failure to release dog from lawfully set trap amounted to cruelty within the statute). The possibility of omissive larceny raises interesting questions. In some jurisdictions it has been held that where, in the case of a mistaken overpayment, the accused keeps the additional money the offence is complete. This is based on the theory that the ‘taking’ is postponed until the accused becomes aware that he has the additional money; see *R v. Ashwell* [1885] 16 QBD 190; see also discussion in Frankel, ‘Criminal Omissions – a Legal Microcosm’ (1965) 11 *Wayne L Rev* 367, 406–10. But Ashwell has been rejected in Ireland (in *R v. Hehir* [1895] 2 IR 709) and the question of omissive larceny should not arise. In *The People (A.G.) v. Singer* (1961) 1 Frewen 214 it was held that the accused was not guilty of obtaining by false pretences where he fraudulently retained money which had been entrusted to him, thus precluding omissions liability for that offence.
As already noted, the distinctive feature of omissions liability is the recognition (or creation) by the law of a pre-existing or extraneous duty to act in circumstances which can attract criminal liability. The identification of these duties has, in the main, been judicially undertaken and, in line with the traditional reluctance to create omissions liability, the prevailing view is that duties should be confined to a limited number of circumstances. Nevertheless, over the years the trend has been one of extending omissions liability. In this context, the difficulties which we noted earlier are most likely to arise. In particular, the judicial creation of duties to act is an extension of criminal liability which would more appropriately be undertaken by the legislature. In addition, the process involves a large measure of uncertainty as judicially-created duties are rarely defined in precise or clearcut terms. With these difficulties in mind, we can classify recognised duties in relation to their identified sources. This classification is primarily a matter of convenience, there being a significant degree of overlap, but it does facilitate analysis.

**Duties arising from statute**

In some cases a statute imposes a duty to assist certain categories of persons. It is usually provided that failure to act in the prescribed manner is an offence in itself. But the law might go further and convict the offender of homicide if the victim dies. Thus, in some child neglect cases where parents were held to be guilty of homicide their duty to act was derived from statute.

**Duties arising from contract**

The failure to perform a contractual obligation which results in death might sometimes be the basis for liability. This is the explanation for a series of decisions which have held neglectful railway gate-keepers guilty of manslaughter. Likewise, it is generally accepted that others who are employed in what might be called a safety capacity, such as lifeguards, owe similar duty. It should be noted that the duty is owed to members of the general public who of course are not parties to the contract. However, any reservations based on a notion of privity are overcome since in each of these cases the very purpose of the accused's employment is to protect the public. Contract is also offered as an explanation of a physician's duty to his patient - the physician undertakes in his contract with the patient to take all measures necessary to preserve the patient's life and health.

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44. See above at notes 6-12.
45. See LaFave & Scott, *Criminal Law* 2nd edn. (St. Paul, 1986) pp. 204–5 citing *Commonwealth v. Welansky* 316 Mass. 383 (1944) where a night club owner was held guilty of manslaughter where his failure to provide proper fire exits resulted in the deaths of a number of patrons.
46. See e.g. *R v. Senior* [1899] 1 QB 283 where the parent's duty was recognised, citing the Cruelty to Children Act, 1894, s. 1.
his patient, and the exclusion of a more general duty to assist all those who might need medical attention. However, it must be assumed that the duty applies whether the patient is fee-paying or not and the traditional contract explanation must be modified accordingly.49

While contract might appear to be a convenient source of duties to act it is not without conceptual difficulties. Aside from the possible issues of privity and consideration to which I have alluded already there is the more general question of whether criminal guilt should be determined, or at least shaped, by private agreement. This problem is aggravated where the contract contains exemption or exclusion clauses relating to the duty for which it is sought to impose criminal liability. In another context, one of the reasons advanced for law’s restrictive approach to the defence of consent is that the private agreement of the parties should not affect the application of the criminal law, the setting of the standards of which is a public matter.50 Thus, it would seem that if the law is to be consistent contract should be a basis for both criminal duties and defences or neither. The inconsistency can be avoided if we rely on the fact that the contract has been entered into, and not its contents, to explain contract-based duties. On this view the railway guard is liable because he has entered into a contract of that type, rather than because the particular terms of his contract impose liability.51 But, that explanation differs little from duties which are based on assumption of responsibility by the accused and the better view might be that contract is a mechanism by which responsibility is assumed rather than the basis of a duty in itself.52

Duties based on a relationship

In some circumstances the relationship between the accused and the victim is held to give rise to a duty to act. The most commonly cited, and uncontroversial, is the duty of a parent to assist a dependent child.53 This duty, which is now reinforced by child neglect statutes in most jurisdictions, has been long recognised at common law. In addition to any statutory liability which the parent might incur he or she is guilty of homicide if the child dies as a result

49. Of course, if the patient is non-fee paying the existence of a contract with the doctor is unlikely due to the absence of consideration. In this event the duty to act could be based on the contract, if any, which entitles the patient to treatment – e.g. the doctor’s contract of employment with a hospital or health authority or, possibly, with a medical insurance scheme to which the patient subscribes. Alternatively, the duty could be based on the doctor’s assumption of responsibility to treat the patient; see below at notes 61–71.

50. Public interest has been identified as the rationale underlying the rule which confines consent as a defence to non-harmful assaults; see Attorney General’s Reference (No. 6 of 1980) [1981] QB 715; R v. Brown [1994] 1 AC 212. On this view the public interest in prohibiting identified conduct cannot be overridden by private agreement. Thus, it is conceivable that while consent might provide a defence to a civil action it would not absolve the actor of criminal liability.

51. Thus, in the unlikely event of the guard benefitting from an exclusion clause that would govern the question of civil liability but would not affect the question of criminal guilt.

52. See below at notes 61–71.

53. Older authorities which suggest that a master owes his apprentice a like duty are no doubt obsolete; see R v. Self (1776) 1 Leach 137; R v. Friend (1802) Russ & Ry 20. The duty could equally be explained as arising from the contract of apprenticeship or, indeed, from the many statutes which governed apprenticeship from the Elizabethan period onwards.
of the failure to act.\footnote{R v. Downes (1875) 1 QBD 25; R v. Senior [1899] 1 QB 283.} It has also been held that the common law duty is not confined to biological parents but extends to those who are in loco parentis, whether by formal or informal arrangement.\footnote{R v. Bubb (1851) 4 Cox C.C. 455 (aunt who lived with child's father after its mother’s death held to owe duty to child); R v. Nicholls (1874) 13 Cox CC 75 (grandmother held to owe duty to child she cares for after mother’s death). These cases can also be explained on the basis that the accused assumed a responsibility towards the deceased; see below at notes 61-71.} Thus, parents have been held guilty of homicide where the child has been denied food and sustenance, necessary medical assistance and, in some cases, where they have failed to protect the child from a partner’s violence.\footnote{R v. Russell [1933] VLR 59 (husband who stood by while wife drowned children held guilty of manslaughter); Palmer v. State 223 Md. 341 (1960) (mother who failed to prevent lover beating her child held guilty of manslaughter); State v. Walden 306 N.C. 466 (1982) (mother guilty of assault as an aider and abettor where she did not prevent the beating of her child by a friend); see also State v. Williquette 129 Wis. 2d 239 (1986).} Most of the authorities concern underage and dependent children and the authorities are divided on the question whether a parent owes a duty to an adult child;\footnote{R v. Shephard (1862) L. & C. 147 (parents held to owe no duty to emancipated daughter); R v. Chattaway (1922) 17 Cr App R 7 (parents held to owe duty to cohabiting adult infirm daughter).} nevertheless, it is now unlikely that the existence of a duty would be denied solely on the grounds that the child has reached adulthood. Likewise, the preponderance of modern opinion is that children would be held to owe a duty to dependent parents.\footnote{Some commentators place the duty of a ship’s captain to rescue passengers or crew members who fall overboard in the relationship category; see LaFave & Scott, Criminal Law 2nd. edn. (St. Paul, 1986) p. 204. But the principal authority on the point (U.S. v. Knowles 26 Fed. Cas. 801 (1864)) speaks of a ‘plain duty’ imposed by law or contract.} It is also accepted that spouses have a similar duty to act in mutual assistance but it is uncertain whether the duty would extend to unmarried cohabiting couples.\footnote{See Smith & Hogan, Criminal Law 7th edn. (London, 1992) p. 48; Davis v. Commonwealth 230 Va. 201 (1985).} However, other relationships, such as that of sibling, do not in themselves give rise to a duty to act.\footnote{State v. Smith 65 Me. 257 (1876); Westrup v. Commonwealth 123 Ky. 95 (1906); R v. Bonnyman (1942) 28 Cr App R 131; State v. Mally 139 Mont. 599 (1961). In most of these cases the spouse to whom the duty was owed was in a state of physical or mental helplessness. Is a duty owed to an adult competent spouse? Such duty could be derived from a husband’s common law obligation to provide his wife with necessaries or from statutory maintenance obligations.}

**Duties arising from assumption of responsibility**

This amorphous category encompasses a wide variety of circumstances in which duties have been held to arise and has proven to be the most fertile ground for judicial creativity. In many cases where neither the relationship between the parties nor a legal instrument, such as statute or contract, is capable of giving rise to a duty the courts have been prepared to hold that the accused owed the victim a duty based on the former’s having undertaken the responsibility to care for the latter. The earliest cases concerned domestic arrangements where the accused undertook to care for a relative, often in
exchange for board and lodging and, in some cases, payment either direct or indirect. To this extent the law relaxed the stricter requirements of a formal relationship and was prepared to impose duties in the context of less formal domestic arrangements. Thus, it has been held that a niece who undertakes the care of an elderly aunt owes a duty based on the assumption by her of that responsibility. This has also been used as the basis for imposing a duty on an adult child towards an infirm and senile parent; of a parent towards an incompetent adult child; of a cohabitant towards her lover’s child; and of a brother towards an incompetent adult sister. However, the principle set out in R v. Nicholls was in wider terms:

... if a grown up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy or other infirmity, he is bound to execute that charge without (at all events) wicked negligence, and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter.

That statement is sufficiently broad to embrace a considerable number of relationships. In general, the recent judicial tendency has been to extend the range of duties through the invocation of the notion of assumption of responsibility. Indicative of that approach is R v. Stone and Dobinson. The disturbing facts of that case need to be set out at some length. The appellants were, respectively, a man of low intelligence who was partially deaf, almost blind with no real sense of smell and his mistress, who was described as being ineffectual and inadequate. They cohabited with the man’s mentally subnormal son. The man’s adult sister joined them as lodger in this unhappy menage. She proved to be morbidly anxious about her weight, denied herself proper food and stayed in her room for days on end. Eventually she became bedridden and remained there in appallingly unhygienic and unventilated conditions. The appellants were aware of her condition and made hopelessly ineffectual efforts to help. However, despite promptings from neighbours they did not summon the police or social services nor did they report the matter to a social worker who visited them. In the end the sister was found dead in her bed in, what the court rightly termed, ‘dreadful degradation.’ It was accepted that had she received timely and proper medical treatment she would have lived. On these facts the appellants were convicted of manslaughter. In upholding the conviction the English Court of Appeal held that the jury was entitled to find that both accused had assumed a duty to care for the sister and were obliged either to summon help or to care for her themselves. The duty to act arose because the appellants undertook to care for a person who was

64. R v. Gibbins and Proctor (1918) 13 Cr App R 134.
66. (1874) 13 Cox CC 75, 76.
unable to care for herself but the court stopped short of a general duty to act in aid of family members or close relatives.

The concept of assumption of responsibility has proved to be suitably flexible to facilitate judicial extension of omissions liability but certain features are common to the majority of the decisions in this category. The first is that in most cases the parties resided in the same household. Second, the parties were usually related by blood, marriage or adoption, whether formal or informal. Third, the beneficiary of the duty was usually unable to care for himself due to youth, illness, old age, senility or other mental infirmity. Fourth, the accused often had begun the process of caring or had made efforts in that regard, however ineffectual. So in Stone and Dobinson the duty was held to have arisen when the deceased became bedridden, infirm and dependent on the assistance of the two accused; but, it would appear, that no duty was owed to her before that time. Viewed thus, few would question the idea of a duty in such circumstances. It is not difficult to equate such cases with those of dependent children, and the social expectation that the 'stronger' party care for the weaker is both natural and understandable. Moreover, where the accused begins to care for the victim others who might be expected to intervene, such as social workers or health authorities, might well be led to desist in the belief that their assistance is not required.

While it might be illustrative of a new, more flexible approach to omissions liability Stone and Dobinson is problematic in several respects. The first is that it is difficult to see where the appellants had in fact undertaken the responsibility to care for the deceased; the record discloses a level of incompetence on their part which makes it unlikely that they would ever be capable of rendering the assistance necessary. Second, given that the duty has been judicially established, its parameters are inexact and the uncertainty leaves undue scope for judicial law-making. The idea of an undertaking is sufficiently vague as to bring a wide variety of social relations within its scope. The danger is that casual acts of generosity and charity could become the

68. See Fisse, Howard's Criminal Law 5th. edn. (Sydney, 1990) p. 122 suggesting that Stone and Dobinson is 'significant in its insistence on looking at the situation as a whole and not seizing on one more or less arbitrary fact, such as blood relationship or the status of lodger, as an exclusive ground of the decision.'

69. Such was their level of incompetence that, inter alia, the appellants were unable to use the telephone; and when they made an effort to contact the deceased's former doctor they walked to the wrong village in search of him. See also Hogan, 'Omissions and the Duty Myth' in Smith (ed.) Criminal Law: Essays for J.C. Smith (London, 1987) p. 85, 91. What objective was pursued in punishing the appellants whose real crime, it seems, was to have been remarkably stupid and incapable of coping with events? The Court of Appeal observed that a sentence of immediate imprisonment was unavoidable 'to mark the public disapproval of such behaviour.' But that savours of vindictiveness and it is likely that the prosecution was a response to what all would agree was an appalling state of affairs which should never have arisen in a modern welfare state. As a cautionary tale of the quality of life in present day society the case is telling. But that does not necessarily make the appellants' conduct wrong in any moral or social sense; if blame is to be apportioned attention might better be focussed on society's failings whether they take the form of official negligence or individuals' lack of interest. Ashworth sees the problem as lying in the breadth of constructive manslaughter, rather than omissions liability – (1989) 105 LQR 424, 440; but the offence of manslaughter has been broadened by omissions liability.
foundation of criminal liability. Would, for instance, a person who occasion­
ionally shops for an elderly neighbour be the subject of a duty when the latter
becomes too frail or ill to care for himself? A narrow interpretation is that
the duty is confined to domestic situations, what has sometimes been called a
household duty. This has the advantage of limiting the duty and falls far short
of a general duty to rescue. However, its attraction is superficial. As noted
earlier where a relationship of a close degree exists between the parties it
seems natural and proper to expect one to assist the other in time of need. But
it is not difficult to imagine household arrangements with much looser bonds
where the expectation might not be as obvious. For instance, should house­
sharing students be under a duty to assist a housemate who becomes seriously
ill due to a drug overdose or a dangerous level of intoxication? Moreover, to
limit the duty to households is not consistent with its underlying rationale and
could exclude from its ambit more compelling cases such as the duty of a
medical practitioner towards a non-fee paying patient. A wider interpretation
of the duty is that it extends to a range of situations where it might be deemed
reasonable or just to expect action on the part of the accused. Thus, some
commentators have opined that a duty would be owed where two parties are
engaged in a joint enterprise, say mountain climbing, in the course of which
one finds himself in a dangerous position. 71

Duties arising where accused has created a danger
In some cases the courts have been prepared to hold that the accused has a
duty to remove a danger which he has created, whether inadvertently or not. If
he fails so to act and a proscribed result occurs the accused is liable for that
result. The most obvious case is where the accused is at fault in creating the
danger. Thus, an accused who robbed and abandoned his victim was held
guilty of homicide when the victim was later run over by another and killed. 72
Little controversy arises from these cases and usually the principal issue is
that of causation. But it has also been held that liability attaches where the
initial conduct which created the danger was inadvertent or blameless. The
most recent and important decision in this respect is that of the House of

70. On the current state of the law probably not. In Pope v. State 284 Md. 309 (1979) the
accused allowed a woman and her infant child who were homeless to reside with her
temporarily. It was held that the accused was not under a duty to prevent the mother from
beating the child. This supports the view that Good Samaritans should not be subjected to
liability. But were Stone and Dobinson not Good Samaritans performing the charitable act of
providing a homeless relative with accommodation?

71. See Smith & Hogan, Criminal Law 7th. edn. (London, 1992) pp. 48–9; LaFave & Scott,
206 (1907), which held that there is no duty, is surely the perfect ‘joint enterprise’ case. On
the other hand, an accused who procured a prostitute who later became unconscious from a
heroin overdose was held to have a duty to assist her; see R v. Taktak (1988) 34 A Crim R
334 discussed in Charleton, Offences Against the Person (Dublin, 1992) p. 100; and Fisse,

72. People v. Fowler 178 Cal. 657 (1918); Henderson v. Kibbe 431 US 145 (1977); see also
State v. Green 242 Ga. 261 (1978) where the accused who left a rape victim alone in the
company of his violent accomplice was held guilty of her murder where the killing was done
in his absence by the accomplice.
Lords in *R v. Miller.* There the appellant, a squatter, while smoking in bed fell asleep with predictable consequences. On awaking to find his bed ablaze he left the room and resumed his slumbers elsewhere. The conflagration spread and destroyed the entire house. The appellant’s conviction for arson was upheld by the Court of Appeal and House of Lords. It was clear that the point at which the appellant formed mens rea was when he first became aware of the fire and, as was eventually held, recklessly disregarded the risk. The Court of Appeal, relying on the continuing act theory, held that his ‘act’, which started with igniting the fire and continued until the burning of the house, was accompanied by the requisite degree of recklessness. The House of Lords differed in its analysis and held that the appellant was under a duty, or responsibility as it preferred to call it, to take measures to extinguish the fire once he realised the existence of the danger which he had created. The duty therefore arises where an accused does an act which sets in train a sequence of events leading to the prohibited result; liability is complete if before the occurrence of that result the required degree of mens rea has been formed by the accused. This element of causation identifies those on whom the duty is imposed – only those who create the danger are bound to act and the passive bystander is still immune from responsibility.

Commentators differ on the interpretation of *Miller.* Traditionalists prefer to explain the decision on the basis of a continuing act and are reluctant to divide the appellant’s conduct into elements of act and omission – thus, they say, the appellant destroyed the house, he did not merely omit to save it. Others, however, consider the duty theory to be an improvement on the continuing act theory and note that in reality the appellant was held liable because he omitted to extinguish the fire. The latter is the more attractive explanation. It was expressly adopted by the House of Lords and it avoids reliance on the continuing act fiction; moreover, it is patently clear that had the appellant acted on becoming aware of the fire he would not have been held guilty. However, even if this analysis is accepted the extent of the duty established in *Miller* is uncertain. Lord Diplock spoke in general terms which suggest that the duty would apply to all result crimes. On this basis the adult who inadvertently knocks the child into the pool is guilty of homicide if having become aware of that fact he neglects to effect a rescue. But is a person who disables an assailant in lawful self-defence under a duty to assist him when he no longer poses a threat? Or is a police officer who shoots an
escaping and dangerous felon under a duty towards the wounded miscreant? All that can safely be said at this stage is that the authorities are too uncertain and marginal to allow a definite conclusion to be drawn and these questions await further resolution.

**Performance of the duty**

The considerable judicial attention to the existence of various duties to act is not matched by similar attention to the question of what steps are required to perform the duty satisfactorily and thereby to avoid liability. This is not unexpected as in most cases the accused made no efforts whatsoever or those which were made were hopelessly inadequate. Moreover, the efforts which would have avoided the prohibited result are often self-evident and not especially onerous. Thus, in *Miller* a telephone call to the fire brigade would probably have saved the house; in *Stone and Dobinson* all the appellants had to do was to alert their visiting social worker to the problem and remedial efforts would, no doubt, have been undertaken. But the question remains: what standard of care should be exercised by those who are subject to a duty to act? The authorities suggest that the accused is required to take reasonable steps to prevent the harmful result. What is reasonable will depend on the circumstances of the case and ultimately this is a question to be determined by the jury. However, it seems to be clear that one is not required to place oneself or others in danger. The matter was best expressed by the Supreme Court of North Carolina in *State v. Walden*:

This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances . . .

There is no reason to suggest that that statement should not apply generally to the performance of duties.

A related question concerns the feasibility of acting in performance of the duty. In some cases remedial action might either be impossible or especially onerous. The authorities speak of the accused’s having been in a position to act, and it would follow that if the accused was not so placed no liability would attach. In a sense the law recognises a defence of impossibility, despite

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78. In *King v. Commonwealth* 285 Ky. 654 (1941) it was held that where a shooting is originally lawful, the shooter owes no duty to render assistance; see contra, *Green v. Cross* (1910) 26 TLR 507 where accused was held guilty of animal cruelty where he neglected to release a dog from a lawfully set trap.

79. 306 N.C. 466, 476 (1982). See also *U.S. v. Knowles* 26 Fed. Cas. 801 (1864) where the master’s duty to rescue a seaman who had fallen overboard was said to be subject to the safety of the ship and those on board.

80. The court’s sensible conclusion can be contrasted with the heroics demanded by the Court for Crown Cases Reserved in *R v. Dudley and Stephens* (1884) 14 QBD 273.
the reluctance to employ that general term. Several related propositions flow from this. The first is that if the accused is unaware of the existence of facts which give rise to the duty no liability attaches to his failure to act. Thus, it has been held that the accused’s failure to report an accident, or to stop after an accident, was not an offence where he was unaware, and could not reasonably have been aware, that the accident had occurred. Second, inadequacy or unavailability of resources to the accused will usually afford a defence. Thus, the early cases which established the parental duty towards children spoke in terms of the parent having the means to make the necessary provision. This approach is substantiated by U.S. v. Springola where the accused’s failure to file returns as required by statute was due, inter alia, to the inability of his staff to bring the accounts up to date and his being unable to complete them himself. He was acquitted on the basis that his case was analogous to ‘physical impossibility’ and the court observed that ‘genuine’ impossibility is a defence to a crime of omission. However, if the impossibility can be attributed to the accused’s default or lack of due diligence there is no defence, especially where the offence is one of strict liability. Finally, a reluctance to act due to a psychological inhibition such as religious belief or preference does not constitute an impossibility.

A further issue in relation to the performance of a duty might arise where the beneficiary of the duty expresses a desire not be rescued. The question arose in Commonwealth v. Konz where the deceased, a diabetic, resolved not to take insulin and publicly proclaimed his belief that God would heal his condition. He eventually died of diabetic ketoacidosis. His wife had been present during what turned out to be his final illness, administered cracked ice but did not summon medical aid. She was held to be not guilty of involuntary manslaughter. The court acknowledged that one spouse owes a duty to assist the other but this was stated to be not as exacting as the duty owed to a child – the marital relationship gives rise to an expectation that the spouse’s wishes be respected and, in this case, that would be frustrated if the duty extended to summoning medical aid. Priority, it would seem, was accorded to respect for individual self-determination and if the decision is generally adopted a duty to act need not be performed where the beneficiary of the duty discloses that desire. This would also explain why prison authorities would not be held guilty.

82. Harding v. Price [1948] 1 KB 695; Police v. Creedon [1976] 1 NZLR 571; State v. Tennant 319 S.E.2d 395 (1984). See contra, Atkinson v. Mc Alpine Ltd [1974] Crim LR 668. In Lambert v. California 355 US 225 (1957) it was held to be unconstitutional to deny an ignorance defence where the duty arose in unusual or unexpected circumstances. If a duty is one which is commonly known or expected (e.g. the road accident reporting duty) it might be that an ignorance defence could be precluded.
84. 464 F.2d 909 (1972).
86. See e.g. R v. Senior [1899] 1 QB 283; R v. Lewis (1903) 7 CCC 261.
when they allow a hunger striker to die. In these circumstances the effect of circumscribing the duty to act thus is twofold: it absolves the person on whom it lies of civil liability if he acts in disregard of the beneficiary’s wishes – had the wife acted it can be presumed that an action for trespass by Konz would be unsuccessful – and of criminal liability if he respects those wishes. On the other hand, it might be argued that there are circumstances where a duty to act should take priority over the wishes of the beneficiary. It is a general proposition that one cannot licence the commission of a crime and that the defence of consent is accordingly limited. Thus, mercy killing is not justified by the deceased’s desire to die – consent is not a defence to homicide. But if, in these circumstances, one cannot actively kill how can a person who is under a duty to act justifiably refuse to preserve life? It does appear to be inconsistent to convict the wife if she killed Konz but to acquit her where she allowed him to die – if his self-determination is to be respected in one case why not the other? This is the very dilemma with which Airedale N.H.S. Trust v. Bland was concerned and was resolved by having recourse to the act­ omission distinction. The appearance of inconsistency is removed if regard is had to that distinction and a moral difference between the two is admitted.

Duties and causation

The issue of causation poses problems in relation to result crimes which are committed by omission. Where an act has occurred there is little difficulty in attributing to the actor the consequences of his conduct. Thus, where the accused pulls the trigger and the victim dies from the gunshot wound there is no difficulty in concluding that the accused caused the victim’s death. The law provides a framework which allows the question of causation to be determined by distinguishing between factual (or ‘but for’) causes and legal causes. The former are necessary but not sufficient conditions which contributed to the result – had they not existed (or ‘but for’ their existence) the result would not have occurred. The latter are those factors which in law are considered to be the cause of the result, sometimes called the proximate or substantial cause. Applying this to the example in question we can conclude that factors such as the manufacture and supply of the gun are ‘but for’ causes. It is obvious that had they not existed the death would not have occurred; but it is equally clear that the manufacturer of the gun did not cause the death. The proximate cause is, of course, the pulling of the trigger by the accused. Moreover, the legal framework accommodates subsequent factors which might affect or contribute to the result. Some intervening factors, such as medical negligence, which contribute to the death do not break the chain of causation between the

88. In Leigh v. Gladstone (1909) 26 TLR 139 it was held that a prison officer’s duty to protect the life and health of a prisoner justified force-feeding her and was a defence to an action in trespass; see discussion in Zellick, ‘The forcible Feeding of Prisoners: an Examination of the Legality of Enforced Therapy’ [1976] PL 153.
89. [1993] AC 789; see above at note 26.
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accused’s act and the prohibited result and are relegated to ‘but for’ causes; others, such as deliberate conduct by a third party, are deemed to be causative.

In case of omissions the causal relationship is not so clear. If the infant drowns in the pool it does not seem sensible to say that all who failed to rescue her caused her death. On the other hand, it does seem appropriate to attribute responsibility to an omitter who was under a duty to act and in that sense the omitter can be said to have caused the death. The existence of a duty, and its neglect, supplies the causation element necessary and operates both to assign and delimit responsibility for the prohibited result. In this sense duty and cause are fused or, as Fletcher put it, duty is a surrogate for causation. Thus, we can happily conclude that the parent who failed to rescue the infant from the pool caused her death just as much as if he had pushed the child in or held her head under the water. By the same token witnesses and passive bystanders are not considered to have caused the death, and even though their contribution to the result is similar it is at most a ‘but for’ cause. This proposition is reflected in Stone and Dobinson. The accused were held to have caused the deceased’s death; others who were aware, or arguably should have been aware, of the circumstances did not cause the death even though they were in a position to do something to relieve the deceased’s distress – the crucial difference was the recognition of a duty to act on the part of the accused but not on the parts of the others.

This merger of duty and causation, although convenient, is, to say the least, somewhat intellectually unsatisfactory and has been criticised. One criticism is that in no sense can an omitter be said to cause a result – on this view Stone and Dobinson did not kill the deceased. The corollary of this view is that omissions liability should not attach to any result crime, as not acting cannot cause a result. Another, quite different, criticism is that the notion of breach of duty does not adequately explain the causal relationship between an accused’s passivity and the prohibited result. The preferred explanation is that there has been a deviation from a routine or a departure from the status quo (which includes expected patterns of conduct).

93. The latter include a neighbour who helped Dobinson in tending to the deceased and the landlord of their local pub who attempted to telephone a doctor on their behalf – action on the part of either would not have been onerous and would have ensured timely and vital medical intervention. It also appears that Stone’s son was visited by a social worker – might he not have been expected to make himself familiar with the domestic circumstances and take appropriate action? See the similar discussion of Palmer v. State 223 Md. 341 (1960) in Frankel, ‘Criminal Omissions: a Legal Microcosm’ (1965) 11 Wayne L Rev 367, 398–9.
95. Leavens, loc. cit. 568–74. Leavens classifies events as being either normal or abnormal from a ‘commonsense’ perspective and an intrusion into the normal course of events is causative; this entails the making value judgments as to what conduct can be expected; the evaluation is both probabilistic (or empirical) and normative; a parent is expected to rescue a drowning infant because empirically we can predict with a high degree of accuracy that most parents will act in that way, and because it is normatively expected – it is on this basis that the parent’s failure can be considered to be the cause of the infant’s death. This mode of analysis
might be expected in some circumstances and where it does not materialise cause can be attributed accordingly. The concept of expected conduct is wider and more flexible than that of duty and its potential is to expand omissions liability. Most, if not all, duties that have been judicially recognised have arisen in circumstances where the accused could be ‘expected’ to act, but the reverse does not hold. There are many circumstances in which action might be expected but as yet no legal duty to act has been recognised.\(^96\) In this regard, legal duty to act is a narrower category, or possibly a subset of, expected conduct.

As long as result crimes attract omissions liability causation will be a problematic issue. The simple solution would be to exclude such liability in the case of result crimes, thus making life easier for courts and jurists. In that event omissions liability would be confined to conduct crimes, enacted by the legislature in the form of neglect statutes. But even in a jurisdiction unencumbered with precedent on the matter it is difficult to imagine the courts ignoring the persuasive authority of their foreign counterparts and to stay out of step with the prevailing Anglo-American approach to this issue. Thus we are left in a somewhat uncomfortable position and have to be satisfied with the view that ‘duty’ describes both the responsibility which is imposed on an accused and the attribution of cause to his failure to act.

A GENERAL DUTY TO ACT?

While the courts have gradually extended omissions liability the law stops far short of imposing a general duty to act. The passive bystander still avoids legal, if not moral, censure. This fails to satisfy the expansionists who consider the prevailing approach to be inadequate. For instance, on this view the acquittal in *People v. Beardsley*\(^97\) is considered to be indefensible, as is the failure to penalise the bystanders whose inactivity allows the infant to drown. Thus, it is argued that the law should incorporate a general duty to rescue and, in this context, reference is made to the many continental codes which impose

differs from the duty approach in that it does not look to external legal doctrines. A different view is advanced by Frankel, loc. cit., 390 arguing that the ‘objective’ contents of duty – the expectation of behaviour consonant with the duty – justifies causal attribution. Both views when applied to *Airedale N.H.S. Trust v. Bland* (1993) AC 789 lead to the conclusion that the doctors who terminate treatment do not cause the patient’s death. Continuing medical treatment which is hopeless or which is not in the patient’s best interests is not normatively expected; thus the resulting death is not a deviation from the normal course of events. Alternatively, the ‘objective’ contents of the duty do not justify the attribution of cause – the cause of death is the operation of an existing condition which is allowed to continue.

96. For instance, the law as yet has not recognised a duty to assist those engaged in a joint enterprise who are imperilled, but such conduct might be expected, in the Leavens’ sense and liability would consequently attach. This case could be distinguished from that of witnesses to a mugging in the metro who fail to intervene as such conduct could not be expected, either empirically or normatively.

such a duty. Moreover, one can also point to the several American states
which have introduced Good Samaritan laws in the past two decades or so.98
Two different approaches are possible.

The first is to enact a statutory rescue duty, such as exists in many
continental codes.99 The most frequently cited duties are those contained in
Articles 62, 63(1) and 63(2) of the French Penal Code, which respectively
penalise failure to report a serious crime, failure to take steps to prevent a
crime from occurring and failure render assistance to someone in peril.100
These offences are conduct crimes and thus avoid the difficulties associated
with causation.101 Moreover, the duty is imposed by a penal enactment and the
existence of a civil law or moral duty is considered of little importance to the
criminal law.102 In general, the rescue duties contained in continental codes
share a number of characteristics. The duty is usually confined to cases of
immediate, direct or imminent danger; the danger must be sudden – the duty
is confined to emergencies and unexpected crises and, for instance, terminal
illnesses are excluded; the danger must be evident – thus, similar to the Anglo-
American position,103 an accused who is unaware of the danger commits no
offence by his inaction. Such duties avoid most of the difficulties associated
with omissions liability. Liability is a legislative, not judical, imposition; the
duty is clearly defined in advance, thus meeting with the objection of
vagueness and lack of fair warning; and being conduct crimes problems of
causation are not encountered. Objections in principle to the enactment of
such duties are twofold. The first, based on a libertarian concern, is that
individual autonomy would be unduly fettered and that the law should play no
part in moral enforcement by compelling the doing of good. The second is
that the absence of a rescue duty is morally defensible as causation should be
the only basis for liability.104 Pragmatic concerns about such legislation focus
on its possible consequences. One is the fear that it would encourage unwanted
intrusion into people's affairs and become a busybody's charter; another is
that it is not obvious that the law would have the effect of persuading
bystanders to rescue in circumstances where at present they remain inactive.

98. E.g. Vermont has a general rescue statute – see Franklin, 'Vermont Requires Rescue: a
Comment' (1972) 25 Stan L Rev 51; Wisconsin sec. 940.34, Stats., creates a duty to aid an
endangered crime victim.

99. See Feldbrugge, 'Good and Bad Samaritans: a Comparative Survey of Criminal Law

100. See Ashworth & Steiner, 'Criminal Omissions and Public Duties: the French Experience'
(J990) 10 LS 153.


103. See above at note 82.

The second approach is that duties to act be extended by expanding the scope of crimes which can be committed by omission. In other words, the range of omissions liability for result crimes should be extended. This would be achieved by legislative and, more controversially, judicial action. Given that the enactment of such legislation is unlikely, and probably impractical, attention is focussed on judicial action. In this regard, the view is that the courts themselves should undertake the task of expanding omissions liability by recognising new duties and interpreting criminal statutes to include omissions liability; in the latter case the artificial limits of linguistic convention should not impede the more important ‘deeper’ principle involved. This, of course, is problematic and it encounters most if not all the problems which are associated with omissions liability. In particular, the principle of legality, and its adjunct principle of strict interpretation of penal statutes, are in direct conflict with the activist role which this strategy envisages for the courts. Moreover, it does seem illogical to attribute the cause of a result to an omitter, especially in cases where no recognised relationship or duty exists. Put bluntly, if it is considered desirable that the law should impose a rescue duty those who fail to act accordingly should be punished for that default, not for its supposed consequences.

CONCLUDING REMARKS

It should by now be clear that criminal liability for omissions is imposed in a wide variety of circumstances. Given the prevailing Anglo-American trend it would be surprising were Irish law to remain immune from overseas developments and, in general, this should not be too great a cause for concern. The principal difficulty lies not in the imposition per se of liability for omissions but in the inconsistencies and vagueness which has arisen in the law’s evolution. These difficulties are especially associated with the judicial creation of duties to act and the extension of some result crimes to include omissions. Typically the latter has involved a strained and unnatural interpretation of language which more readily accommodates action rather than omission. Moreover, it is only with difficulty that the cause of a prohibited result can be attributed to an omission. In this regard a legislative measure to anticipate judicial creativity in this area is to be preferred. Ideally duties to act would be thus created and omissions liability focused on conduct crimes. However, even were that to occur it can not be assumed that the courts would remain inactive. The Canadian experience has shown a history of judicial activism despite the existence of a comprehensive Criminal Code. Nevertheless, despite the potential for residual judicial creativity, there is much to be said for legislative initiative in this area if only to pre-empt that which is probably inevitable.