

Liability for omissions in the criminal law

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Common lawyers have long shown a remarkable reluctance to impose criminal liability for omissions. Such liability, it has recently been said, is 'uncongenial'¹ – and this seems to be right. Even where the law does, in reality, impose liability for omissions we find courts and writers trying to explain the phenomenon on some other ground. The feeling seems to be that, because the imposition of liability for an omission implies a duty to act it is an interference with the liberty of a person who wishes only to mind his own business and let others get on with minding theirs. Moreover omissions do not cause evil results in the same obvious sense as acts.² Since, *ex hypothesi*, the defendant does nothing, the evil result would necessarily occur in precisely the same way if, at the moment of the alleged omission, he did not exist. The often repeated example, found in Stephen's *Digest of the Criminal Law*³ and elsewhere, is that of the passer-by who sees a child drowning in a shallow pool. He could easily save the child without risk to himself but he passes by and allows it to drown. It appears that at common law he commits no offence. He did not drown the child. If he had not come along, it would have drowned in just the same way.

Professor Hyman Gross on omissions

One distinguished modern writer, Professor Hyman Gross, appears to go so far as to say that there is no such thing as liability for a pure omission.⁴ He states that 'in laws creating criminal omissions there is conduct required for liability though liability is not for that conduct alone'. Now it is, of course, true that there are many provisions which make it illegal to do something unless some thing is also done. Broadcasting a dramatic or musical performance without the consent of the performers, driving a car without third-party insurance, selling ice-cream in a public place without conspicuously displaying a notice of the vendor's name and address, are examples taken from English law.⁵ These cases are perhaps indistinguishable from others which no-one would think of as consisting in an omission. Larceny was taking

1. Hyman Gross *A Theory of Criminal Justice* (1979) p 62.

2. Fletcher *Rethinking Criminal Law* (1978) p 371; 'Of course, a bystander may cause death in the trivial sense that 'but for' his failure to act, the victim would not have died. But there is no causing of death in the sense implicit in the tradition of homicidal tainting.'

3. (4th edn), Article 212.

4. *A Theory of Criminal Justice* p 63. It is, apparently, 'an illusion' that liability for an omission is simply liability for failing to do what is required.

5. Smith & Hogan *Criminal Law* (5th edn) p 46.

and carrying property away *without the consent of the owner*, common assault is striking a person *without his consent*; but it would be unrealistic and artificial in the highest degree to regard those crimes as offences of omission on the ground that the defendant is guilty because of his omission to obtain consent. The positive action of the defendant which must be proved is the gist of these offences, though the negative factor is a condition of liability.

It is Professor Gross's attempt to force all omission offences into this category which breaks down.

'A state may wish to create criminal liability for residents who fail to file an income tax return. It seems natural then to create liability for an omission. But, alternatively, the law might formulate this as a prohibition that prohibits residence in the state without filing a return.'⁶

It is, however, just as unrealistic and artificial to regard this as 'a conduct offence' as it would be to regard larceny or assault as an offence of omission. Professor Gross, indeed, seems to recognise this; he continues to say of his income tax example:

'What is then prohibited (though not unconditionally) is a legitimate activity, and this will cause reasonable men to scratch their heads and wonder what the legislature had in mind. Because the law in this form suggests that residence in the state is the thing of underlying concern, very strange issues of exculpation are likely to arise as those against whom such a law is enforced try to show that they did not reside in the state intentionally, or that they could not help themselves and were forced to live there, or that laws restricting residence in this way are in any case invalid.'⁷

One might have thought that Professor Gross had at this point decisively rebutted his own argument; but not a bit of it. He goes on to conclude:

'We are left, then, with a view of criminal omissions that represents no departure from the general requirement that liability be for conduct. Crimes of omission are committed only when specified acts are done, just as is the case with straightforward prohibitions. The stress in omissions, however, is on what must be done additionally if there is not to be liability. Even though liability is imposed *because* something was not done, liability nevertheless is *for doing* certain things without doing certain other things.'⁸

So, in Professor Gross's view, the offence apparently *is* (though not expressed to be) residing in the state without filing an income tax return. 'Residing' might, though not without some strain, be regarded as an act; but what about such an offence as misprision of treason?

6. *Op cit* p 64.

7. *Op cit* pp 64-65.

8. *Ibid.*

Here the positive part of the offence would have to be 'owing allegiance to Her Majesty' which is a state of affairs that is hard to see as an act or as conduct. In the offence of failure to report an accident the 'conduct' would have to be, 'being a motorist who has been involved in an accident'. This is surely a distorted and unacceptable way of regarding these offences. The realistic way is to recognise that certain events or circumstances create a duty to act; and that the omission to act is the offence. Being a resident creates a duty to file an income tax return; being a motorist who has been involved in an accident creates a duty to report it; owing allegiance to Her Majesty creates a duty to report treasonable acts to the authorities; and so on.

Liability for omissions reluctantly recognised

The common law was slow to impose liability for omissions and, when it did so both courts and commentators have sometimes – including very recent times – tried to explain the result on other grounds. Early cases arising out of the negligent operation of railways provides an illustration. In *Smith* (1869)⁹ the defendant was employed as a watchman to give a warning to any persons crossing a turnpike road where it was intersected by a tramway. The tramway had existed before the road and his employer was under no statutory duty to provide a watchman; but he had done so and Smith had strict orders never to be absent from his post. Disobeying his orders and in breach of contract, he left his post and, while he was away, the deceased was knocked down by some trucks and killed. It was contended on Smith's behalf that, because this was an 'act of omission', the omission ought to have been stated in the indictment. The judge, Lush J, rejected that argument, holding that the words 'did feloniously kill and slay' were sufficient to include an omission; but he went on to hold that, because the employer had no statutory duty to provide a watchman and the defendant was merely his 'private servant', his negligence 'did not constitute such a breach of duty as to make him guilty of manslaughter'.

Thirty years later, a different result was reached in *Pittwood*.¹⁰ The defendant was a gatekeeper on the Somerset and Dorset Railway whose duties were to keep the gate shut whenever a train was passing along the line. The defendant opened the gate to let a car pass, forgot to shut it again and went off to have his lunch. As a result, a haycart crossing the line was struck and one person was killed. It was argued that there was no case to go to the jury; that the defendant was under no duty to the deceased. He contracted only with his employers, the railway company. Wright J rejected this argument holding, *inter alia*, that a man might incur criminal liability from a duty arising out of a contract. However, his first reason for his decision was that –

'There might be cases of misfeasance and cases of mere non-feasance. Here it was quite clear that there was evidence of misfeasance as the prisoner directly contributed to the accident.'

9. (1869) 11 Cox CC 210.

10. (1902) 19 TLR 37.

What Wright J meant by misfeasance is not entirely clear, but it seems likely that, as Helen Beynon argues, he was referring to the fact that the defendant opened the gate.

She writes in a recent article¹¹ –

‘... he must have construed the defendant’s conduct in opening and not shutting the gate as one course of conduct, gate-keeping, the net effect of which was an act and not an omission.’

If the defendant’s liability depended on the fact that he had opened the gate, it would follow that the result would have been different, if, when he came on duty, the gate had been opened by a colleague for a train which passed through while the responsibility for the gatekeeping was handed over. That is a conclusion which I would find offensive on both moral and logical grounds. The death would still have arisen out of the defendant’s negligent ‘gatekeeping’ and the fact that the defendant had done nothing at all, except assume the duty of keeping the gate, should make no difference. His duty to shut the gate was, surely, precisely the same whether it had been opened by himself or by a colleague. To describe what is really an omission as an act obscures the truth. There is no precise borderline between acts and omissions but this is true of many other distinctions in the criminal law. When we have a case which plainly consists in liability for an omission, it is at least unhelpful and possibly dangerous to try to disguise the fact and to describe the occurrence as an act. The matter has been the subject of debate in England recently arising out of the case of *Miller*.¹²

The defendant was squatting in a house owned by a housing association. One evening he went to a bedroom, lay down, lit a cigarette and went to sleep. He awoke to find that he had set the mattress alight and that it was smouldering. He did nothing to put out the fire but merely moved into an adjoining room and went to sleep there. The house caught fire and extensive damage was caused. He was charged with arson contrary to section 1(1) and (3) of the Criminal Damage Act 1971. The Act requires intention or recklessness and it seems to have been accepted that he did not set the mattress on fire intentionally or recklessly; it was an accident. It was submitted at the trial that he had no case to answer as a mere omission to put out the fire could not give rise to criminal liability. The submission was overruled. The recorder held that there is a distinction between the case of a person who comes across an existing dangerous situation, where he is under no obligation to do anything, and that where he is accidentally or deliberately responsible for the existence of the dangerous situation. In the latter case, he held that the person involved is under a duty to take action. Miller was convicted. His appeal to the Court of Appeal

11. ‘Doctors as Murderers’ [1982] Crim LR 17 at 22. It is difficult to follow Ms Beynon’s further opinion that ‘there would have been some sense in this since after all the accusation was that the accused failed to open a shut gate, not that he failed to shut an open gate’.

12. [1982] 2 All ER 386, CA; affirmed, [1983] 3 All ER 978, HL.

was dismissed but the court evinced the coyness about omissions to which I am referring. They doubted whether the recorder was correct in holding that there was a duty on the defendant, when he woke up, to extinguish the smouldering mattress. Instead, they followed a passage in Professor Glanville Williams's *Textbook of Criminal Law*¹³ –

'What is in issue is the question of the concurrence between *actus reus* and *mens rea*. Normally these must coincide in point of time, but there are exceptions. In addition to those that are well recognised, an exception supported by common sense but as yet inadequately supported by authority is to the effect that an unintentional act followed by an intentional omission to rectify the act can be regarded *in toto* as an intentional act. To formulate the rule more precisely: where the *actus reus* includes an act causing an event, and a person does the act without the mental element specified for the offence, but comes to know that it has caused or may cause the event and that he may be able to prevent the occurrence or limit the continuation of the event, and he can in fact prevent the occurrence or limit the continuation of the event, it is his duty to take reasonable steps in that regard, and if he fails to take such steps then: (a) if after acquiring such knowledge he knew that the event or its continuation was practically certain unless action were taken, he is deemed to have acted intentionally in causing it, and (b) if after acquiring such knowledge he was reckless as to the continuation of the event, he is deemed to have acted recklessly in causing it.'

The court said that this principle should be applied when 'reality and common sense so require; this may well be a matter to be left to the jury'.¹⁴

The decision that Miller was guilty is surely right but the theory adopted is, with respect to both Glanville Williams and the Court of Appeal, unsatisfactory because it involves a legal fiction and there should be no room for fictions in any modern system of criminal law. The theory requires us, as the *Textbook* says, to 'deem' an act to have been done intentionally or recklessly when in fact it was not. A person's liability to conviction and punishment should not depend on our having to pretend that something is so when it is not.¹⁵ The court says that the rule should apply only when 'reality and common sense' require. The 'reality' (as accepted by the court) is, of course, that the defendant set fire to the bed accidentally. If we have regard to the act of setting fire to the bed and are to look at the reality, he was neither intentional nor reckless and ought to have been acquitted. The reality is that he is held to be guilty because he failed to put out the fire which he had started. This can be tested by considering the court's opinion that it was doubtful whether the defendant was under any duty at criminal law to extinguish the fire. If he was under no such duty, then

13. (1978), pp 143–144. This passage is omitted from the second edition, 1983.

14. P 392.

15. As A. P. Herbert makes his fictional Lord Mildew say, 'there is too much of this dammed deeming'.

he was (so far as the criminal law is concerned) at liberty to walk away and let it burn. Up to that point, it was admitted that he had committed no criminal offence. How could his exercise of his legal liberty to walk away make him guilty of a crime? The *reality* is that he had no liberty under the criminal law to walk away. He was under a duty to take reasonable steps to put out the fire. Whatever the court may have said, that is the legal effect of its decision.

Miller's further appeal to the House of Lords was dismissed.¹⁶ Lord Diplock, with whom the whole House concurred, referred to the two theories as the 'continuous Act' and the 'duty' theories pointing out that in the circumstances they lead to an identical result and said that he would, 'for this purpose adopt the duty theory as being the easier to explain to a jury'.¹⁷

This is satisfactory as far as it goes, but I believe that Professor Williams, as well as I, would think that there is more at stake here than ease of explanation to a jury.

Duty and awareness

It seems clear that the House held that the defendant came under the duty recognised by the criminal law only when he was aware of what he had done and of the consequences of what he had done.¹⁸ This is noteworthy because the crime in that case was one which does not require actual awareness of any kind. It is sufficient, where the defendant has caused damage by an act, that the facts were such that a risk of damage by fire would have been obvious to any reasonable person who stopped to consider the matter. That is where we are concerned with an act. Where the defendant has done no act the first question is whether he was under any duty; and, in answering that question, we are to have regard to his actual knowledge. Once the duty is established, then the ordinary principles of *mens rea* relating to the offence in question are to be applied. So in a case of criminal damage, when the defendant has become aware of the events which have occurred, the question is whether those events –

'would make it obvious to anyone who troubled to give his mind to them that they present a risk that property belonging to another would be damaged.'¹⁹

This is rather like the theory of intention propounded by O. W. Holmes which was adopted in *DDP v Smith*²⁰ – would a reasonable

16. [1983] 1 All ER 978.

17. P 983. Lord Diplock expressed a preference for the word 'responsibility' instead of 'duty'. 'Duty' suggests 'an obligation owed to another person, ie the person to whom the endangered property belongs, whereas a criminal statute defines combinations of conduct and state of mind which render a person liable to punishment by the state itself.' 'Duty' is, however, a term which has long been used throughout the common law world in the exposition of the criminal law relating to omissions without apparently creating any difficulty.

18. See p 981, e–f, p 983, e–f.

19. P 982, g–j.

20. [1961] AC 290.

person with the knowledge of the defendant have foreseen the probability of the occurrence in question? A reasonable person in Miller's position, knowing that the bed was smouldering, would certainly have foreseen that it was likely that, if nothing were done, the building would be damaged by fire.

A general principle

The House did not enunciate any general principle and the decision does not go beyond cases of damage to property. It is, however, inconceivable that it does not extend to injury to the person. If Miller had left a fellow squatter sleeping in the same room and he had been asphyxiated, Miller would surely have been guilty of manslaughter. It cannot be supposed that the law regards damage to property as more serious than loss of life, or serious injury to the person. Nor does there seem to be any logical reason why a similar principle should not extend to other interests which are protected by the criminal law. An example is the protection of animals from cruelty. One of the cases discussed in *Miller* is *Green v Cross*²¹ where the defendant inadvertently caught a dog in a trap. At the time when he found the animal trapped and in pain, he had committed no offence. But if he then failed to take steps which he might reasonably have been expected to take to release it from its misery, he was guilty of causing it to be ill-treated, abused and tortured, contrary to the Cruelty to Animals Act 1849. Other interests such as that in the security of the state call, *a fortiori*, for similar protection. If an official were to write a letter containing highly secret information to X and, after handing the letter to the mail office of his department, were to discover that X was a spy, it cannot be doubted that it would be his duty to prevent the despatch of the letter. His omission to do so would surely constitute an offence against any appropriately worded legislation relating to official secrets.

Though it was assumed in *Miller* that the defendant committed no crime when he set the mattress alight, he was surely guilty of at least the tort of negligence. It is submitted, however, that the principle should not be confined to the case where the defendant's initial act is wrongful. Suppose that, on leaving my office on Friday evening, I lock the store-room door, reasonably believing the room to be empty. I then hear movement inside and realise that I have locked in a colleague and that he will be imprisoned there for the weekend unless I unlock the door and let him out. Surely my omission to do so would render me liable for false imprisonment (in criminal as well as civil law); and it should be no answer that locking the door was an entirely lawful and reasonable act.

Suppose, again, that without any fault on my part, I were to knock a small child into the notorious shallow pool – he was careering along not looking where he was going until we collided. Surely the lenience of the common law does not extend so far as to permit me to walk off, leaving him to drown when I could easily have saved him.

I venture, therefore, to suggest a general principle of which *Miller* is

21. (1910) 103 LT 279.

an example: whenever the defendant's act, though without his knowledge, imperils the person, liberty or property of another, or any other interest protected by the criminal law, and the defendant becomes aware of the events creating the peril, he has a duty to take reasonable steps to prevent the peril from resulting in the harm in question. He will, however, be guilty of a crime only if two further conditions are satisfied. The first is the existence of an offence which is capable of being committed by omission. In the case of statutory offences, this will depend on the precise wording of the definition. Not every definition of an offence admits of satisfaction by omission. The second condition is that the defendant must have omitted to act with the fault required for the particular crime. In *Miller* it was sufficient that it would have been obvious to a reasonable man, had he given any thought to the matter, that there was a risk that the premises would be burned.²² 'Caldwell recklessness' suffices. If, on the other hand, the hypothetical fellow-tramp had been burned and suffered grievous bodily harm it would have been necessary for the prosecution to prove that the defendant had actually foreseen that some bodily harm was likely to follow.²³ If, but only if, he had such foresight, he could have been convicted of maliciously inflicting grievous bodily harm contrary to s 20 of the Offences against the Person Act 1861. If he had been charged with causing grievous bodily harm with intent, contrary to s 18 of the same Act, it would have been necessary for the prosecution to go further and prove that the defendant actually wanted grievous bodily harm to be caused or knew that it was virtual certainty.²⁴ If such a state of mind were proved, and the victim had died, the defendant would have been guilty of murder. Indeed, it would seem to be sufficient on a murder charge to prove that the defendant foresaw that grievous bodily harm was highly probable or, perhaps, merely probable.²⁵ That is the *mens rea* of murder when it is committed by doing an act and it would seem right that the same should be required in the case of an omission where there is a duty to act.

Words including or excluding omissions

I return now to the significance of the particular words used in the definition of a statutory offence.

In *Miller* the House held that arson can be committed by omission. Since 1971 arson in English law has been governed by the Criminal Damage Act of that year. Section 1(1) provides that

'A person who without lawful excuse destroys or damages property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

22. *Caldwell* [1981] 1 All ER 961, HL; *Elliott v C* [1983] 2 All ER 1005.

23. '*Cunningham* ([1957] 2 QB 396) recklessness' still applies in offences governed by the word 'maliciously'. See Smith & Hogan *Criminal Law* (5th edn) pp 52–56 *W v Dobbey* [1983] Crim LR 681.

24. *Belfon* [1976] 3 All ER 46, CA.

25. *Hyam v DPP* [1975] AC 55, HL.

Section 1(3) provides that when the offence is committed by fire, it shall be charged as arson. *Miller* then accepts without discussion that the verbs, 'destroy' and 'damage' include cases where destruction or damage occurs as the result of an omission by a person with a duty to act. I do not find anything objectionable, or even remarkable, in this. Clearly, however, something depends on the words used in the definition of the offence which is in issue. For instance, I thought (and still think) that arson under English law could not be committed by omission before 1971. The crime was then to be found in sections 1 to 6 of the Malicious Damage Act 1861 which required that the defendant should have 'unlawfully and maliciously set fire to . . .' the property in question. ' . . . set fire to . . .' seems to require a positive act and to leave no room for liability by omission.²⁶ So, if the duty theory is followed, *Miller*, if his case had occurred before 1971, would have escaped liability on a charge of arson, whereas if the continuing act theory applies, he would of course have been guilty. This would have allowed us to say that *Miller* *did* intentionally or recklessly 'set fire to' the premises, since his conduct is to be regarded 'in toto' as an intentional or reckless act. While I agree that it is desirable that the likes of *Miller* should be convicted, I think it even more desirable that they should not be convicted unless it be proved that they have committed the offence as defined by law. If the defendant did not 'maliciously set fire to' the property he should not be convicted by pretending that he did.

An example given by Professor Williams²⁷ himself suggests another equally objectionable result, ' . . . a driver accidentally hits a pedestrian and severely injures him. He drives on, knowing that he could help the victim but being reckless whether or not the victim dies. If the victim dies, why should this not be manslaughter?'

I agree with Professor Williams that this should be manslaughter, but I would put it on the ground that the motorist owes a duty to the person he has injured to take reasonable steps to help him. Professor Williams, however is giving this as an illustration of this theory, that is, that the motorist 'is deemed to have acted recklessly in causing it [the death]'. Though Professor Williams denies it,²⁸ it seems to me to follow inevitably that the driver would then be guilty of the statutory offence of causing death by reckless driving.²⁹ The only 'act' which we can deem to have been done recklessly is driving. Since the driver did *not* in fact cause death by reckless driving, it would be quite outrageous to convict him of that offence. The reality may be that he was driving with perfect care and attention when he caused the injury. His fault is in going away, leaving the injured pedestrian to die; and that has nothing to do with driving.

26. Smith & Hogan *Criminal Law* (2nd edn, 1969), p 36, n 7, opining that *Commonwealth v Cati* (1923) 247 Mass 20, a case with facts similar to *Miller*, would not apply in English law.

27. *Textbook* (1st edn) p 144.

28. See correspondence at [1982] Crim LR 773–774.

29. Professor Williams writes: 'This is not so. Such a driver would not come within the words of the statute; he would not have driven recklessly'. This is, of course, true – but it seems to overlook the 'deeming'.

Professor Williams advocates the continuing act theory because he fears that the duty theory may lead to an undue extension of criminal liability;³⁰ but these examples suggest that in many instances it is the continuing act theory which is going to have the greater effect. Since the innocent act is deemed to be intentional or reckless, it is immaterial that the word or phrase defining the act is one wholly inappropriate to liability by omission.

Non-fatal offences against the person

Most of the English cases concerning liability for omissions are charges of homicide. Since murder and manslaughter are still common law offences in England, there is no statutory word to construe; but the words 'kill and slay' in an indictment have been held capable of satisfaction by proof of an omission and so has the word 'murder'.³¹ Lord Campbell CJ, delivering the judgment of the Court for Crown Cases Reserved in *Hughes* (1857) said that '... it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter only'.³²

One reason why most of the cases concern manslaughter may well be that manslaughter is a crime which can be committed by negligence. In the case of an omission it will usually be more difficult to prove intention than in the case of an act. Intention was however proved in *Gibbins and Procter*³³ where the judge directed the jury that the defendants were guilty of murder if they intentionally withheld food from the child in their care with intent to cause her grievous bodily harm, as a result of which she died. The Court of Criminal Appeal held that this was a correct direction. Suppose that the child had not died but had sustained grievous bodily harm? It is difficult to suppose that the court would not have held the defendants guilty of causing grievous bodily harm with intent to do so contrary to section 18 of the Offences against the Person Act 1861. The commission of this offence, in fact, if not in law, was an essential constituent of the defendants' liability, as the case was left to the jury; and 'cause' is a not inapt word to include liability for omission. There is indeed a serious logical difficulty in not holding the defendant liable for causing grievous bodily harm. The question is whether he was under a duty to act. If he is to be liable for homicide but not for the included non-fatal offence, it seems that we cannot answer the question at the time of the omission but we must wait to see what happens. If the grievous bodily harm results in death, then we will say that he was under a duty to have taken steps to see that this did not happen. But whether or not death occurs may well be a matter of pure chance. Surely the retrospective imposition of a duty is

30. See [1982] Crim LR 773.

31. See *Smith* (1869) 11 Cox CC 210, above, n 9.

32. *Hughes* (1857) Dears & Bell 249.

33. (1919) 13 Cr App R 134.

unacceptable. Either the defendant was under a duty at the time he, with the prescribed state of mind, omitted to act, or he was not; and the answer given, in the circumstances of *Gibbins and Proctor*, is that he was under a duty.³⁴

What then of other offences against the person? If 'damage', 'destroy', 'kill' and 'slay' may be satisfied by proof of an omission to carry out a duty, why not 'wound' or 'inflict' grievous bodily harm? The answer accepted in English law at least until recently was that (i) the words 'wound' and 'inflict' both imply an assault; and (ii) that 'assault' requires an act and cannot be committed by omission. Both of these propositions are, however, open to challenge. Following the Victorian case of *Salisbury*³⁵ the House of Lords has held in two cases, *Wilson*³⁶ and *Jenkins*,³⁷ that the word 'inflict' does not, after all, necessarily imply an assault, though it may still be narrower than 'cause' in requiring the causation of some physical impact upon the body of another, as where the victim is caused to jump out of a window or run into an iron bar. The assumption that 'assault' requires an act should not go unchallenged. Is there some special magic in the word which distinguishes it from 'kill', 'slay', etc? If D digs a pit with the intention that P should fall into it, and he does, that is said to be an assault.³⁸ If D is sitting in a corridor and, hearing P running towards him, he puts out his foot with the intention that P shall fall over it, and he does, that is plainly an assault. Should it not equally be an assault if D, having dug the pit with no criminal intention, decides to leave it uncovered so that P will fall into it – which he does? Or if D's legs are already extended and he decides not to draw them back, so that P will fall over them? These seem to be cases where there might properly be held to be a duty to act within the principles of *Miller* – D's act has created the peril and he knows it. If he should happen to cause death, it would seem to be manslaughter, or even murder if he intended to cause grievous bodily harm (it is a very deep pit; or P, as D knows, has very brittle bones). If only grievous bodily harm occurs, he will be liable for causing that. It seems strange that he should escape liability altogether if some lesser degree of harm is caused.

There seems, in fact, to be no actual decision that assault cannot be committed by omission. The matter was considered by the English Divisional Court in *Fagan v Metropolitan Police Commissioner*,³⁹ the case of 'parking on a copper's foot'. It is in Professor Williams's discussion of this case in his *Textbook*⁴⁰ that there occurs the passage relied on by the

34. If the defendant intended the consequence, he ought in principle to be guilty of an attempt, but there seems to be no authority on the question whether there can be an attempt at common law. The English Criminal Attempts Act 1981 requires an act and it is by no means certain that this would include an omission. See Ian Dennis [1982] Crim LR 7, Smith & Hogan *Criminal Law* (5th edn) p 263.

35. [1976] VR 452.

36. [1983] 3 All ER 448. See commentary [1984] Crim LR 37.

37. [1983] 3 All ER 448.

38. *Clarence* (1881) 8 QBD 54 *per* Wills J agreeing with Stephen J.

39. [1969] 1 QB 439, DC.

40. P 143.

Court of Appeal in *Miller* and cited above. The defendant, having been directed by a policeman to pull in to the side of the road, did so with his mini-car coming to rest on the officer's foot. When told, 'Get off, you are on my foot', Fagan replied in abusive terms, switched off the ignition and remained seated in the car. Only after several requests from the officer did he drive the car off the officer's foot. The trial court thought that driving on to the officer's foot may have been accidental but they were satisfied that he 'knowingly, unnecessarily and provocatively' allowed the car to remain there. The majority of the Divisional Court held that the defendant was guilty of an act constituting an assault. They reasoned as follows:

'Knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating the intention of keeping the wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.'

Williams criticises the reasoning as unconvincing. 'Suppose that the defendant had got out of the car, saying nothing, leaving the engine running and leaving the officer helplessly imprisoned; would the court then have called it a mere omission and not an assault?' He then went on to formulate the principle cited above and followed by the Court of Appeal in *Miller*. Fagan's conduct should have been regarded in toto as an intentional act and therefore an assault. The Court of Appeal agreed with this criticism of *Fagan*. The House of Lords did not discuss *Fagan* and it is not entirely clear where this case stands after their expression of preference for the 'duty' or responsibility theory. The outcome would seem to depend on whether an assault can be committed by omission. James LJ, speaking for the majority in *Fagan*, said that it was unnecessary to formulate any concluded views on this point. Bridge LJ, dissenting, however, stated firmly 'No mere omission to act can amount to an assault'. Since, as he found, the defendant had done precisely nothing after the car came to rest on the constable's foot, it followed that there was no assault.

Bridge J's dissent was not based on any difference of opinion as to the law but followed because he took a different and, in my opinion, more realistic view of the facts. There was no continuing act in this case.

'If one man accidentally treads on another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault; but there is no true parallel between such cases and the present case.'⁴¹

In the case, the appellant did nothing; the car rested on the foot by its own weight and remained stationary by its own inertia.

Fagan, like *Miller*, seems to be an appropriate case for conviction. If leaving the car on the constable's foot had caused him grievous bodily

41. [1969] 1 QB at 446.

harm, Fagan would presumably have been held liable for that much more serious offence. The only valid reason for not convicting of assault would be that the word 'assault' excludes omission.

Continuing acts

Where we have a true continuing act, it should obviously be sufficient that the defendant forms the *mens rea* at any time during the continuance of the act. No question of liability for omission arises. The ratio decidendi of Fagan's case was that he formed the *mens rea* during the continuance of an assault. The only criticism that I would make of that is that the court had unduly to strain the facts to fit the law. Suppose that D accidentally pokes his thumb in P's eye, pressing his head against a wall. Having realised what he has done, D decides to keep his thumb there for a while. Maybe there is no 'willed muscular movement' here, but there is an exertion of muscular power and that is surely sufficient to constitute an act.

This was the opinion of the majority in the New Zealand case of *Kaitamaki*,⁴² holding that sexual intercourse is 'obviously a continuing act'.⁴³ The defendant had sexual intercourse with a woman believing, so he said, that she consented to his doing so until after penetration had occurred. He then realised that she was not consenting but persisted in the act of intercourse. The decision of the majority seems to be that so to persist is rape both –

- (a) when D has penetrated P without her consent, but believing she is consenting; and
- (b) when D has penetrated P with her consent which she has then withdrawn.

The former seems more appropriately described as a continuing act of rape than the latter; but the cogent dissenting judgment of Woodhouse J holds that neither is rape and this seems to be essentially because the act in rape is the act of penetration which is realistically regarded as instantaneous rather than a continuing act.

Both *Fagan* and *Kaitamaki* are then somewhat dubious applications of the continuing act principle. An obviously proper application would be the case where a person innocently assumes possession of an article which it is unlawful to possess. Assuming that it is not an offence of absolute liability, he commits no offence. If, however, he then discovers the true nature of the article and continues in possession after he has had a reasonable opportunity to deliver it to the proper authorities, his inactivity should constitute an offence. The *actus reus* is continuing and, during its continuance, he has formed the necessary *mens rea*.

Another example may be found in the offence of false imprisonment. If D has imprisoned P lawfully, his deliberate omission to release him when the imprisonment comes to an end surely ought to amount to an offence.⁴³

42. [1980] 1 NZLR 59.

43. Smith & Hogan *Criminal Law* (5th edn) pp 384–385. See also the recommendation of the Criminal Law Revision Committee, Fourteenth Report, Cmd 7844, paras 252–256.

Conclusions

In this paper I have concentrated on a particular type of case in which the question of liability for an omission arises. I am not making a case for a wholesale extension of criminal liability for omissions. Indeed, I believe that the criminal law should never be extended without very good cause. My plea is for the avoidance of fictions and the recognition of the reality of what we do in applying the criminal law; and for consistency in the application of principles. It is important that criminal law should be rational. I have not touched on the wider questions of when the criminal law should impose duties. I note that even those ambitious codifiers, the authors of the American Model Penal Code,⁴⁴ contented themselves with providing that

'Liability for the commission of an offence may not be based on an omission unaccompanied by action unless:

- (a) the omission is expressly made sufficient by the law defining the offence; or
- (b) a duty to perform the omitted act is otherwise imposed by law.'

The law to which we are referred is the civil law,⁴⁵ that is, the law of tort and contract. The Indian Penal Code has a similar provision.⁴⁶

The English Criminal Law Revision Committee were equally unwilling to descend to detail, recommending that the matter be left to the common law, in this case the common law of crime, including such relevance of the civil law as the common law of crime may allow.⁴⁷

Nor have I attempted to consider the question of the content of the duty when it does arise. Recent cases in England have raised in an acute form questions as to the nature and extent of the duty owed by parents and doctors to a child suffering from Down's syndrome. I hope to discuss these questions on another occasion.

44. Section 2.01(3).

45. See Tentative Draft No 4, p 123.

46. Sections 32 and 43.

47. Note 43, above.

