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# **CRIMINAL LIABILITY FOR OMISSIONS IN SCOTS LAW**

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# CONTENTS

|   | <i>Page</i> |
|---|-------------|
| <b>INTRODUCTION</b>   | <b>1</b>    |
| <br>  |             |
| <b>CHAPTER 1</b>  |             |
| <b>THE INFLUENCE OF GERALD GORDON</b>   |             |
| 1.1 <i>Gordon's Interpretation of the law</i>                                 | 3           |
| 1.2 <i>Gordon's Four Categories of Duty</i>                                   | 4           |
| 1.3 <i>Contemporary Scots Case Law</i>  | 7           |
| <br>  |             |
| <b>CHAPTER 2</b>  |             |
| <b>THE HISTORICAL DEVELOPMENT OF SCOTS CRIMINAL LAW</b>                       |             |
| 2.1 <i>The Historical Development of 'Neglect of Duty'</i>                    | 11          |
| 2.2 <i>Historical Considerations of Criminal Conduct as Opposed to 'Duty'</i> | 17          |
| 2.3 <i>Summary of Historical Analysis</i>                                     | 20          |
| <br>  |             |
| <b>CHAPTER 3</b>  |             |
| <b>THE ACT / OMISSION DISTINTION</b>  |             |
| 3.1 <i>The Act/Omission Distinction</i>                                       | 22          |
| 3.2 <i>Defining an 'Act'</i>  | 23          |
| 3.3 <i>Defining an 'Omission'</i>   | 26          |
| 3.4 <i>Judicial Interpretation of 'Acts' and 'Omissions'</i>                  | 27          |
| 3.5 <i>'Welzel's Theory'</i>  | 31          |
| 3.6 <i>Professor Antony Duff and the 'Action Presumption'</i>                 | 33          |

## CHAPTER 4

### OMISSIONS AND THE SCOPE OF THE CRIMINAL LAW

|   |    |
|---|----|
| 4.1 <i>The Principle of Legality</i>  | 37 |
| 4.2 <i>The Principle of Autonomy – ‘Liberal Individualism’ versus ‘Social Responsibility’</i> | 39 |

## CHAPTER 5

### ACTS, OMISSIONS AND DUTY OR CONDUCT AND CAUSATION?

|  |    |
|--|----|
| 5.1 <i>The ‘Duty’ Theory</i>                         | 45 |
| 5.2 <i>Omissions as ‘Causes’ of Criminal Results</i> | 48 |
| 5.3 <i>The Normative Theory of Causation</i>         | 50 |

|            |    |
|------------|----|
| CONCLUSION | 56 |
|------------|----|

|              |    |
|--------------|----|
| BIBLIOGRAPHY | 59 |
|--------------|----|

## INTRODUCTION

The law of omissions can be described at its most basic as applying to those situations where someone has not acted or failed to act in circumstances where there is some societal expectation placed upon that particular individual to act. The decision taken by the individual not to act in the relevant context is then deemed to be an appropriate subject for the criminal law to consider. There are theorists who believe that omissions liability has no place in the criminal law and there are others who believe that the scope of such liability should be widened to encompass a wide spectrum of conduct which may be subject to criminal sanction. As well as these arguments based on principle and the merits of criminalising omissions there is also debate as to how such liability should be constructed. Modern legal systems have tended to adopt a concept of 'duty to act', whereby an individual will be subject to criminal punishment if they failed to act in certain circumstances where they had a duty to do so. Those who argue in favour of such an approach stress the need to distinguish between 'acts' which are rightly of concern to the criminal law and 'omissions' which are only of interest to the criminal law if the 'omitter' had a duty to act under the circumstances. However, there is also an argument which is centred on the concept of conduct and causation. Such a theory is predicated on the assumption that the criminal law should be concerned with the conduct of individuals and whether that conduct has caused a particular criminal result. Proponents of this theory argue that the criminal law should consider the ideas of conduct and causation rather than attempting to define acts and omissions and then establish whether or not an individual had a duty to act in certain circumstances. Essentially, it must be determined whether or not 'omissions' in certain circumstances should be subject to criminal sanctions and, if so, how the criminal law be structured in order to facilitate the achievement of this objective.

Historically there was very little discussion of criminal omissions in European legal systems. Under Roman law there were some delicts of 'omittendo' such as the failure of a slave to defend his master from assault or the failure of a husband to prevent his wife from becoming a prostitute, however the question of the scope of 'omissions' liability was never fully considered and only developed in response to each individual case<sup>1</sup>. The institutional writers of Scots criminal law also said very little on the subject of omissions. Hume never expressly dealt with the subject of criminal omissions, however he discussed crimes of this nature under the headings of offences against the person and offences against the course of justice, referring to such conduct as 'cruel', 'unnatural' or 'barbarous' treatment and other types of neglect of duty or even under the heading of art and part liability<sup>2</sup>. This may have been an attempt to avoid the issue of omissions by the writer, however it could most likely be inferred that it was not considered to be much of a recognised issue at that point in time. Hume did, however state that there were obvious limitations to any type of 'omissions' liability in the sense that any such liability should be clear and not based on 'suspicion' or 'conjecture'<sup>3</sup>. Essentially omissions liability, according to Hume, could not be subject to a wide discretion by the courts in order to avoid retrospective punishment being applied.

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<sup>1</sup> Otto Kirchheimer, "Criminal Omissions," 55 *Harv. L. Rev.* 615, 636 (1942), p165

<sup>2</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (1698) Hume, I, 397

<sup>3</sup> *Ibid* at p189

Graham Hughes also highlights the fact that English institutional writers showed ‘little awareness of criminal omissions as a field of liability of any special significance’<sup>4</sup>. Coke<sup>5</sup> insisted on the need for an ‘overt deed’ and apart from an acknowledgement of a few exceptions, it appears that the need for an act was considered to be a pre-requisite before any discussion of criminal liability could arise. Hawkins considers omissions only in the context of common nuisance; however the argument does not develop much beyond that point<sup>6</sup>. The historical difficulty in criminalising ‘omissions’ is exemplified by Stroud who states that an omission ‘is not like an act, a real event, but is merely an artificial conception consisting of the negation of a particular act’<sup>7</sup>, however it is clear that the Anglo-American courts have not viewed an omission as such in this period. The approach has been more consistent with Bishop<sup>8</sup>, who states that an omission:

‘is not properly an act, yet in a sense it is. It is a departure from the order of things established by law. It is a checking of action; or it is like the case of a man who stands still while the company to which he is attached moves along, when we say, he leaves the company’.

This provides a truer reflection of how the Anglo-American courts have tended to consider the concept on an ‘omission’ as there has been a recognition of omissions liability in certain circumstances; however the development of the common law has been rather incoherent and at times contradictory.

It will be argued in this paper that the present position adopted by Scots law in relation to criminal liability for omissions is unsatisfactory. The current position is inconsistent with historic Scots case law and the act/omission distinction lacks credit and does not address the fundamental issue of causation in relation to the conduct of the accused. There are many decisions which it is submitted ultimately arrive at the correct conclusion, albeit with illogical and unprincipled reasoning, and there are also decisions which are absurd and create uncertainty, inconsistency and dissatisfaction with the present law. It will be argued that Scots law must return to the historic precedent set out in the nineteenth century case law, abandoning the ‘duty based’ approach that has been adopted in the post-Gerald Gordon era and develop a principled framework for criminalisation based on conduct and causation that will lead to a more consistent and principled legal landscape.

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<sup>4</sup> Graham Hughes, “Criminal Omissions” 67 YLJ 590 1957-58, at 590

<sup>5</sup> Coke, Sir Edward. *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes*. (London: Printed for W. Clarke and Sons), (1817) at 5

<sup>6</sup> William Hawkins, *A Treatise of Pleas of the Crown; or, a system of the principal matters relating to that subject, digested under proper heads*, 8<sup>th</sup> edition (1824), at 692

<sup>7</sup> Stroud, Douglas Aikenhead, *Mens rea: Or, Imputability under The law of England*, (Sweet & Maxwell Ltd :London), (1914) at 4

<sup>8</sup> J. Bishop, *Bishop on Criminal Law*, (9th ed. 1923), 637-639

## CHAPTER 1

### THE INFLUENCE OF GERALD GORDON

The natural point to begin any discussion of the criminalisation of omissions in Scots law is to consider the work of Gerald Gordon, on which the present law of omissions in Scotland is largely based. Scots law did not develop the criminal law of 'omissions' in any meaningful or substantive way until the publication of *The Criminal Law of Scotland*, by Gerald Gordon in 1967, of which two subsequent editions have been published. Gordon, heavily influenced by Anglo-American theorists such as Glanville Williams<sup>9</sup>, sought to restructure the criminal law of Scotland in relation to 'omissions' liability. This hugely important publication changed the course of Scots law, arguably in no area more so than that of 'omissions' liability. This chapter will analyse the work of Gerald Gordon and how this work influenced Scots criminal law in the area of 'omission' liability.

#### 1.1 *Gordon's Interpretation of the law*

The first observation that Gordon made was that 'omissions' liability should be separated into two categories. The first category is cases of 'pure' omission, where the particular conduct, brought about by an omission, constitutes the actus reus of the crime. It is the 'omission' itself which is criminal and the accused is penalised for the 'failure' to do something. In modern Scots law the vast majority of such offences would be contained in statute<sup>10</sup>. The second type of case is that of 'commission by omission'. In such cases it is not the 'omission' in itself which is criminal, rather the result of that omission which constitutes the actus reus the same as any act would. The importance of this distinction will become clearer, however it allows for a consideration of different types of 'omissions' and may assist in developing a coherent framework within which to criminalise omissions.

Gordon states that all omissions liability should be criminal only in restricted circumstances. He recognised the potentially tautologous definitions of omissions liability and stated that the law can only have regard to 'legal obligations'. In other words, Gordon stated that omissions liability could only be imposed if the obligation to act was recognised in law and not merely because the conduct appeared objectively wrongful in nature. The law does not enforce moral obligations unless they have been adopted as 'legal obligations'<sup>11</sup>. This was the beginning of his development of the 'duty theory'. That is to say that if someone does not perform a positive act, he must have been under a legal duty to have acted in order to be subject to criminal liability for his failure to act. It is then a question of when such legal duties arise.

Gordon first considered whether there is a general duty to prevent crime in Scots law. An example is given of the case of *Geo Kerr and Others*<sup>12</sup>. Here a man stood by and watched whilst a number of his friends raped a woman. He took no part in the crime; however he did nothing to prevent it. He was not subject to any criminal liability in this case. Although the court did accept there may be a

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<sup>9</sup> Glanville Williams "Criminal Omissions — the Conventional View" (1991). 107 L.Q.R. 86

<sup>10</sup> Gerald Gordon, *The Criminal Law of Scotland*, Vol.1, (1<sup>st</sup> ed, 1967), at 3.30 p 81

<sup>11</sup> *Ibid* at 3.33

<sup>12</sup> (1871) 2 Couper 334

potential charge of aiding and abetting the crime<sup>13</sup>, he was not guilty of a separate crime on his own<sup>14</sup>. This very case highlights the distinction between moral and legal obligations in relation to omissions. It would appear to be clear to any reasonable man that the accused was under some general moral duty to at the very least call for help in order to stop the crime; however, according to Gordon, there is no legal obligation to act placed on the accused in Scots law. It is therefore imperative that the law is clear on when such legal duties arise.

In response to any such confusion or uncertainty that may have arisen from the result of his analysis of this case Gordon sets out four types of case where in his view an individual would have a duty to act. In such cases the failure to act would be deemed equivalent to bringing about the result through a positive act. Gordon largely uses authority from other common law jurisdictions as the foundation of his argument rather than the Scots case law that was available at the time.

### **1.2 Gordon's Four Categories of Duty**

The first type of case set out by Gordon is where the omission follows on from a prior dangerous act<sup>15</sup>. The rationale behind this type of case is that where a person has created a dangerous situation, it is incumbent upon him to do all that he reasonably can to prevent the danger he has created.

Gordon cites the case of *McManimy and Higgans*<sup>16</sup> which concerned a man who had typhus fever and was staying at the Inn run by the accused. The accused parties removed Robert McGill from his bed and placed him on a coach to Glasgow where he was deserted, exposed to the inclemency of the weather and died. As the two men had put the deceased in a situation of danger, they subsequently had a duty to prevent this danger. By Gordon's own admission this was a unusual way to deal with this case as it would appear to be too wide to place a duty on all lodging-house keepers to look after the health of their lodgers and too narrow to say that a duty would only ever arise if a lodging-house keeper removes a sick person from shelter and leaves him in an exposed place<sup>17</sup>.

It is recognised that the prior dangerous act need not be criminal. In *McPhail v Clark*<sup>18</sup> a farmer was charged with culpably and recklessly endangering the road users<sup>19</sup> after he burned straw in his field and the smoke which resulted obscured a nearby carriageway and caused a traffic accident. Here it is clear that the initial actions of the farmer were perfectly legal, however he is penalised for failing to prevent the dangerous situation that he has created. It is this failure that is deemed to have caused the result.

The second category of case is where there is a personal relationship involved<sup>20</sup>. The most obvious of these personal relationships would be between a parent and a child. Gordon gives the example of

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<sup>13</sup> It is unclear why English terminology was used here

<sup>14</sup> (1871) 2 Couper 334 at 337

<sup>15</sup> Gordon at 3.33, p83

<sup>16</sup> (1847) Ark 321

<sup>17</sup> Gordon at 3.33

<sup>18</sup> (1983) S.L.T. (sh.Ct) 37

<sup>19</sup> Interestingly not with culpably and recklessly injuring them even although persons were injured

<sup>20</sup> Gordon at 3.35



the Australian case of *R v Russell*<sup>21</sup>. The father in this case was alleged to have murdered his wife and children by pushing them into a pond. The accused stated that it was his wife that had thrown herself and the children into the pond after an argument. Interestingly, the trial judge directed the jury that if the father had merely stood by and watched the drowning take place, and played no part in throwing his wife and children into the pond, he could be convicted of manslaughter. This direction was upheld by the full bench of the Supreme Court of Australia. The court stated that if the father had failed to intervene as a result of gross and culpable neglect, he would be guilty of manslaughter. If he intentionally failed to intervene this would amount to murder<sup>22</sup>.

It is interesting that Gordon chose to use an Australian case to support this category of duty, particularly owing to the fact that there was a reasonable amount of Scots case law on the issue of 'omissions' and the parent/child relationship. In fact, more recent publications on Scots criminal law have followed Gordon in citing this case as an authority for this type of omissions liability<sup>23</sup>. This is perhaps unsurprising as the earlier Scots cases do not necessarily support the 'duty theory' that Gordon was trying to promote. He then references the case of *People v Beardsley*<sup>24</sup> in which the accused had been spending the weekend with his mistress and she had taken a drug overdose. The accused, along with a friend, moved her to another location and left her there where she subsequently died. No attempt was made to summon assistance for the deceased in any way. The court held that the accused was under no legal duty to assist his mistress in any way stating that:

"seeking for a proper determination of the case ... by the application of the legal principles involved, we must eliminate from the case all consideration of mere moral obligation, and discover whether the respondent was under a legal duty towards [the deceased] at the time of her death ... which required him to make all reasonable and proper effort to save her; the omission to perform which duty would make him responsible for her death"<sup>25</sup>.

The court seems to suggest that had the deceased been the wife of the accused, he would have been under a duty to assist her; however this would not be the case for a mistress. This decision has been heavily criticised, particularly by Graham Hughes: "To be temperate about such a decision", he says:

"is difficult. In its savage proclamation that the wages of sin is death, it ignores any impulse of charity and compassion. It proclaims a morality which is smug, ignorant and vindictive. In a civilised society, a man who finds himself with a helplessly ill person who has no other source of aid should be under a duty to summon help whether the person is his wife, his mistress, a prostitute or a Chief Justice"<sup>26</sup>.

Gordon himself concedes that the boundaries of such a duty are not clear in Scots law<sup>27</sup> although he does reference certain statutory provisions where a duty is clearly expressed, such as the *Children and Young Persons (Scotland) Act 1937*. It is however unclear, in the context of the common law,

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<sup>21</sup> (1933) 39 *Argus Law Rep* 76

<sup>22</sup> He was also convicted of killing his wife on the grounds that the jury were entitled to find that he had participated in her death, with McArthur J. dissenting, due to the fact that the wife was capable of protecting herself

<sup>23</sup> Gane and Stoddart, *A Casebook on Scottish Criminal Law*, (4<sup>th</sup> ed, 2009)

<sup>24</sup> (1907) 150 *Mich.* 206

<sup>25</sup> *Ibid* at 164

<sup>26</sup> Graham Hughes, "Criminal Omissions" 67 *YLJ* 590 1957-58, at 624

<sup>27</sup> Gordon at 3.35

whether such a duty extends only to those who are married, or co-habitants. Does it extend to all blood-relatives? Siblings? And Cousins? The only thing that is certain is that the boundaries of a legal duty in this context are uncertain and there is no clear guiding principle or precedent<sup>28</sup>.

The third category of duty stated by Gordon is where there is an express contract. This can arise via a contract with the victim, a third party, or the state itself<sup>29</sup>. This type of duty is consistent with the first category of cases referenced in the first chapter. Gordon gives the example of the case of *Thos. Mitchell*<sup>30</sup> where a magistrate who declined to assist a messenger-at-arms who had been attacked by a crowd and deprived of his prisoner was convicted of being art and part liable in the crowd's deforcement of the messenger. Hume stated that this type of 'tacit encouragement ... would not bestow upon the ordinary man'<sup>31</sup>. Therefore, Gordon is stating that the art and part guilt of the magistrate is the equivalent of a duty placed on the magistrate as part of an express contract by virtue of his position of employment and that an ordinary man would not owe such a duty.

The case of *William Hardie*<sup>32</sup> is also given as authority for this type of duty. Here, the inspector of the poor could be charged with culpable homicide if he had ignored a poor relief application and the applicant subsequently died<sup>33</sup>. The significance of this duty is that the contract, which the prosecution claimed established the duty, was between the accused and a third party and not the victim identified on the indictment. Although the case was not ultimately proceeded with, it is historically significant and interesting as the courts appear to have accepted that this type of vicarious duty could exist between parties in relation to the criminal law of Scotland almost a century before such a duty was established in the civil law of Scotland in the landmark case of *Donoghue v Stevenson*<sup>34</sup>.

The final category of duty identified by Gordon is where a duty arises out of a legal obligation. The law, according to Gordon, can impose a legal obligation based on a particular relationship between individuals<sup>35</sup>. Gordon cites the English case of *R v Instan*<sup>36</sup>. The accused lived alone with her aunt who was bedridden. She gave her aunt no food and called for no medical attention for a period of ten days, a result of which her aunt died. The accused was subsequently convicted of manslaughter. Lord Coleridge stated that: "A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement"<sup>37</sup>. This is a curious statement as it appears to conflate law and morality, suggesting that any moral obligation can be deemed a legal obligation if the courts decide that it is. Gordon also argues that this statement is both too wide and tautologous<sup>38</sup> and suggests that *Instan* should be understood in terms of the law imposing an obligation in a situation whereby the accused and deceased live in the circumstances in which they

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<sup>28</sup>It will be discussed in a later chapter whether a duty based on such relationships is appropriate in the context of the criminal law

<sup>29</sup>Gordon at 3.36

<sup>30</sup>Hume *Commentaries*, Vol.I at 397

<sup>31</sup>*Ibid*

<sup>32</sup>(1847) *Ark.* 247

<sup>33</sup>As previously stated, although the case was not proceeded with the charge was deemed to be relevant. The inspector of the poor has an express contract with the state to consider all poor relief application, which amounts to a legal duty. Failure to perform this duty, leading to the death or injury of an applicant, can result in criminal sanction).

<sup>34</sup>[1932] *UKHL* 100

<sup>35</sup>Gordon at 3.37

<sup>36</sup>[1893] 1 *Q.B.* 450

<sup>37</sup>*Ibid* at 453

<sup>38</sup>Gordon at 3.37

had lived, and taking into account their relationship this may imply an undertaking on the healthy person to look after the invalid<sup>39</sup>. In essence, whether or not a legal duty will be imposed will, in Gordon's view, depend on the circumstances of each case and the relationship between the parties. It could be inferred that *Instan* had voluntarily undertaken to look after her invalid aunt and that this undertaking has placed her in a position whereby her aunt is dependent on her. This is quite distinct from a mere moral duty. As Hall states:

“we have not yet reached the point of really believing that everyone is morally obliged to be his brother's keeper; or at least, that is not believed sufficiently to be given implementation by the criminal law.”<sup>40</sup>

The four categories of 'duty' introduced by Gordon may at first glance appear to be a sensible and pragmatic approach to the issue of criminalising omissions. However if one analyses the case law closely a few observations can be made. Firstly, Most of the authority cited by Gordon to support his theory is not Scots law. Of course, such authority is certainly persuasive and, in the absence of any Scots law on the particular issue, may ordinarily be adopted as the position in Scotland, however Gordon appears to disregard much of the nineteenth century Scots case law<sup>41</sup> This is undoubtedly due to the fact that Gordon was seeking to introduce a new approach to the law of 'omissions', however if this case law is examined, it does not create any greater certainty than the previous approach.

There are more questions than answers. The decisions in many of the cases cited are ambiguous and do not set any clear and meaningful principle. Scots law is then left with four vague and incoherent categories of 'duty', largely adopted from other Anglo-American jurisdictions. It is also questionable whether the 'duty approach' is an appropriate approach for the criminal law in Scotland, given particular reference to the historic 'conduct based' approach of the Scottish Courts and prosecutors. These issues will be discussed in later chapters, however it is important to firstly consider how Scots law has developed post-1967 and what approach Scots law now takes in relation to 'omissions' liability.

### **1.3 Contemporary Scots Case Law**

More recent case law has tended to follow Gordon without criticising his approach, however it must be noted that there has been very few Scots cases concerning omissions liability in the post-Gordon era.

In the case of *Paterson v Lees*<sup>42</sup>, the accused was charged with the crime of shameless indecency after allowing two young children to watch a pornographic video. He made no positive attempt to induce the children to view the video and merely allowed the children to view it. It was held in this case that the relevant crime of shamelessly indecent conduct could not be committed passively and therefore there was no relevant charge to bring against the accused. The fact that the accused

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<sup>39</sup> Although this in itself could be seen as a moral judgement by the courts, as could many decisions

<sup>40</sup> Jerome Hall, *General Principles of Criminal Law*, (1<sup>st</sup> ed, 1947), at 210

<sup>41</sup> He states that there is not really any formal Scots law on omissions, however when he does cite any Scots case law he is critical of the decisions and states that the approach of the courts was inconsistent

<sup>42</sup> (1999) JC 159

merely failed to act was irrelevant and he had no duty to act under the circumstances whereas if he had made a deliberate attempt to show the video to the children he would have committed a crime, according to the court. The court also stated that the law should not be concerned with conduct deemed to be anti-social or immoral but conduct that is essentially criminal<sup>43</sup>. This case again raises the question of when 'duties' are moral or legal. There is clearly a moral obligation on the part of the accused; however the court has difficulty in establishing a legal duty. Based on Gordon's narrow criteria it is difficult to see how such a case could ever establish a legal duty despite the morally repugnant nature of the accused's conduct. It is almost ludicrous that the issue of viewing pornographic videos with minors should rest so heavily on whether the accused 'acted' or 'omitted' and the subsequent artificial creation of a duty to deal with such an issue. If the courts consider the overall conduct of the accused, in conjunction with his mens rea, a more satisfactory result may prevail, assuming that there is sufficiency of evidence to prosecute.

It must also be noted that in this case the court were primarily concerned about the limits of the crime of shameless indecency<sup>44</sup> in light of the case of *Watt v Annan*<sup>45</sup> which had appeared to create a crime that "rests on an unsound theory, has an uncertain ambit of liability and lays open to prosecution some forms of private conduct the legality of which should be a question for the legislature"<sup>46</sup>. It can perhaps be concluded from the sentiment of the court expressed by Lord Rodger that the reluctance to impose liability for the particular omission in this case was most likely the result of the courts dissatisfaction with the law of shameless indecency as opposed to any view that the scope of criminal liability for omissions should not be widened in such circumstances.

In the case of *McCue v Currie*<sup>47</sup>. The accused was charged with 'culpably and recklessly setting fire to a caravan that he had forced open in order to steal from it'<sup>48</sup>. He was initially convicted as he had left the area without attempting to summon assistance to extinguish the fire, however on appeal the court stated that his actions after he had started the fire were not relevant to the issue of determining his *mens rea*, which should be determined in relation to him starting the fire<sup>49</sup>. The court appeared to focus on the initial crime and not on his subsequent failure to seek assistance. This is another example of a case that could not purely be considered in relation to the omission of the accused as he had engaged in a prior criminal act<sup>50</sup>. There was also reluctance on the part of the court to allocate a 'duty' to the accused here, which is surprising given that this is a case which is in greater harmony with the criteria set out by Gordon. This may be explained by considering what Gane and Stoddart state regarding this case<sup>51</sup>. It appears that the court misconstrued the decision in the English case of *R v Miller*<sup>52</sup>. In this case when the vagrant awoke to discover that he had dropped a cigarette and his mattress was on fire he merely moved into another room. He was convicted of arson and the court in *McCue v Currie* appear to suggest that the only reason the English decision could have been reached was due to a specific statutory provision, which is actually incorrect,

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<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid* per Lord Justice-General Rodger, p233F-G

<sup>45</sup> 1978 J.C. 84

<sup>46</sup> *Ibid* at p234D

<sup>47</sup> (2004) SLT 858

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid* at 862

<sup>50</sup> T.H.Jones and M.G.A.Christie, *Criminal Law*, (3<sup>rd</sup> edn, 2003), at.49

<sup>51</sup> Gane and Stoddart, *A Casebook on Scottish Criminal Law*, (4<sup>th</sup> ed, 2009), at 2-11 (Notes)

<sup>52</sup> [1983] 2 A.C. 161

however there was also an issue in relation to the particular wording of the charge and so this may have affected the outcome<sup>53</sup>.

In the case of *Mallin v Clark*<sup>54</sup>, a police officer was injured by a syringe which was concealed in the clothing of the accused and had not been disclosed to the police officer before he conducted his search. The accused was charged with 'culpably and recklessly concealing a used syringe on his person and failing to disclose this to the police when being searched'<sup>55</sup>. Initially the accused was convicted, however on appeal it was deemed that the Crown had failed to display that such a duty to disclose existed<sup>56</sup>. The court did state that this was not a definitive statement that such a duty could never arise, however it would appear unclear when such a duty would arise and in what context. This would seem to be an obvious case for recognising a duty on the part of the accused, however, this highlights the difficulty that the courts have in establishing 'duties' when constrained by such narrow criteria as set out by Gordon. The court also considered the *Criminal Procedure (Scotland) Act 1995, s14(9)* which states that when someone has been detained under *s14(1)* of the said act he is under no duty to answer police questions other than to provide certain identifying information. The fact that the accused had not actively denied the existence of the syringe appears to be the crucial factor in this case<sup>57</sup>. It is apparent that this case was decided largely based on statutory procedure rather than legal principle and to this extent the court was constrained from further developing the law, even in the event that a willingness to do so was there.

In the case of *Bone v HMA*<sup>58</sup> a mother was initially convicted of the culpable homicide of her child after her partner had assaulted her child resulting in her death and Ms Bone did not attempt to either prevent the assault or summon help. The charge read that she 'witnessed and countenanced'<sup>59</sup> the assault and this amounted to an assault on her child. On appeal it was held that there was a 'material failure' by the trial judge to give sufficient directions to the jury in relation to whether Ms Bone had taken all 'reasonable steps' to protect the child and ensure her wellbeing, due to the fact that Ms Bone was considered to have the mental capacity of a child. She was also in a secluded area at the time of the assault, and was fearful of her partner<sup>60</sup>. This case is important as it firmly establishes the duty of a parent to protect their child and ensure their wellbeing, however it is also important as it considers that the test of reasonableness in such circumstances should have a subjective dimension and it is important to consider the facts and context of each individual case and whether or not it would be reasonable for a person who is deemed to have a 'duty to act' to intervene. This creates further ambiguity and uncertainty in relation to the 'duty theory'. The need for a subjective approach to be taken in this case could be seen to have prevented the courts from developing a clear principle for future cases to follow as the particular facts of this case had allowed the court to avoid the issue of causation. Such opinion may have been of great assistance to the analysis of causation and omissions liability.

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<sup>53</sup> James Chalmers, "Fireraising by Omission" 2004 S.L.T. (News) 59

<sup>54</sup> (2002) SLT 120

<sup>55</sup> *Ibid* at 1025

<sup>56</sup> *Ibid*

<sup>57</sup> Gane and Stoddart, *A Casebook on Scottish Criminal Law*, (4<sup>th</sup> ed, 2009) at 8-34 (Notes)

<sup>58</sup> (2006) SLT 164

<sup>59</sup> *Ibid*

<sup>60</sup> *Ibid* at 167H-K

The cases highlighted do suggest that the Scottish courts will accept that there are certain situations where an individual may be deemed to have a duty to act in certain circumstances, broadly following the criteria set out by Gordon, however no clear and coherent principle has developed and it is unclear in what circumstances or context, or possibly based on which type of relationship such a duty would arise. It is also important to consider, as will be later highlighted, the fact that in most of the earlier Scottish cases, the omission was part of a set of circumstances which also involved positive acts<sup>61</sup>. It must also be noted that each case appears to have been decided on a particular fact or circumstance unique to that individual case which has not assisted in the development of the law in this area post-Gordon by preventing a general discussion of omissions liability by the criminal courts in Scotland.

The preferred approach taken by Scottish courts post-Gordon is to place criminal liability on those who are considered to have a 'duty to act' and fail to do so and to this extent the Scottish courts have broadly followed Gordon's framework, however due to the unclear nature of Scots criminal law in this area and the fact that there does not appear to be a clear legal basis for affirmative duties in the criminal law of Scotland, it would appear to be necessary to examine when a duty to act may be considered to exist, and what considerations should be taken into account when determining whether certain omissions should be considered in the context of the criminal law. The 'duty theory' is a response to and implication of the act/omission distinction which now holds a great deal of weight in the minds of many contemporary legal theorists<sup>62</sup>. The rationale behind this distinction as well as the merits of such a distinction will be discussed later, however a greater analysis of the nineteenth century Scots law cases is needed in order to establish what approach was taken by the courts at this time and how Gordon's analysis has differed from this approach.

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<sup>61</sup> M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (1993), at.24

<sup>62</sup> Moore at 24

## CHAPTER 2

### THE HISTORICAL DEVELOPMENT OF SCOTS CRIMINAL LAW

Historically, Scots law did not expressly deal with the issue of 'omission' liability. However, if older case reports are examined in detail, examples of cases which would now be considered to be cases of 'omission' can be identified. This chapter will consider the historical development of 'omissions' liability in Scots criminal law and how, in many respects, the approach of the courts and prosecutors is distinguishable from the present approach which has developed over recent years.

#### ***2.1 The Historical Development of 'Neglect of Duty'***

As has been previously stated, Hume did not expressly deal with crimes of omission, however he discussed conduct which might fall into the category of omissions today in his discussion of offences against the person and offences against the course of justice<sup>63</sup>.

In relation to offences against the course of justice, Hume recognised the crimes of 'neglect of duty in public officers'. He stated:

"Further still; it is not to be understood, that it is with respect to Judges only, or in the exercise of powers of a judicial nature, that this neglect of duty is acknowledged as a point of dittay. If our statutes were even silent on the subject, the common law would reach the misdemeanour, who as a magistrate, or in any station of public trust, should be notoriously careless of the welfare of that which is committed to him. But the truth is, we have a statute 1457 c.76, 'anent the position of negligent officers,' which declares and confirms the common law (for it can hardly be said to do more) and orders that persons 'who be found in faultise,' shall lose their offices, and be liable to punishment in goods and person, after the quantise of sik and respasse at the kings will."<sup>64</sup>

Hume recognised a crime of neglect of duty in public officers which extended beyond those exercising a judicial capacity. He also reaffirmed that such neglect of duty was recognised in both statute and common law. An individual exercising their capacity as a public officer could be held criminally liable for a neglect of that duty. Although not expressly detailed by Hume, it can no doubt be inferred that the particular duty owed would be a duty to the public at large by virtue of their public position rather than a particular duty owed to another individual.

Hume references the case of *Archibald Stewart*<sup>65</sup>, the Provost of Edinburgh, who was charged with alleged misbehaviour and neglect of duty, with respect to the requisite arrangements for the defence of the city of Edinburgh against the rebels in 1745. The libel read:

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<sup>63</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (1698) Hume, I, 397

<sup>64</sup> *Ibid* at 410

<sup>65</sup> October 26,27,28,29 and November 2 1747 at 410

“that the panel, at the time and place libelled, being then the Lord Provost of the city of Edinburgh, wilfully neglected to pursue, or wilfully opposed and obstructed when proposed by others, such measures as were proper and necessary for the defence of the city against the rebels, in the instances libelled, or so much of them as do amount to such wilful neglect”.<sup>66</sup>

His conduct was deemed to have “weakened the defence of the town” and the cannon, firelocks and bayonets fell into the hands of the rebels. Although the provost was acquitted on all charges the important point here is that the charges were deemed to be relevant by the court. The provost was subject to criminal proceedings for his alleged ‘neglect of duty’. The issue here was not whether the provost acted or omitted, such consideration do not appear to be given any consideration at all at this time. The issue at hand is whether the conduct of the provost could be said to amount to a neglect of his duty as a public officer. Although there is no mention of omissions whatsoever by Hume, this is an early example of a case whereby omissions liability is dealt with by appealing to the concept of a duty. This is the duty of a public officer presumably owed to the wider public, to whom he is a servant.

In the case of *Charles Macculloch*<sup>67</sup> the accused was charged with:

“breach of trust by an officer of excise in discharge of his duty as such; and also, wilful neglect and violation of duty as such; as also, the fraudulently making of false entries, or omitting to make the proper and necessary entries, by an officer of excise in the books required to be kept by him, with intent to defraud, or enable a trader under his survey to defraud the Government out of the duties truly and by law exigible from said trader”.

Macculloch pled guilty to the charges and was sentenced to nine months imprisonment. Although the charge contains elements of positive conduct, it is particularly relevant as it makes reference to ‘omitting’ and it also recognises the concept of a ‘duty’ placed upon public officers when exercising their capacities in their public office.

The beginning of the nineteenth century saw the first major wave of case law attempting to deal with the issue of omissions in the criminal law of Scotland and England. Prosecutors began to consider situations where an accused had ‘failed to act’ to prevent danger or had acted carelessly or negligently<sup>68</sup>. Following the example of Hume, many of the cases brought before the courts concerned individuals who had neglected their duty as a public officer, however this duty was extended to cover not only public officers but also those who neglected their duties bestowed upon them by the nature of their employment.

The first notable nineteenth century case concerning the former category of liability is that of *Ezekiel M’Haffie*<sup>69</sup>. Mr M’Haffie was the master of the Dumbarton Castle steam packet travelling between Stranraer and Glasgow. He was charged with culpable homicide; and culpably, negligently and recklessly managing or directing a vessel or steam packet, so as to cause it to run down, sink and destroy another boat or vessel thereby seriously wounding and injuring the person of a man sailing

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<sup>66</sup> *Ibid*

<sup>67</sup> November 10 1828 In Hume, *Vol.1 Chapter XV Supplementary Notes* at 106

<sup>68</sup> L. Farmer, *Criminal Law, Tradition and Legal Order*, (Cambridge University Press, 1997), p155

<sup>69</sup> 4 – *High Court of Admiralty* 26 November 1827 – Appendix III, p38 – *Justiciary Reports 1826-29*, Syme



in such boat or vessel, or with one or other of these crimes. The court deemed it to be his special duty as master of the steam packet to have one or more of his crew constantly stationed on the lookout. He failed in this duty as he was collecting fares at the time of the collision and no member of staff was keeping a lookout at this time.

The judge directed the jury that under common law they only had to enquire whether there was that degree of negligence on the part of the prisoner which, in the eye of the common law and of common sense, made him guilty in terms of the libel. It was held that the disaster would not have taken place 'but for' the culpable negligence of the panel. Mr M'Haffie was found guilty<sup>70</sup> and sentenced to six months imprisonment. Cockburn and McNeill, for the panel, argued that the panel was charged with two crimes and the jury did not specify which of the two crimes he had been found guilty of committing. The court stated that as the two crimes were not inconsistent with each other, the general verdict of guilty covered both crimes. Apart from providing an early reference to the 'but for' test of causation, the judgement of this case is interesting as it recognised the duty of care owed by the master to his ship. The master is not criminally liable for any specific act; rather, he is criminally liable for failing in his duties as master of the steam packet. The court also states that Mr M'Haffie should be criminally liable for the crash and potentially the results of that crash if the common man would find him to have conducted himself in a negligent manner.

What is interesting about this is that the court seems to advocate a mens rea of negligence and they also appear to consider the overall conduct of Mr M'Haffie in relation to his role as master of the steam packet. This case is important as it accepts the concept of a duty on the part of Mr M'Haffie, however it also suggests that the overall conduct of Mr M'Haffie should be considered, and the question that then has to be answered is whether or not that conduct was negligent. The courts appear to take a 'two pronged' approach in this case.

In the case of *HMA v James Cooper*<sup>71</sup>, the accused was charged with culpable neglect of duty by any person in charge of the rails or other parts of the functioning of a railway for conveying passengers whereby the lieges are bereaved of life, or injured in their persons, and put in danger of their lives. Mr Cooper had a duty to keep the two main railway lines clear, which he failed to do, and a collision occurred where people were injured and one person died. Mr Cooper had initially been charged with culpable homicide, however this charge was dropped and he pled guilty to culpable neglect of duty and was sentenced to ten months imprisonment.

In *HMA v William Paton and Richard McNab*<sup>72</sup> the accused men were engine inspectors and their duty was to ensure that the engines were in a fit and proper state for the journey intended. They neglected to examine the engine of the train and a collision subsequently occurred where one man died. They were both found guilty with Mr Paton and Mr McNab receiving custodial sentences of twelve and seven months respectively.

These cases provide examples of the courts in Scotland accepting that, in certain circumstances, a failure to perform one's job properly can result in criminal liability for the consequences of that failure, even going as far to say that Culpable Homicide can be a relevant charge in such circumstances. The language used by the courts is also particularly interesting as there are

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<sup>70</sup> By a general verdict if guilty covering both charges

<sup>71</sup> 19 September 1842, *Justiciary Reports – Brown (1)* 1842-43, p389

<sup>72</sup> 11 August 1845, *Justiciary Reports, Brown (2)*

continuing references made to 'neglect', suggesting that the courts are considering the overall conduct of the accused when determining each case, perhaps as a way of avoiding the issue of omissions, although this was not expressly articulated in the judgement or reasoning of the court. Here it becomes clear that there was an acceptance of a duty being owed in certain circumstances, as well as negligent conduct being recognised as an appropriate concern for the criminal law.

The case of *HMA v Alexander Dickson*<sup>73</sup> concerned the construction of hustings for which Mr Dickson was responsible. After being constructed, the hustings gave way and people were injured as a result. It was argued by the prosecution that he had a duty to construct the hustings with due care and he was charged with culpable neglect or omission in the performance of a duty by a person undertaking and executing the construction of hustings or any other structure, for the reception of the lieges. He was found not guilty, not because he did not owe any duty, rather because witnesses were able to speak to the safety of the hustings being sufficient. The word 'omission' was actually libelled on the indictment in this case. The relevance of this is that it recognises the very nature of the conduct of the accused. The accused is being charged for what he did not do, rather than for what he explicitly did.

*HMA v William Hardie*<sup>74</sup> concerned an Inspector of the poor of the parish of Falkirk who was charged with culpable homicide and wilful, wicked and culpable neglect of duty and violation of the duties of his office by a public officer after he failed to inquire into the circumstances of Margaret Cameron. She was poor and had no means of subsistence. It was argued by the prosecution that he failed to make himself aware of her circumstances and as a result she died. The case was transferred to the High Court in Edinburgh; however no further proceedings took place. It is rather unfortunate that the case did not proceed as the discussion would have no doubt been of interest in relation to whom the duty was owed. It may have been owed to Margaret Cameron or his employers. Also, the question of whether he could be held responsible for her death may also have been resolved.

*HMA v Thomas Henderson*<sup>75</sup> the accused parties were charged with Culpable Homicide and reckless neglect of duty by an officer charged with the care and navigation of a ship after the ship under their charge struck a rock resulting in people drowning. The accused parties had failed to position any sufficient lookout at or near the bows of the ship and it was held by the court that they negligently and recklessly abandoned and deserted the care and navigation of the ship for a time and returned to their rooms to sleep contrary to the rules of good seamanship. After the ship struck the rock the parties proceeded to steer the ship contrary to the rules of good seamanship and they also failed to supply sufficient amounts of oars in the lifeboats, which were kept in a poor condition, and people drowned as a result. The court held that this conduct amounted to culpable and reckless neglect of duty and Mr Henderson was sentenced to eighteen months in prison whilst Mr Wilkins was sentenced to seven years transportation.

This case, of course, concerns both acts and omissions. One way to evaluate the judgement of this case would be to say that the accused parties are guilty of the negligent 'steering' of the ship and therefore this is not really a true omissions case, however the court does not discriminate here between act and omission. The court considered the overall conduct of the parties. Reference is

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<sup>73</sup> 16 September 1847, *Justiciary Reports*, Arkley, at p352

<sup>74</sup> 10 April 1847, *Justiciary Reports*, Arkley, at p247

<sup>75</sup> *George Langlands and John Williams and Others*, 29 August 1850, *Justiciary Reports*, Arkley

made to both how they acted negligently, and also how they negligently failed to act. This is surely a case whereby the court has considered the overall negligent conduct of the parties without much, if any, discussion of what was an act and what was an omission. In the context of this case the distinction appears to be rather futile. The concerned is with the conduct of the parties who are subject to the criminal charge.

In *HMA v John McDonald and Others*<sup>76</sup> Mr McDonald, who was an engineman, was held to have failed to clear a station of a goods train that had unexpectedly arrived when the regular train was approaching the station and a collision ensued. It was held that he was negligent in allowing the train to cross when he was aware that there would not be enough time for the other train to vacate the line. Both McDonald, and Thomas Wilson were deemed to have culpably neglected and omitted to perform their said respective duties and were sentenced to four and seven month's imprisonment respectively.

*HMA v William Macintosh and William Wilson*<sup>77</sup> concerned a telegraph officer, Macintosh, and an engine driver, Wilson. They were charged with culpable homicide and culpable neglect of duty when a signal was turned off too soon and a train was allowed to pass through causing a collision. John Sinclair was mortally wounded and died. Wilson was liberated, however the charges proceeded against Macintosh and he pled guilty to neglect of duty, The Lord Justice Clerk stated that this was the most 'serious case requiring exemplary punishment'<sup>78</sup> and he was sentenced to two years imprisonment. This sentence<sup>79</sup> is a sharp rise from previous sentences imposed for neglect of duty and this, combined with the comments of the Lord Justice Clerk, perhaps displays a greater willingness of the courts to punish such conduct.

Criminal liability at this stage was not only confined to the railways and the seas. One case which emphasises the varied application of the law in this area is the case of *HMA v Charles Buchan*<sup>80</sup>. The accused was a pharmacist administered a mixture of medicine which he deemed to be of a safe and proper description for the purposes of alleviating a cough to a child, He was charged with 'Wickedly, recklessly, ignorantly and culpably' failing to inform himself as to the age and state of health or strength of the child. A label was attached and the doses on the label were agreed to which were considered highly dangerous for the child. The child died and this type of charge under the circumstances was unprecedented at the time. The prosecution argued here that one must take all precautions in the directions of use if a person is exhausted with the dispensation of drugs; however it was held by the court that it would be impossible to determine the extent of the inquiry needed given the subjective nature of such an inquiry based on the needs of individuals requiring the medicine and on this basis upheld the objection to the relevancy of the charge. It is important to note that at this point, there was very little regulation of the administering of poisons and the government would soon realise that cases such as this were occurring more frequently and regulation was needed in order to deal with the problem that the common law was having difficulty dealing with.

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<sup>76</sup> 24 March 1853, *Justiciary Reports, Irvine Vol 1, 1852-54*, at p164

<sup>77</sup> 17-19 March 1855, *Justiciary Reports, Irvine (2)* at p136

<sup>78</sup> *Ibid* at 141

<sup>79</sup> Along with the sentence in *HMA v Thomas Henderson and George Langlands and John Williams and Others*

<sup>80</sup> 5 May 1863, *Justiciary Reports, Irvine 4*, at p392

In *HMA v Archibald Grassom and James Drummond*<sup>81</sup> the accused was charged with neglecting to direct, manage and steer a steam vessel or to cause it to be steered with due care and caution and with due regard to the safety of any small boat or other vessel and neglecting to keep a good lookout, whereby another boat was struck to the danger of the lives of numerous people. Grassom was in charge of the ship, with Drummond being an employee on the ship and the prosecution argued that the accused had a duty to do this and that they 'Culpably and recklessly neglected their duty as persons in charge of or employed on board of any steam vessel navigating a public harbour or other public place of navigation whereby there is injury to a person or the lieges'.

The Lord Justice Clerk stated to the jury that:

'This case requires no special knowledge of the law for its decision. If in any common sense view of the circumstances, you should come to the conclusion that this accident was the result of negligence, that negligence is criminal therefore the parties are guilty'<sup>82</sup>.

Grassom and Drummond were subsequently found guilty of the charges labelled and were sentenced to three and two month's imprisonment respectively.

This case and the others that have been mentioned clearly display how Scots law was developing at this point in relation to this particular type of omissions case. There was no specific list of professions or roles that would be subject to criminal liability for the failure to act in specific circumstances; however liability stretched over a diverse field of roles. Ship captains, train drivers, engine inspectors, telegraph officers, those charged with the administration of poisons and medicines, inspectors of the poor and so on. These types of cases would soon move from the common law and be dealt with under statute as successive governments began to move away from traditional Victorian laissez-faire policies towards a more socially conscious style of governance.

The cases mentioned also detail the development of the approach taken by the judiciary over this period. Although each case appears to stand independently to the others, with little or no mention of previous cases in the later judgements, it is clear that the Scots courts were recognising that certain individuals, in certain roles in society have duties. It is at times rather unclear exactly when these duties arise and to whom they are owed, however the general notion of some kind of duty is prevalent in these types of cases.

There is also no discussion of 'acts' as compared to 'omissions'. Occasionally the word 'omission' was used, however the courts never at any point attempted to define what an 'omission' was, let alone attempt to distinguish an 'omission' from an 'act'. The courts consider the conduct of the accused in relation to the alleged crime. Whether that conduct is actively steering a ship into a rock or failing to steer the ship at all where it collides into a rock is not given much consideration by the courts. The general test at this point appeared to be whether or not someone, who had a duty of some description, conducted themselves in a negligent manner, or neglected to perform that duty. One may argue that the question of whether or not someone had a duty, in these cases, is not completely essential. The courts seem to determine whether someone's conduct was negligent in order to determine whether criminal liability should be attached to that conduct. In any event, it is clear at this stage that the courts were beginning to formulate the concept of a 'duty' to either act or

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<sup>81</sup> 1884, *Justiciary Reports*, Couper 5

<sup>82</sup> *Ibid* at 489

take care, as well as considering a course of conduct and a test as to whether an individual conducted themselves in a negligent manner.

## **2.2 Historical Considerations of Criminal Conduct as Opposed to 'Duty'**

Hume also considered what may now be deemed to be omissions cases in the context of crimes against the person and more specifically under the heading of 'child murder'<sup>83</sup>. He stated that desertion and exposure of infants which resulted in their death could properly be classified as murder. If the death of the child did not result it of course would not be as serious a crime, but a crime nonetheless and even if the child died by some other means after desertion or exposure the crime would be no other than 'a species of culpable homicide'<sup>84</sup>.

He cites the case of *HMA v Mary Graham*<sup>85</sup>. Graham was indicted for incest and for the exposure of her new born child naked as it came into the world, in a field of corn, where it was afterwards found dead. She confessed stating that 'she did expose and lay it out, naked as it was born, amongst the corn, immediately after the birth'. She was convicted of the charges and sentenced to be scourged and confined in the house of correction, until the magistrates of the burgh could dispose of her. The accused was convicted, not necessarily for her actions or what she failed to do, but rather for her overall conduct. Hume states that murder would not have been an inappropriate charge here however he considered such cases as cruel, unnatural or barbarous treatment and rather than state that the parent was under a duty to ensure the wellbeing of the child, he considered the conduct of the parent towards the child and whether this conduct amounted to neglect of the child. The approach taken by Hume was followed by the Scottish courts in the nineteenth century where the courts did not consider the duty owed by a parent to the child, perhaps they felt that this was patently obvious. The courts began to deal with this type of case by examining the overall conduct of the parent in relation to that child and whether this conduct was of concern to the criminal law. As will be displayed, this type of criminal liability began to extend beyond the apparent and child relationship, however the majority of cases in this area do concern this particular type of relationship.

In the case of *HMA v David and Janet Gemmell*<sup>86</sup> both parties were charged with culpable homicide and cruel and unnatural treatment of a child of tender years, by its parent or custodian, whereby such a child is injured in person and health. They had cruelly and unnaturally maltreated and abused Margaret Baird, who was around 11 at the time and reputed to be the natural child of David Gemmell, in breach of their duty as custodians of her by neglecting to afford her such wholesome food, such decent clothing, cleanly and comfortable accommodation as was necessary to her health, suitable to their condition in life and within their power to afford. They had done this by confining the child to a loft and a closet and locked it for long periods of time. They then sought no medical assistance for Margaret and she died on 21 October 1840. They secretly buried her body in a field. Both parties pled guilty to the charge and were sentenced to four months imprisonment.

This seems to be a rather light sentence under the circumstances, particularly due to the fact that there was evidence of their physically assaulting Margaret with their fists and a stick. It is however, a

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<sup>83</sup> Hume, Vol.1, Chapter VI, at 299

<sup>84</sup> *Ibid*

<sup>85</sup> December 21, 1703

<sup>86</sup> No.104 (unnatural treatment of a child) June 5, 1841, *Justiciary Reports (2) 1838-41*, Archibald Swinton at p552

very early recognition in Scots law of the duty a custodian has over an individual in their care. Although this case contains evidence of acts and omissions on the part of the accused parties, it is important as the courts recognise that both parties were under a duty to provide proper care to Margaret. Their actions amounted to neglect of that duty.

In the case of *HMA v William Fairweather and Ann Young*<sup>87</sup> the accused parties were charged with wickedly, feloniously and cruelly imprisoning and keeping a person, who happened to be their daughter, of weak intellect in a place injurious to the health and to the mental constitution of such person. The court placed emphasis on the fact that this crime was deemed to be more serious as it was committed by the father and legal custodian of the child. It was held that they had previously evinced malice towards the child and they were bound to treat her in a proper manner. Their conduct amounted to wicked, felonious and cruel treatment and wilful culpable neglect and the child was reduced to a state of almost idiocy. William Fairweather pled guilty as libelled and was sentenced to one year in prison and Ann Young was fugitated for non-appearance. Here the court appears to focus on the overall course of conduct of the accused parties. Rather than focus on when they acted and when they omitted, the overall conduct of the parties is considered and this is what gives the conduct its criminal character.

In *HMA v George Fay*<sup>88</sup> a shoemaker was charged with culpable homicide and cruel, barbarous and unnatural treatment of his wife. On 3 June 1947 Fay placed his wife in a water closet and locked it, leaving her there for over three months with no light or ventilation. It was held by the court that he had deprived her of what was required for her health, comfort or decency and exposed her to filth and excrement. She lost all command of her limbs and he sought no medical assistance. She died on 7 October 1947. Fay pleaded not guilty to the charges, however he was found guilty. Again this case concerns both positive acts and failures to act on the part of the accused. However, again what is interesting is the fact that the court did not appear to concern themselves with making a distinction between the different types of conduct. Rather than stating that Fay has “failed” to act in a certain way, his conduct is framed in the indictment as “unnatural treatment” of his wife which accommodates either acts or omissions. Perhaps the case may be different if the case was one of “pure” omission, however we can begin to ascertain the approach that the Scots courts were taking at this time when dealing with cases involving omission.

In the case of *HMA v Catherine McGavin*<sup>89</sup> the accused was charged with culpable homicide and cruel and unnatural treatment of a child by its stepmother or other lawful custodian of a child of tender years. McGavin was married to Thomas Fairley and had lawful custody over Mary Fairley, who was between two and three years old at the time of the incidents. She was held to have beaten the child on the breast, face, shoulders and arms. She was also held to have thrown the child to the floor and walls. She exposed the child to the cold, cruelly withheld supply of food and clothing and the vital functions of the child were gradually destroyed and she died on 23 September 1845. Lord Moncrieff proposed transportation for a period of seven years and the Lord Justice Clerk agreed. What is firstly striking about this case is the severity of the sentence in contrast to earlier cases. This could demonstrate the greater focus the courts were placing on punishing such crimes at this time; however this case could be distinguished by the fact that there is far greater evidence of physical

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<sup>87</sup> 25 April 1842, *Justiciary Reports, Brown (1)*, at p309

<sup>88</sup> 27 December 1847, *Justiciary Reports, Arkley*, at p397

<sup>89</sup> 11 May 1846, *Justiciary Reports, Arkley*, at p67

violence on the part of the stepmother in comparison to earlier cases. What appears to be significant in this case is that the fact that the stepmother withheld food and clothing and allowed the child to be exposed to the cold is referenced in the indictment. There is no mention of a failure of a duty or such like. Once again, the positive acts and omissions all form part of a course of criminal conduct whereby the courts deem it appropriate, if not necessary, to punish the accused.

*In HMA v Peter McManimy and Peter Higgins*<sup>90</sup> the parties were charged with culpable homicide and also wilful, wicked or reckless, cruel and culpable removal from a sickbed, of a sick person, while in a state of stupor or unconsciousness or of total helplessness or of incapacity of resistance in consequence of severe disease, by the persons exhausted with, or who have assumed the custody or charge of such sick person. McManimy and Higgins were sentenced to nine and six month's imprisonment respectively.

In the case of *HMA v Isabella Martin*<sup>91</sup> a pregnant woman who knew she was in pregnant was charged with culpable homicide after she made no precautions for and did not call for any assistance at the birth of her child, which as a consequence died of suffocation. There was a lack of evidence to establish whether or not she suffocated the child, however the Solicitor General departed from a charge of murder and contended that the panel had been guilty of culpable and reckless disregard of whether the child should live or die. First of all the child must have been born alive, and then it would have to be established that had the panel obtained assistance at the birth the child would have lived. The neglect had to be the direct cause of death. But for the panels neglect of the child it would have lived. The court agreed with this reasoning and held that she had wilfully and intentionally refrained from calling for assistance when the time for the child to be delivered arrived and the child died as a consequence. She was found guilty of culpable homicide and was sentenced to six months in prison.

In the case of *HMA v Barbara Gray*<sup>92</sup> the accused was indicted of culpable homicide and also culpable and wilful neglect and bad treatment of a child of tender age by a person who has the custody of keeping it whereby such child in injured in its health. Gray agreed to nurse and bring up an illegitimate child and become the custodier and guardian of that said child. The charge read that she culpably and wilfully neglected to supply the said child with wholesome and sufficient food, clothing and keep her in damp condition and expose her to the cold and fail to give her such care and attention as were necessary to preserve the health of a child of such tender age. Her constitution and vital powers were gradually destroyed.

An objection to the relevancy was made by counsel for the accused stating that the charge was too vague and should have included such wording as barbarous, cruel, wicked, culpable and wilful, however she pled guilty to the charge of culpable and wilful neglect and bad treatment of a child of tender age at the second diet and was sentenced to fifteen months in prison. This case, after the deletions, involved no real positive conduct on the part of the accused and so she was being punished entirely for what she failed to do when she assumed custody of this child. This could be said to be one of the first 'true' omissions case in this area and Gray was charged with a crime based solely on what she failed to do after assuming a duty to do certain things.

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<sup>90</sup> 28 June 1847, *Justiciary Reports*, Arkley, at 321

<sup>91</sup> 29 January 1877, *Justiciary Reports*, Couper, at 379

<sup>92</sup> 31 January and 21 February 1881, *Justiciary Reports*, Cooper (4), at p389

Finally, *HMA v Elizabeth Scott*<sup>93</sup> concerned a charge of culpable homicide and neglect to call for assistance at child birth. This case raises a few confusing points. The first being that the court held that a child did not have to be completely born for such a charge to be competent. It was also argued by counsel for the accused that failure to call for assistance at child birth was not an offence under common law or statute. Lord Young appeared to suggest that the charge was not a good charge and the charge was struck out and the issue was not dealt with. The accused was acquitted. This case does not appear to sit alongside the case of *Isabella Martin*. It was unclear after this judgement where the law stood on this particular issue and this case was not particularly helpful in the development of the law.

### **2.3 Summary of Historical Analysis**

Two clear categories of 'omissions' liability appear to develop from Hume and the subsequent case law and it is clear that there was a willingness on the part of both the Scots public prosecutors, courts and the legislator to criminalise 'omissions'. The first category of case law concerned individuals who had duties imposed on them by virtue of their role in society. These duties were owed to the whole of society and could be considered in a similar light to the civil law duties to take reasonable care in the sense that if someone neglected their duty they were held responsible for the consequences that ensued. It is irrelevant whether the individual acted or omitted at any given time as they could breach their duty in either way and the duty did not necessarily depend on a particular relationship between the accused and another person.

The second category concerned those who failed to act in situations where they would be required to act by virtue of their relationship with another individual. In this type of case the concept of a duty was not the issue that concerned the courts. The courts considered the overall conduct of the accused in relation to the other individual and whether this conduct could be considered to be criminal in nature. The question of whether the accused acted or omitted at particular times was avoided by considering the course of conduct undertaken by the accused, which included both acts and omissions.

These cases developed at a time of minimal government. This was a pre- welfare state era of laissez-faire government when many in society, including elected officials, who critical of the 'heartless and calculating methods of political economy'<sup>94</sup> were becoming concerned about the standard of living of certain members of society and it has been stated that this pragmatic use of the criminal law was intended to achieve some social or public health regulation.<sup>95</sup>

This is supported by the fact that parliament enacted statutes which began to regulate the very type of activity that the criminal law was becoming concerned with at this time. It is perhaps as a result of this pragmatic use of the law that the approach to 'omissions' based liability has changed to the present position as it has been argued that it does not present a basis for a normative theory and

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<sup>93</sup> 29 March 1892, *Justiciary Reports*, *White III*

<sup>94</sup> M. Michie, *An Enlightenment Tory in Victorian Scotland: The career of Sir Archibald Alison* (Tuckwell Press: East Linton, 1997) at 199

<sup>95</sup> Robert S. Shiels, "Scots Criminal Law and Liability for Omissions", *Journal of Criminal Law* (2006) at 413



Scots law was not intend for this type of regulation<sup>96</sup>. This argument suggests that the nineteenth century approach was appropriate for the particular time; however modern Scots law demanded a more coherent and recognised principle. However, it will be argued that the principle developed in the nineteenth century case law did create a coherent and principled framework based on normative principles in which the law could operate and it is in fact the change in approach taken by Scots law which lacks coherence and any meaningful principle<sup>97</sup>.

It could be argued that Gordon was attempting to set the limits of the criminal law of omissions by developing his duty theory with four set criteria. It is true that until that point the Scottish courts had remained consistent with the approach taken by Hume to a degree however the scope of omissions liability was beginning to widen as time progressed. The attempt by Gordon to create a framework for omissions liability is not without merit however it is unclear why Gordon chose the particular criteria that he did, given that there were many different categories of duty advocated by his contemporaries. The criteria set out by Gordon, based on the concept of a duty, lacks clarity and consistency and it fails to recognise the way the law was beginning to develop in the Scottish courts following the principles set down by Hume.

The first category of historic omissions liability in Scotland, whereby duties were imposed on individuals based on their role in society is not necessarily what concerns this paper. The majority of the common law in this area has been superseded by statute which regulates the conduct of persons in the course of their employment. The concept of a duty here may well be appropriate however it is not what concerns this discussion. It is the approach taken in the second category which concerns this paper, namely considering the overall course of conduct of an individual in situations where they fail to act in such circumstances in which they would be expected to act. Such cases can and indeed were dealt with by considering the conduct and causation of the accused, rather than focusing on the need for a duty. Neither Hume nor the Scottish courts historically considered this type of case by discussing duties. Perhaps the duty was so obvious it did not need to be stated, however the courts focused on the overall conduct of the accused and whether this conduct caused the criminal result. Gordon stated that such cases should be considered by appealing to the concept of a duty owed by one individual to another. This approach, which has now found favour with the Scottish courts, is inconsistent with the historic position of Scots law relating to omissions. It will now be argued that Scots law should abandon the 'duty theory' and return to the historic approach taken by Hume and the Scottish courts on omissions by considering the overall conduct of the accused and whether that conduct can be said to have caused the criminal result. In order to do this the importance of the distinction between acts and omissions must be examined if an alternative to the 'duty theory' is to be considered.

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<sup>96</sup> *Ibid*

<sup>97</sup> *Criminal Law Essays in Honour of J.C. Smith*, Brian Hogan, "Omissions and the Duty Myth", 85 – 92, (Butterworths and Co Publishers Ltd, 1987) at 54

## CHAPTER 3

### THE ACT / OMISSION DISTINTION

Anglo-American legal systems have developed theories on criminalising omissions based on the concept of a moral and legal distinction between acts and omissions. It has been stated that the distinction between misfeasance and non-feasance is “deeply rooted in the common law”<sup>98</sup>. This distinction may have been downplayed by commentators and theorists in certain circumstances; however the distinction appears to be embedded in the law<sup>99</sup>. There has been an historic tendency on the part of the courts to limit the circumstances in which an omission may be subject to criminal liability by adopting an extremely narrow interpretation of an omission<sup>100</sup>. This chapter will consider how ‘acts’ and ‘omissions’ are defined and distinguished in Scots criminal law and whether such a distinction is necessary.

#### 3.1 The Act/Omission Distinction

If such a great deal of weight is to be assigned to the importance of this distinction between acts and omissions, it is of paramount importance that the law states clearly what constitutes an ‘act’ and an ‘omission’ in order to establish what criteria distinguishes one from another. It is obvious that an omission cannot be distinguished from an act until the concept of an ‘act’ is clearly defined in law.

Criminal liability is typically divided into two parts. The first part concerns the conduct of the accused, known as the *actus reus*. The second part is the state of mind of the accused, known as the *mens rea*<sup>101</sup>. Conventional theory tends to assert that a pre-requisite for criminal liability is a ‘voluntary act’ on the part of the accused<sup>102</sup>. The ‘act’ is incorporated in the *actus reus* and the ‘voluntary’ element satisfies the *mens rea*.

This demand for a ‘voluntary act’ is generally referred to as the ‘act requirement’. The rationale behind this theory is that the criminal law is concerned with wrongdoing, the paradigm of which takes the form of voluntary action<sup>103</sup>. As members of society we are punished for wrongs that we commit. This is to say that we are held criminally liable for that which we ‘do’. We are not held criminally liable for what we think, or what we are<sup>104</sup>. We are only held criminally liable for our thoughts if those thoughts manifest themselves in some kind of prohibited conduct that is of interest to the criminal law. The act requirement fulfils the role of ensuring that we are only punished in these specific circumstances. There is a distinction between moral and criminal responsibility. Our

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<sup>98</sup> JG. Fleming, *Law of Torts*, (8<sup>th</sup> edn 1992) at 146

<sup>99</sup> P. Glazebrook, “Criminal omissions” (1960) 76 *LQR* 386

<sup>100</sup> Alan Norrie, *Crime, Reason and History*, (London: Butterworths, 2001) at p120

<sup>101</sup> J. Herring, *Criminal law: Text, Cases and Materials*, (Oxford University Press, 4<sup>th</sup> ed, 2010) at p73

<sup>102</sup> M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (1993), at.24

<sup>103</sup> W. Wilson, *Central Issues in Criminal Theory*, (Oxford: Hart, 2002) at p77

<sup>104</sup> *Robinson v California* 370 US 660 (1962) - where the US Supreme Court ruled unconstitutional a statute rendering drug addiction a criminal offence – The defendant was being punished for his status and not for anything that he had actively done

thoughts, character traits etc. may attract moral condemnation; however criminal responsibility generally must be grounded in some 'voluntary act'<sup>105</sup>.

This provides some understanding of why an 'act' may be demanded in the criminal law, either as a necessary condition of criminal liability or at the very least as a pervasive feature of criminal liability<sup>106</sup>, however more detailed analysis is needed in order to establish how the concept of an 'act' is defined.

### **3.2 Defining an 'Act'**

Conventional theory places heavy reliance on the concept of an 'act' being centred on physical movement. Moore categorises an 'act' as a "willed bodily movement"<sup>107</sup> Therefore a part of the individuals body must move at the individuals own volition.

Moore outlines four theses to this theory of "willed bodily movement"<sup>108</sup>.

The first of which he calls the "identity thesis". He states that movement of the body, such as moving a finger, is one of the simplest things that we know how to achieve as human beings. The acts that are required for criminal liability are identical to such events.

The second is the "exclusivity thesis". There are more technical acts, such as killing, which tend to form the ordinary definition of crimes in substantive prohibitions; however these more complex acts are achieved by more simple acts involving bodily movement. If someone kills another by stabbing him in the heart the act of killing in this sense is made up of different voluntary acts. The individual must voluntarily move their arm in order to pick up the knife and subsequently plunge it into the heart of the victim. The various simpler acts involved combine to create the more complex act of killing.

The third thesis, the "mental cause thesis", concerns the mental element underlying an act. Moore argues<sup>109</sup> that not all bodily movement can satisfy the act requirement. There is a need for an exercising of will connected to such bodily movement<sup>110</sup>. These three theses outline the requirement for 'willed bodily movement' before criminal liability can attach to conduct.

The fourth thesis, the "equivalence thesis", seeks to address the special part of the criminal law, where complex action descriptions, such as killing, are used. According to Moore<sup>111</sup> these complex descriptions of action are essentially encompassing all simple acts. For example, if a law prohibits killing another, this is equal to any prohibition against any simple act that may cause death.

This theory has found much favour in Anglo-American legal systems; however it has not been without its critics. It has been argued that Moore's theory creates an artificial concept of action and

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<sup>105</sup> Antony Duff, *Answering for Crime*, (Oxford: Hart Publishing c2007), p95

<sup>106</sup> G. P. Fletcher, *Rethinking Criminal Law*, (Boston MA: Little, Brown, c1978), p420 at 6.4

<sup>107</sup> M. Moore, *Act and Crime* 1993 at 44 ; see also Holmes, *The Common Law* 91 (1881) concerning "a voluntary muscular contraction" or "a motion of the body consequent upon a determination of the will"

<sup>108</sup> *Ibid* at 44-46

<sup>109</sup> *Ibid*

<sup>110</sup> This rules out events such as reflex actions

<sup>111</sup> M. Moore at 44-46

view of the world<sup>112</sup>. There is merit in this criticism. Focusing on bodily movement fails to take into account the reality of life and does not focus on what is the true concern of the criminal law. Criminal law prohibits certain conduct. This conduct may be a result of 'acts' or 'omissions'. H.L.A. Hart supports this view. He states that if one considers our conduct in everyday life we consider ourselves to be engaged in certain activities such as talking, eating etc. We do not necessarily think about the individual bodily movements which combine to create this conduct<sup>113</sup>. If one considers the process of eating, we do not focus on our individual acts, such as moving our arms, opening our mouths, chewing etc. We consider ourselves to be eating. Our overall conduct forms the process of eating. The individual actions involved are not what concern us.

Herring refers to such instances as 'automatic pilot'<sup>114</sup>. We perform such tasks as a matter of routine without necessarily consciously considering the individual acts which combine to produce the process. It is completely artificial to deem our individual acts in such circumstances to be 'willed' in a meaningful sense. This could be considered to be a type of 'unconscious will'<sup>115</sup>, however the realistic approach is to consider our overall conduct and how this may interest the criminal law. Moore's theses is clear and may help to create an element of certainty in the law, however this presumed certainty is at the expense of a rational account of human conduct and how our conduct affects the outside world.

The criminal law is not concerned per se with individual bodily movements at a specific moment in time. What concerns the criminal law is human conduct and the practical effects of such conduct. The requirement for 'willed bodily movement'<sup>116</sup> is, according to Duff, a philosophically untenable account of action<sup>117</sup>. He argues that, even if this is a viable account of a concept of action, which is a matter of debate, it is not an account of the kind of agency that interests the criminal law. This definition does not assist in attempting to set a plausible constraint on the scope of the criminal law<sup>118</sup>.

One can do many things which have meaning and an impact on the outside world by not moving. Duff gives the example<sup>119</sup> of failing to rise when the Queen enters the room. No bodily movement has occurred here, however this could be deemed as much of an insult as a rude gesture towards the Queen, which involves willed bodily movement. Our 'doings', in relation to the nature and character of such 'doings' do not logically require movement. Criminal liability may involve bodily movement in the majority of cases; however it is not bodily movement as such that is of interest to the criminal law. 'They are not necessarily involved either as objects or as conditions of liability' in the criminal law<sup>120</sup>. The criminal law punishes conduct however this may be framed by the courts or in legislation. According to Arthur Leavens, "Conduct causally attributed to a particular harm is characterised as an omission only because too little of that actors conduct has been analysed"<sup>121</sup>. What Leavens is arguing is that positive action is easier for the courts to analyse. Omissions are more

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<sup>112</sup> Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, (Oxford University Press: 2008), 231pp

<sup>113</sup> H.L.A. Hart, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1968)

<sup>114</sup> J. Herring, *Criminal Law: Text, Cases and Materials*, (4<sup>th</sup> ed, Oxford University Press, 2010)

<sup>115</sup> G.P. Fletcher at p420

<sup>116</sup> M. Moore (1993) at 44

<sup>117</sup> Antony Duff, *Answering for Crime*, (Oxford: Hart Publishing c2007), at p97

<sup>118</sup> *ibid*

<sup>119</sup> *Ibid* at 98

<sup>120</sup> *Ibid* at 99

<sup>121</sup> Arthur Leavens, "A Causation Approach to Omissions", 76 *Cal. L. Rev.* 547 (1988) at 583

difficult to analyse, as there is often no positive conduct involved, and this may lead the courts to give less attention to the issue of omissions as subjects of criminal liability.

Moore does concede that criminal liability can be attached to omissions; however he argues that this is justified only as an exception to the act requirement<sup>122</sup>. According to Moore, criminal responsibility is still rooted in the concept of a 'voluntary act', which is defined as 'willed bodily movement'. Only in exceptional circumstances is the criminal law 'forced to abjure a key building block in the construction of criminal liability to ensure that key societal goals are not trumped by moral freedom'<sup>123</sup>. Outside these exceptional circumstances, Moore does not consider omissions to be a proper concern of the criminal law.

What Moore argues is important. There is a great deal at stake in any debate regarding what type of omissions should ordinarily be subject to criminal liability. Moore is arguing from the perspective of a libertarian. Essentially his argument is that the state should interfere in the everyday lives of citizens as little as possible and the criminal law should also reflect this approach. His argument is based on the idea that omissions liability encroaches on individual freedom and autonomy and therefore should only apply in limited circumstances. The 'act requirement' is an attempt to set a plausible constraint on omissions liability that does not interfere with the liberty of individuals to any great extent. Critics of Moore's theory of omissions liability, such as Andrew Ashworth, who argue for a different type of omissions based liability based on the concept of 'social responsibility' would contend that omissions liability should be extended in order to reflect contemporary society. This argument is based on the idea that we all owe duties to each other as part of a civilised society and that by imposing greater duties on individuals our personal autonomy is actually enhanced and this makes for a more harmonious and prosperous society. The debate is of significant importance as it is not merely a question of how a particular aspect of criminal liability should be categorised but rather what kind of society one would wish to live in and how we should interact as individuals and as part of a collective society. The crucial consideration is determining how the state and the criminal law should be part of that process and this is the essence of the discussion concerning omissions based liability. The stakes could truly not be any higher if one considers the different potential outcomes and consequences that would result.

Of course, there is also the issue of how omissions based liability should be structured. This part of the debate is largely concerned with the criminal process. Moore attempts to formulate a framework for omissions liability based on the 'act requirement' as a plausible constraint of such liability; however others have sought to construct a concept of omissions liability based on different criteria. There is of course the 'duty theory'<sup>124</sup> and there are also theories based on normative concepts<sup>125</sup> which ordinarily consider the issues of conduct and causation in relation to omissions. This debate is largely a legal debate concerned with how the criminal law should be structured based on legal norms and principles. It is a debate whereby issues concerning either pragmatism or principle may offer differing outcomes. The challenge is attempting to establish a framework which is based on sound legal principles such as fair warning, certainty in the law, consistency in the law, and also coherent and rationale judgements which create law that can stand up to scrutiny and be

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<sup>122</sup> M.Moore (1993) at 22-34, 55-9

<sup>123</sup> *Ibid*

<sup>124</sup> See Glanville Williams "Criminal Omissions — the Conventional View" (1991). 107 L.Q.R. 86

<sup>125</sup> H.L.A. Hart and A. Honore, *Causation in the law*, (2<sup>nd</sup> ed, 1985)

respected, however these principles also have to be harmonised with a pragmatic approach to the law which allows for the law to apply to the reality of everyday life and operate in a way that serves both the interests of justice and the public at large.

Unfortunately neither the Scots nor English courts have provided a clear definition of an 'act'. This therefore creates considerable difficulty in subsequently distinguishing an omission from an act.

### **3.3 Defining an 'Omission'**

Attempts have been made to define an omission. Omissions have been described as 'literally nothing', 'not a real event' or a 'negation of an act'<sup>126</sup>. Clearly if an omission is to be described as 'nothing' then this presents a considerable barrier to criminalisation. However, Wilson states that an omission cannot be deemed to be simply inaction<sup>127</sup>. He states that they are special cases of inaction, namely those where, as with affirmative action, the ommitter plays some morally significant part in the process by which the relevant criminal harm occurs<sup>128</sup>. An omission cannot simply be considered inaction. Omissions occur when there would have been some societal or normative expectation that the ommitter may have acted<sup>129</sup>.

If someone did not do something at a specific point in time, this would go unrecognised by the rest of society unless there was some expectation that the person should have acted. If no such expectation existed then no notice would be taken by anyone in relation of the ommitter's failure to act at that particular time. It is the disappointment of some expectation, or a departure from a societal norm that alerts others to an individual's 'omission'. Without relying on any meaningful distinction between act and omission, it could be stated that the individual has conducted himself in a way that is either prohibited by law or, in the normative sense; the individual has conducted himself in a way that has disappointed an expectation. This understanding of criminal conduct does not necessarily require any distinction between omission and action to be made.

This submission is supported by Wilson, who states that there is no clear moral basis upon which to distinguish acts and omissions<sup>130</sup>. The criminal law does not hold every person responsible in every situation whereby they neglect to do something they could have done. However, this does not rule out criminal liability for omissions. We can be held criminally liable for both what we do, and for what we fail to do<sup>131</sup>.

The act/omission distinction has been utilised as a means to limit criminal liability as well as attempting to determine the scope of the criminal law. The attempt to limit the scope of criminal liability through appealing to the act/omission distinction is not without its merits, however focusing on bodily movement as opposed to non-movement is a highly artificial way to consider human action, the impact of that action on wider society and how that action may interest the criminal law.

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<sup>126</sup> Graham Hughes, "Criminal Omissions" 67 YLJ 590 1957-58

<sup>127</sup> W. Wilson, *Central Issues in Criminal Theory*, (Oxford: Hart, 2002), at 86

<sup>128</sup> *Ibid*

<sup>129</sup> H.L.A. Hart and A. Honore, *Causation in the law*, (2<sup>nd</sup> ed, 1985)

<sup>130</sup> W. Wilson, *Central Issues in Criminal Theory*, (Oxford: Hart, 2002), at 87

<sup>131</sup> *Ibid* at 86

According to Graham Hughes<sup>132</sup>:

“The only fruitful concept of an act for the criminal law must synthesise the defendant’s physical movements with external accompanying circumstances and sometimes with certain consequences. It is not accurate to say that an omission is not a real event. It involves (like an act) tangible happenings”.

That is not to say that there is no practical difference between an act and omission. The argument submitted is that much of the focus on bodily movement and the assertion that an omission is not a real event is unhelpful in the quest to establish coherence and principle in this area of the law. Omissions can affect the world around us as much as acts can<sup>133</sup>. The traditional approach in Anglo-American law of focusing on bodily movement rather than conduct and will has found much favour amongst commentators, however it misses the point. It fails to focus on what concerns the criminal law, and that is conduct.

Fletcher gives the example of guards at Buckingham Palace contrasted with the viewing public<sup>134</sup>. Fletcher states that the conscious non-motion of the guards is a greater assertion of personality than the casual acting of the public in front of them. The significance of the non-motion of the guards is just as relevant as if they were marching around the palace grounds. The focus of the criminal law should be on the will and conduct of the individual. Passivity, after all, is willed as much as activity<sup>135</sup>. It is unclear how any practical distinction between moving and non-moving is relevant for the purposes of the criminal law.

It is not asserted that there is never any practical difference between an act and an omission. It is clear that, in the linguistic sense distinctions can be made. The distinction is, however, not of much importance to the criminal law, and on occasions can be most unhelpful. If one dilutes the importance and relevance of the act/omission distinction, by focusing on the will of the individual and how that will manifests itself in the conduct of that individual, one can begin to abandon the traditional focus on bodily movement and assimilate act and omissions together under the general concept of ‘conduct’, which is after all the primary concern of the criminal law.

### ***3.4 Judicial Interpretation of ‘Acts’ and ‘Omissions’***

The distinction between acts and omissions has also caused considerable difficulty in the English courts over the years. The interpretation of what an act or an omission may be in different circumstances has been subject to debate and at times has produced unsatisfactory, inconsistent and at times ludicrous decisions by the judiciary. This is of course of relevance to any discussion of Scots law as such authority can be, and has been, used as persuasive authority for the Scots courts.

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<sup>132</sup> Graham Hughes, “Criminal Omissions” 67 YLJ 590 1957-58

<sup>133</sup> G.P. Fletcher (1978) at 6.4.1, p421

<sup>134</sup> *Ibid*

<sup>135</sup> E. Beiling, *Lehre Vom Verbrechen*, (Tübingen: Mohr: P. Siebeck), 1906 at 9

In *Speck*<sup>136</sup>, the accused was convicted of ‘an act of gross indecency with or towards a child’ in contravention of the Indecency with Children Act 1960, s1 (1). A child had put her hand on Mr Speck’s genitals. Mr Speck failed to remove the child’s hand and became sexually aroused. The court remarkably deemed his conduct to amount to an ‘act’ and he was convicted. This is undoubtedly the correct decision and there would justifiably be public concern if such instances were not subject to criminal sanction. Mr Speck intentionally failed to remove the child’s hand in order to obtain sexual gratification, however the courts method of reaching this decision is what is concerning. It is quite clear that Mr Speck has not ‘acted’ in the traditional sense requiring willed bodily movement<sup>137</sup>. His conduct would be more appropriately categorised as an omission or failure to act<sup>138</sup>. The issue that the court faced in this case was that Mr Speck’s conduct did not satisfy the traditional concept of acting and therefore the courts, in order to achieve a satisfactory judgement, had to artificially deem his conduct to be an act in order to justify conviction. A more reasonable approach, surely, would be to consider the overall conduct of Mr Speck and whether he conducted himself with the necessary mens rea. This is a classic example of the courts attempting to overcome the act/omission distinction in order to avoid an absurd decision.

*Airedale NHS Trust v Bland*<sup>139</sup> concerned a severe injury sustained by Mr Bland during the Hillsborough Disaster. This left him in a persistent vegetative state. It was widely agreed by the medical experts that there was no hope of a recovery. A declaration was sought, with the approval of Mr Bland’s parents that would permit the doctor to turn off the life-support machine. The concern was that if the life-support machine had been turned off by the doctor, without the approval of the courts, there may be a potential manslaughter charge brought against members of the medical team. It was held that there would be no benefit in keeping Mr Bland alive.

Lord Goff of Chieveley emphasised the distinction between a doctor stopping a course of treatment and actively bringing about the patient’s death by administering a drug. Herring<sup>140</sup> states that the court were exercising caution here in order to avoid a decision that may have been interpreted as legalising euthanasia. A distinction was also made between the doctor turning off a life support machine and an ‘interloper’ turning off the machine. The conduct of the doctor in turning off the life-support was deemed to be an omission; however, it would have been deemed an act if anyone else had turned the machine off. Lord Mustill continued that as the conduct of the doctor was deemed to be an omission, criminal liability would only be incurred if the doctor had a duty to continue the treatment. As there was no hope of recovery, there was no duty on the doctor to continue the treatment and therefore the life-support machine could be turned off.

It difficult to comprehend that switching off a life-support machine could be considered an omission, following the traditional concept of act and omission. This is quite clearly an act following that reasoning. It is also illogical to say that the exact same conduct may be deemed to be either an act or omission based on who was responsible for the conduct. This is the very type of case that highlights the problems of the act/omission distinction. If we consider the overall conduct of the medical team,

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<sup>136</sup> (1977) 2 All ER 859

<sup>137</sup> M. Moore (1993) at 44

<sup>138</sup> J. Herring, *Criminal Law: Text, Cases and Materials*, (4<sup>th</sup> ed, Oxford University Press, 2010), at 83

<sup>139</sup> [1993] AC 789 (HL)

<sup>140</sup> J. Herring (2010) at 106



it would be possible to analyse the entire course of treatment and consider whether the conduct was criminal.

Most reasonable individuals would accept that the doctors have committed no criminal act. Abandoning the strong reliance on the act/omission distinction would allow courts to consider whether conduct is criminal, rather than perform the tedious exercise of establishing whether pressing a switch is an act or an omission. By the admission of Lord Mustill in this case “we are still forced to take the law as we find it and try to make it work”. If by this his Lordship is suggesting that the act/omission distinction can be used as a mechanism for avoiding criminal liability against all logic then it is perhaps time that the law developed a new approach to this problem.

In *Miller*<sup>141</sup>, a man squatting in a house fell asleep with a lit cigarette in his hand. When he awoke to discover that the mattress was on fire he decided to sleep in another room, making no attempt to put out the fire or call for help. The entire house caught fire and extensive damage was caused. He was subsequently charged and convicted of arson under the Criminal Damage Act 1971 s1 (1) and (3). His appeal to the Court of Appeal was dismissed. The court quoted Professor Glanville Williams<sup>142</sup>:

“What is in issue is the question of the concurrence between actus reus and mens rea. Normally these coincide in point in 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 the event and that he may be able to 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 continuance 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”.

This was in response to the decision in the initial trial that declared the defendant was under a duty to prevent the spread of the fire when he awoke to discover it. The Court of Appeal are stating that he is not under a duty, however his conduct can be considered as a continuing act once he discovers the danger.

The appeal progressed to the House of Lords and was dismissed. Lord Diplock referred to both what he termed the ‘continuing act’ and ‘duty’ theories. He stated that the same conclusion was reached in both cases and “for this purpose adopt the duty theory as being easier to explain to the jury”<sup>143</sup>. *JC Smith*<sup>144</sup> is critical of this decision. He agrees with the ultimate decision, however, is dismayed at

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<sup>141</sup> [1983] 3 All ER 978 HL

<sup>142</sup> Glanville Williams, *Textbook of Criminal Law*, (London: Stevens, 1978) at 143-144

<sup>143</sup> *Ibid* at 983

<sup>144</sup> JC Smith, “Liability for Omissions in the Criminal Law”, *Legal Studies* 88 at 92

the reluctance of the court to impose a duty in this case rather than base a decision on a 'legal fiction'<sup>145</sup>.

It is regrettable that a particular theory appears to have been adopted by the courts based on the ease at which it may be explained to the jury. It may be argued that this is as good a reason as any to develop a particular theory however any theory of action and omission should surely be based on principle and not convenience. If the courts were to consistently make judgements based on what was convenient in the circumstances, rather than what the correct decision would be in relation to the appropriate legal authority and reasoning the common law would surely not stand up to scrutiny, even in the eyes of the lay person. This case is another illustration of the courts ultimately reaching what would widely be regarded as the correct decision but in an unprincipled and unsatisfactory way. It may at first appear most logical to apply the duty theory to this case, however, once again it is submitted that the most rational approach would be to consider the conduct of the accused as a whole.

Rather than attempting to state that, in certain circumstances, the occurrence of the actus reus and mens rea can be assimilated by appealing to the 'continuing act' theory, consider the course of conduct of the accused. It may be argued that because the accused did not drop the cigarette intentionally or recklessly then there has been no act of any interest to the criminal law. The courts are then forced to overcome the unhelpful distinction between acts and omissions in order to arrive at a satisfactory judgement. Would it be so offensive to the senses of the reasonable man to penalise those who discover fires and allow them to develop regardless? It is submitted that this conduct is reckless in itself, regardless of whether any initial act on the part of the accused initiated the fire.

In *Fagan v Metropolitan Police Commissioner*<sup>146</sup> the defendant was instructed to bring his car into the side of the road by a police officer. The car ran over the foot of the police officer unbeknown to the defendant at this stage. The police officer instructed the defendant to move the car. The defendant responded by switching off the ignition and being abusive. After several requests he moved the car. The divisional court held that the defendant was guilty of an act constituting an assault. The reasoning being that, as he remained seated his body was in contact with the officer through the medium of the car. On appeal James LJ stated that "No mere omission to act can be an assault" and the conviction was quashed.

This case again displays the detrimental effect of giving too much weight to the act/omission distinction when the courts are considering whether or not to impose criminal liability. In reality, the defendant has intentionally left a parked car on a police officer's foot. In the course of this event he performs different acts and he also fails to perform certain acts. Examining the overall conduct of the defendant would allow the courts to consider whether the defendant should be convicted of assault without attempting to establish when he acted and when he failed to act. Bridge LJ<sup>147</sup> states that had the defendant accidentally tread on the police officer's foot and maintained the pressure after realising the mistake then this would have constituted an act. This confuses the matter further as, aside from the fact that this event would involve direct contact, it is unclear why this would be

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<sup>145</sup> *Ibid*

<sup>146</sup> [1969] 1 QB 439 PC

<sup>147</sup> *Ibid* at 446

deemed an act when the conduct in question was not. It is of course difficult to conceive of a case of 'assault by omission' in Scots law; however this is a much too simplistic way to view such an occurrence. This case involved different acts and omissions at different times; however one can surely not say that this case involves merely an omission on the part of the accused. The accused acted at certain moments and he also omitted to act at certain moments. Only by considering the overall conduct of the accused can we achieve a full understanding of what the courts should consider in relation to his potential criminal liability.

It is true that in the majority of the cases mentioned the decisions reached would most likely be deemed to be correct. This does not detract from the fact that the act/omission distinction has had to be manipulated and overcome in order to avoid an absurd decision. The courts have adopted reasoning that is difficult to follow in some cases. It is not contested that there are of course practical differences between acts and omissions, however the differences are not so vast that the act/omission distinction should be used in a way that can be manipulated in order to overcome the obstacles that it represents. This is avoiding the important issue at hand. The criminal law is not interested per se in whether at a particular moment in time an individual's body moved in a particular way. Criminal law is interested in the character of one's conduct<sup>148</sup>. Conduct incorporates act and omissions within its general rubric<sup>149</sup> recognising that there are distinctions between acts and omissions; however the distinction is not so fundamental that it should be used as a constraint on criminal liability. According to Hogan the distinction is 'at best unhelpful and at worst misleading. It would be more conducive to clarity of thought if we spoke of conduct and causation'<sup>150</sup>. A new approach is necessary in order to define the concept of action, omission and conduct in a way that is relevant for the purposes of the criminal law.

### 3.5 'Welzel's Theory'

If the criminal law is to abandon the conventional concept of action, which is to consider action as "willed bodily movement"<sup>151</sup> it is important to consider other plausible and workable definitions of human action and conduct. George Fletcher provides a comprehensive and detailed account of the work of Professor Hans Welzel<sup>152</sup>.

Professor Welzel began to develop a new theory of action to rival the conventional view of action. According to Fletcher, Welzel's theory became 'the cornerstone of an entire theory of criminal responsibility'<sup>153</sup>.

The main criticism that Welzel directed towards the traditional concept of action was that acting was in fact 'teleological, goal directed activity'. This is the view that we cannot understand the concept of action by merely considering bodily movement generated by the will. We are best placed to understand action in terms of considering what the aim of that action is. Welzel's argument is that

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<sup>148</sup> Antony Duff (2007) at 96

<sup>149</sup> G.P. Fletcher, *Rethinking Criminal Law* (1978) at 6.4.1. p421

<sup>150</sup> *Criminal Law Essays in Honour of J.C. Smith*, Brian Hogan, "Omissions and the Duty Myth", 85 – 92, (Butterworths and Co Publishers Ltd, 1987) at 92

<sup>151</sup> M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (1993), at 24

<sup>152</sup> G. P. Fletcher, *Rethinking Criminal Law*, (Boston MA: Little, Brown, c1978), at 6.4.3.

<sup>153</sup> *Ibid*

human action is 'intrinsically purposive'. According to Welzel, it is not possible to develop a complete understanding of action by merely considering bodily movement as an outward manifestation of the 'will'. In other words, action cannot be understood in terms of A moving his arm as a result of his will to move his arm. In order to properly develop the concept of action one must consider the purposive nature of that action. The inquiry has to move towards the question of why A moved his arm, in order to fully understand the nature of A's action.

Welzel's main criticism was the laws 'preoccupation with the causal mode of understanding criminal law'. The notion that acts are merely products of the will does not capture the essence of the act and does not provide a philosophically tenable account of action. Welzel did not believe that the will or desires caused external bodily movement. He developed a teleological concept of acting. 'A human act could be interpreted only so far as the agent's goal was perceived'<sup>154</sup>. According to Welzel, action was not blind; it was seeing<sup>155</sup>. Action should not be seen as the mere physical manifestation of the 'will'. The concept of action is more complex than this and must encompass the purpose behind movement in order to understand action.

Fletcher offers some amendments to Welzel's theory<sup>156</sup>. He states that we need to categorise the different applications of the term 'causal' in this area and be clear about the potential alternatives. Fletcher states that there is a need to re-emphasise causation and stress the perception of human acting as a form of intersubjective understanding.

There is a distinction to be made between bodily movements and human acts. In order for someone to be acting we can understand a purpose in what they are doing. When we discuss bodily movement generated by the will, this takes no account of the purpose of that movement. Effectively, bodily movement generated by the will is another way of saying intentional movement. All we are considering here is that A moved his arm and he intended to move his arm, without any consideration as to why he moved his arm. According to Welzel, we always see particular acts rather than some general phenomenon called acting. This is to say that when we perceive someone to be acting, we consider why they are acting. This 'purposive' element of action is crucial to our understanding of action.

An example of this would be to say that when we see someone walking down the street, if we ever think about what they are doing we would consider them to be walking. We could also say that they are voluntarily moving their legs back and forward. This is essentially two different ways of describing the same action, however the former example considers the purposive element of the action. The purposive element of action is crucial to our understanding of action and indeed conduct.

Welzel also draws a distinction between 'purposive' activity, such as breaking into a house and activity which is an end in itself, such as dancing. When someone breaks into a house, they perform many acts as part of the general activity of breaking into the house. Perhaps they smash a window, walk upstairs, or steal certain items. There is an underlying purpose to such activity. This can of course be distinguished from certain activity in which there is no underlying purpose to the activity other than the taking part in the activity, the activity is not just the means but also the end.

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<sup>154</sup> *Ibid*

<sup>155</sup> *Ibid* at 33

<sup>156</sup> *Ibid* at 6.4.3

Fletcher suggests that we could consider Welzel's theory not as a theory of acting, but rather a 'theory about the relationship between acting and intending'<sup>157</sup>. The concept of intending and acting are intrinsically linked and there is no need for them to be disassociated from each other. According to Fletcher, this is the most appealing aspect of Welzel's theory. The fact that Welzel's theory overcomes what Fletcher terms the 'false dichotomy' between acting and intending that dominates contemporary theoretical considerations of the criminal law.

One problem with Welzel's theory is that it does not easily incorporate crimes of recklessness or negligence. Sometimes the law is concerned with the way in which conduct is executed rather than the purpose of such conduct. Recklessness can also be related to knowledge as someone could act intentionally whilst being reckless as to the outcome of that action. For example, if someone intentionally fires a gun into a crowded room and no-one is injured, he can be said to be acting intentionally, however he may have been reckless as to the potential outcome of his decision to act in such a way. He is deemed to be reckless in relation to his lack of knowledge of the potential outcome of his actions and his failure to consider the potential outcome. This demonstrates the difficulty in applying Welzel's theory to such crimes.

Fletcher recognises the problems with Welzel's theory; however the theory is perhaps more of a philosophical rather than legal theory. The significance of the theory, in relation to the discussion around criminalising omissions, is that it is not concerned with physical movement per se. What Welzel's theory concerns is the purposive nature of conduct. If we seek out the purpose of a particular omission in order to understand the conduct of the ommitter we begin to explore the issues that concern the criminal law<sup>158</sup>.

The criminal law is concerned with conduct, causation and mens rea. If these factors combine to form the actus reus of the crime then there is a case for potential criminal liability. The relevance of Welzel's theory, for the purposes of this discussion, is not necessarily to adopt this theory as the new definition of human action. The theory is relevant as it demonstrates the irrelevance of bodily movement in the criminal law. The bodily movement, even accompanied by the will, does not tell us much. It is only when we begin to consider conduct in relation to the intended purpose of that conduct that we can develop a truly complete understanding of human agency and conduct.

### **3.6 Professor Antony Duff and the 'Action Presumption'**

Antony Duff also provides an alternative to the conventional theory of human agency<sup>159</sup>. Duff's main criticism of the conventional 'act requirement' is similar to that of Welzel. He states that the act requirement fails to provide 'a tenable account of the concept of an act that sets plausible constraints on the scope of criminal liability'<sup>160</sup>. He argues that the identity and character of our

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<sup>157</sup> *Ibid*

<sup>158</sup> *Ibid*

<sup>159</sup> Antony Duff, *Answering for Crime*, (Oxford: Hart Publishing c2007), at 95

<sup>160</sup> *Ibid* at 96

actions do not logically require movement<sup>161</sup>. If this is the case, where does that leave the act/omission distinction?

What is submitted here is not that there are no practical differences between acts and omissions; however the concept of acts as 'willed bodily movement' is not the type of agency that concerns the criminal law<sup>162</sup>. One may argue that there are physical or social distinctions to be made between an act and an omission; however these distinctions are of little relevance to the criminal law. The criminal law is concerned with the prevention and punishment of harmful 'conduct'.

Duff argues that a new theory should be adopted in order to define the scope and object of criminal responsibility. He names this theory the 'action presumption'.

Similar to Welzel's theory, Duff sees little merit in developing a conception of action based around willed bodily movement. He states that we must view the concept of action as a 'social phenomenon engaged in the social world in which we live'<sup>163</sup>. The focus should not be on our capacity to move or control our bodies, in other words the concept of the 'will'. The focus should be on our 'capacity to engage in practical reasoning and to actualise its results in ways that make a difference to the world in which we live'<sup>164</sup>. He calls this the 'action presumption'.

Of course our capacity to exercise our will, which manifests itself in bodily movement is important to us as agents, however the exercise of this capacity does not display what is essential to our social agency<sup>165</sup>. Duff argues that what is essential is 'the exercise of the capacity to actualise the results of our practical reasoning in ways that make a difference to the social and material world in which we exercise it'<sup>166</sup>. According to Duff, the criminal law offers reasons for acting in certain ways. We should consider these reasons in our practical reasoning and this should guide our conduct. If we subsequently do what we had reason not to do, we have to answer for this in the courts.

Duff distinguishes between two types of action that we can be held criminally liable for. The first is when we are held liable for actualising the results of our practical reasoning. This would be more appropriately stated as successfully carrying out our intention to commit a particular crime.

The second type of action we may be criminally liable for is when we do not successfully actualise an intention in itself; however we commit some wrong whilst attempting to actualise that intention. Duff gives the example of causing criminal damage whilst carrying out the intention to burn rubbish<sup>167</sup>. This would arguably be capable of encompassing crimes of negligence or recklessness.

Duff provides an example to illustrate the distinction between the act requirement and the action presumption. In this example a man is sitting in a chair whilst a child swings his arm in a way that will clearly knock over the vase. He could easily stop his arm from swinging, but does not do so. The vase eventually is smashed.

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<sup>161</sup> *Ibid* at 97

<sup>162</sup> *Ibid*

<sup>163</sup> *Ibid* at 99

<sup>164</sup> *Ibid*

<sup>165</sup> *Ibid* at 100

<sup>166</sup> *Ibid* at 101

<sup>167</sup> *Ibid*

Under the act requirement, there is a demand for 'willed bodily movement'<sup>168</sup>. This requirement would not be satisfied as he is not wilfully moving his body. The action presumption will permit criminal responsibility if his non-resistance actualised the result of his practical reasoning<sup>169</sup>. For these purposes, whether there was voluntary bodily movement is irrelevant. In these circumstances the man would be responsible for the damage if he intentionally chose not to resist.

The crucial distinction between the conventional 'act requirement' and Duff's 'action presumption' is that the conventional theory is preoccupied with willed bodily movement. If there is no bodily movement there can be no criminal liability, except in extreme circumstances. The 'action presumption' takes no interest in bodily movement. The question is whether the conduct of the individual actualises the result of their practical reasoning. If that conduct subsequently causes harm then there is potential for criminal liability to be attached. No relevance is placed on whether the individual wilfully moved their body.

Duff also considers the issue of omissions liability in criminal law directly<sup>170</sup>. He makes some distinctions between acts and omissions.

Firstly, a distinction must be made between 'letting happen' and 'not doing'. If A disappoints an expectation to do something, his conduct will be considered to be a 'not doing'. If there is no expectation placed upon A to do anything, then his conduct will be deemed a mere 'letting happen' and will not be subject to criminal liability.

Secondly, an omission can actualise the result of practical reasoning (if one explicitly decides not to do X) or it can involve simply the failure to exercise one's capacity for practical reasoning in a way that would lead one to prevent X<sup>171</sup>.

Thirdly, we can distinguish commission by omission from mere omission cases.

Fourthly, we must recognise a category of omission in between 'commission by omission' and mere 'omission' cases. In cases of mere omission, one is held liable for a failure to do X. There is no subsequent liability for the consequences of that failure. However someone can be held liable for not preventing a harm that another has caused and be held responsible for that harm. The difference between this and cases of commission by omission is that the failure is deemed to be a lesser wrong than that of the individual who actively causes harm<sup>172</sup>.

Duff does accept that there is a difference between bringing about and failing to prevent harm and that our responsibilities to prevent harm are not as 'universally stringent' as our responsibility not to do harm. To apply an equally stringent responsibility to prevent harm would, according to Duff, be too 'onerous and implausible'<sup>173</sup>.

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<sup>168</sup> M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (1993), at 24

<sup>169</sup> Duff (2007) at 106

<sup>170</sup> *Ibid* at 107

<sup>171</sup> *Ibid*

<sup>172</sup> *Ibid*

<sup>173</sup> *Ibid* at 109

However, the most important aspect of Duff's analysis is his assertion that the requirement for action is neither an object nor even a condition of criminal responsibility<sup>174</sup>. Duff states that the action presumption would be unsustainable if it were to require action as distinct from omission.

It is true, according to Duff, that 'there is still some moral significance in the distinction' between acts and omissions, however he suggests that action should only play a 'modest role' in determining the structure and scope of criminal responsibility<sup>175</sup>.

It should be noted, however that whilst Duff states that there is a moral distinction between acts and omissions, he does not believe that there is any real need for a legal distinction<sup>176</sup>. He states that when we say that the criminal law requires action, essentially what we mean is that we should not be punished for 'thoughts, character traits, or virtue'<sup>177</sup>. This does not rule out criminal liability for omissions in the criminal law.

Essentially, Duff is arguing that the focus of criminal responsibility should not be determined by some arbitrary act/omission distinction. The issue of bodily movement is not an interest or concern of the criminal law. The importance of Duff's theory and account of action is that it considers an individual as a social agent, who has the ability to engage in practical reasoning. Similar to Welzel's argument, he stresses the purposive nature of conduct as being the true way of understanding action and conduct. A new concept of action must be developed if the criminal law is to progress past the conventional requirement for 'willed bodily movement'. This is not what interests the criminal law. In order to formulate a new theory of criminalisation of omissions based on a consideration of mens rea, conduct and causation it is important to promote a concept of action that recognises human beings as social agents. Willed bodily movement does not give a full account of action. What should be considered is the conduct of an individual and whether that conduct actualised the result of their practical reasoning<sup>178</sup>.

As appealing as the conduct based approach to criminalising omissions appears to be it has never overridden the conventional approach, which is to consider 'acts' and 'omissions' as entirely different concepts, in the thought processes of many members of the legal profession. As has been demonstrated, there appears to be a widely held belief that omissions do not amount to the same level of wrongdoing as acts. The act/omission distinction is at times utilised to prevent or at the very least limit criminal liability for omissions. It then becomes important to consider why the objections towards criminalising omissions exist.

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<sup>174</sup> *Ibid* at 112

<sup>175</sup> *Ibid*

<sup>176</sup> *Ibid* at 113

<sup>177</sup> *Ibid* at 114

<sup>178</sup> *Ibid* at 95



## CHAPTER 4

### OMISSIONS AND THE SCOPE OF THE CRIMINAL LAW

Much of the discussion surrounding the concept of liability for omissions in the criminal law is focused on whether or not such liability is within the scope of the criminal law. This chapter will examine the arguments for and against attaching criminal liability to those who fail to act and consider whether or not liability for omissions does or should fall within the scope of the criminal law.

#### 4.1 The Principle of Legality

Jeremy Bentham once stated:

“The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto”<sup>179</sup>.

He continues:

“A woman’s head-dress catches fire: water is at hand; a man instead of assisting to quench the fire looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation; lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle; another, knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?”<sup>180</sup>.

If there was an argument for increasing the scope of criminal liability for omissions in Bentham’s time and that scope has not increased by any substantial margin in the subsequent centuries, it would suggest that there are serious concerns surrounding any notion of a potential increase in the scope of criminal liability for omissions. The reasons for these concerns must now be examined.

Gordon recognised the difficulty in extending the scope of criminal liability based on the principle that the criminal law should be construed narrowly<sup>181</sup>. There is a general reluctance to increase the scope of the criminal law relating to omissions. This reluctance seems predominantly encapsulated in two major concerns. The first of these concerns is the legality principle and the second is the principle of autonomy.

The principle of legality states that it would be unfair to impose burdens on members of society except in circumstances which are well-defined and well publicised<sup>182</sup>. This principle clearly creates a problem in relation to omissions liability. It is much easier for the law to detail prohibited conduct than it is to detail positive duties or at least positive conduct that is to be encouraged by the law.

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<sup>179</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (London, 1823), XVII, at 19

<sup>180</sup> *Ibid*

<sup>181</sup> Gordon (1978) at p89

<sup>182</sup> Andrew Ashworth, “The Scope of Criminal Liability for Omissions”, (1989) *L.Q.R.* 424 at 430

There is a danger that criminalising omissions would lead to a creation of obligations that are 'open ended and/or fall due unpredictably'<sup>183</sup>.

The legality principle is grounded in the concept that the state can only punish an individual if he has conducted himself in a way that the state has made clear that he should not<sup>184</sup>. The difficulty in criminalising omissions is that essentially the state is punishing an individual for failing to do something. The argument follows that it may not be clear what the state expects an individual to do under certain circumstances. Furthermore, the ambiguous nature of some statutes that penalise omissions could be said to give a wide discretion to police and prosecutors over whom to prosecute and under what circumstances<sup>185</sup>. This could open the process up to a great deal of manipulation and corruption by the authorities. This argument is weakened by the fact that certain laws prohibiting positive acts may be open to the same process of manipulation and corruption which is said to plague certain omissions based statutes. The legality principle also lacks credit when one considers the fact that many opponents of omissions based liability, such as Moore<sup>186</sup>, would be opposed to omissions based liability based on ideological grounds no matter how clearly defined such liability was. In this sense one could state that the principle of legality is a legitimate concern when attempting to formulate a concept of omissions based liability, however it is not a concern which should have a great deal of weight attributed to it. The principle applies to laws prohibiting positive acts as well as those penalising omissions. It is true that criminalising omissions in this context may present greater challenges, however there is no reason to say that these challenges could not be overcome in the same way as they could be in relation to laws prohibiting positive acts.

There is also a concern over the principle of fair warning, as well as fair labelling of offences. There is a danger with omissions liability that individuals will be held criminally liable for conduct that they were unaware was criminal. The danger of this becomes more acute in relation to omissions as it is a basic fact that people are less likely to be aware of obligations placed on them to act as opposed to prohibited conduct<sup>187</sup>. The criminal law should aim to achieve maximum certainty and members of society should be well aware of what types of conduct is acceptable. It is more difficult to outline conduct that is expected of citizens than it is to state what conduct is prohibited. There is a severe danger that the principle of fair warning may be jeopardised by omissions based offences.

The principle of legality is a perfectly reasonable concern for those who are sceptical about omissions liability to have, however it is submitted that such a concern can be addressed by considering the nature of our common law. It has been stated that the common law is a constant process of 'rolling review'<sup>188</sup>. The very nature of a common law system is that the courts consistently develop and update the law. We do not live in a jurisdiction with a penal code. The vast majority of our criminal law is 'judge made' common law. It is arguable to say that the position of the law in a common law jurisdiction may always carry an element of uncertainty as the law is constantly being developed by the courts.

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<sup>183</sup> W. Wilson, *Central Issues in Criminal Theory*, (Oxford: Hart, 2002), at 95

<sup>184</sup> *Ibid*

<sup>185</sup> J. Herring (2010) at p113

<sup>186</sup> M. Moore (1993), *Act and Crime*

<sup>187</sup> W. Wilson, *Central Issues in Criminal Theory*, (Oxford: Hart, 2002), at 97

<sup>188</sup> *ibid*

For example Hume stated, in relation to marital rape, that a man could never be convicted of raping his wife based on a presumption of consent on the part of the wife arising from the fact of marriage<sup>189</sup>. This largely reflected the views of society at this time. Women were essentially considered to be the property of their husbands and effectively the common law reflected this view. As society has progressed over the centuries and with reference to the Suffragette movement, women now enjoy, at least in theory, equal rights with men and in the case of *S v HMA*<sup>190</sup> the status of a husband and wife as equal partners in a marriage was recognised and the immunity against prosecution of a husband who has sexual intercourse with his wife without her consent was removed. This is a prime example of the common law developing to reflect the societal norms of the time, however this could be considered a judicial extension of the criminal law which retrospectively punishes an individual for something that was technically not a crime at the time of commission. It has been argued that this type of 'judicial law-making' is undemocratic and is inconsistent with the principle of legality as the judiciary are effectively acting as the legislature<sup>191</sup>. This is problematic as the legislature lacks a democratic mandate and it could be argued that what is essentially new law created by the judiciary breaches the human rights of the accused under Article Seven of the European Convention of Human Rights, which prohibits the retrospective imposition of criminal liability.

However, this argument can be countered by the idea that flexibility in the criminal law is something that is desirable and to an extent inevitable<sup>192</sup>. The criminal law should be able to respond to conduct that is deemed to be harmful to society and this response should be as effective and swift as possible<sup>193</sup>. A rigid criminal law that cannot respond to such behaviour, is impractical and undesirable, and constantly appealing to the legislature, when the response would not be as prompt or appropriate to the perceived social threat would be problematic and unsatisfactory<sup>194</sup>. The argument here is that not only does the common law work in terms of pragmatism and efficiency, it is also flexible in a way that allows for the courts to respond to behaviour that is considered wrongful which is beneficial to society as a whole. To this extent the common law works in both theory and practice and whilst the principle of legality is important, it is difficult to understand how omissions based liability would present any new problems that have not already been considered in relation to liability for positive actions under the criminal law. It is accepted that the uncertainty is increased somewhat in relation to omissions liability; however this is not to such a great degree that it should be of major concern. The principle of legality can be satisfied as much for omissions as acts, providing the conceptual framework is coherent and principled.

#### **4.2 The Principle of Autonomy – 'Liberal Individualism' versus 'Social Responsibility'**

The second concern that may be raised in relation to criminalising omissions is in relation to the principle of autonomy. *Simester and Sullivan* describe the principle as follows:

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<sup>189</sup> Hume, *Commentaries*, Vol. I, 306

<sup>190</sup> (1989) *S.L.T.* 469

<sup>191</sup> Gane and Stoddart, *A Casebook on Scottish Criminal Law*, (4<sup>th</sup> ed, 2009), p7, at 1-12 (Notes)

<sup>192</sup> *Ibid*

<sup>193</sup> Alan Rodger, "A Time for Everything Under the Law: Some Reflections on Retrospectivity" (2005) 121 *L.Q.R.* 57

<sup>194</sup> Gane and Stoddart p7, at 1-12

“We value living in a society where citizens are respected as individuals – where they are free to live their own lives and pursue their own priorities without having their choices determined by legal duties to act or intervene. The prohibition of omissions is far more intrusive upon individuals’ autonomy and freedom than is the prohibition of acts, which is why the systematic imposition of (criminal or civil) liabilities for failure to act is to be restricted”<sup>195</sup>.

Moore<sup>196</sup> argues that ‘compelling people to act is to stigmatise the people that liberal society cherishes – those who go around minding their own business and whose destiny is to leave no mark on society, let alone a bloody one’. Wilson goes even further in his defence of the principle of autonomy when he states that compelling people to act in certain circumstances is to punish those who behave in a way that is encouraged by western capitalism, namely ‘the rational pursuit of self-interest in a community of likeminded individuals’.

These types of arguments are sometimes referred to as concepts of ‘Liberal Individualism’. Liberal individualism is concerned with protecting individual autonomy and liberty against commands and desires of an authoritarian state. This is the ability of the individual to make his own informed judgements without being compelled by the state to act in a certain way<sup>197</sup>. There is a general assertion by defenders of this view that criminalising omissions or a failure to act restricts the personal autonomy of the individual. It is argued that the criminal law should be concerned with preventing criminal acts and not encouraging acts that are considered to be morally acceptable<sup>198</sup>. However, not all omissions are of this character and it could be argued that certain omissions appear, at least prima facie, as manifestly criminal as positive acts.

It has been suggested that placing a responsibility or a duty to act on individuals in certain cases takes on a ‘sinister authoritarian colour’ whereby individual citizens will be coerced into acting like ‘subsidiary policemen and tell-tales’<sup>199</sup> and that placing these duties on individuals is inconsistent with fundamental principles of the criminal law as individuals can then be punished for non-action or even thoughts<sup>200</sup>. It is also argued that so called ‘Bad Samaritan’ laws<sup>201</sup> create the unreasonable risk of both legally and morally condemning an individual who may ‘freeze’ or be unaware of how to respond to a situation<sup>202</sup> and is subject to a criminal penalty as a result of being unable to respond in a way that society may wish for him to respond. The concerns regarding the criminalising of certain omissions and an individual persons right to autonomy and liberty could possibly be dismissed by suggesting that it would be difficult to establish how the demanding of an action could offend the liberty of an individual to a much greater extent than prohibiting certain actions, which is a crucial aspect of the criminal law.

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<sup>195</sup> A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine*, (Oxford: Hart Publishing, 4<sup>th</sup> ed, 2010) at 69

<sup>196</sup> M. Moore (1993) at 58-60

<sup>197</sup> Alan W. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, (London: Butterworths, 2<sup>nd</sup> ed, 2001) at 134

<sup>198</sup> M. Moore (1993) at 24

<sup>199</sup> Glanville Williams "Criminal Omissions — the Conventional View" (1991). 107 L.Q.R. 86

<sup>200</sup> *Ibid*

<sup>201</sup> Which can place a statutory duty on individuals to assist other individuals in certain situations when it would not be considered unreasonable to do so

<sup>202</sup> J. Dressler, ‘Some brief thoughts (Mostly negative) about ‘Bad Samaritan’ laws’ (2000) *Santa Clara LR* 971, at 981-9

It is possibly true that compelling a positive act in certain circumstances is more onerous than prohibiting certain conduct, however it is largely a question of degree and it is debateable how onerous certain positive legal obligations actually are. There is a tendency to exaggerate this argument. It surely cannot be argued that the actions of someone shouting loudly to themselves in the street are manifestly more wrongful than leaving a severely wounded man to die on the same street when one could have easily called an ambulance. The former results in a few disgruntled neighbours and the latter results in the death of another human being. The latter does not even appear *prima facie* to be more onerous than the former and both cases involve a restriction on the liberty of the individual in question, however there are laws in Scotland which would allow for criminal sanction for the former case but not the latter. It is largely a question of degree. There are rightly many cases of omissions which should not be subject to criminal liability, however this is also true in the case of positive acts.

It has also been asserted that 'what goes on in a man's head is never enough in itself to constitute a crime' and that some external state of affairs is required<sup>203</sup>. Duff argues that, as an omission involves no positive act, it is may only possible to place criminal liability on an individual as a result of his thoughts<sup>204</sup>. This is unquestionably restrictive on an individual's autonomy and liberty, as it is not just shaping how one should act but also considering how one should think. Thoughts could well be considered to be immoral or offensive; however there is no justifiable reason to criminalise thoughts, unless one considers the act to be merely evidence of the criminal intention. It would not be consistent with general principles of the criminal law to hold individuals criminally responsible for what they think or who they are<sup>205</sup> however, this is a rather extreme position to take. There is no reason to believe that omissions liability is the same as criminalising thoughts. This would be out with the remit of the criminal law. Morris states that the criminal law does not punish for the 'thoughts' or the 'passivity' of the individual, but rather for the omission that permits the occurrence of a harmful event<sup>206</sup>. It is submitted that this is a more rational perspective on omissions based liability, rather than concerns about criminalising thoughts.

In order to counter any criticism based on liberal individualism, it is prudent to appeal to the concept of 'social responsibility'. Macaulay<sup>207</sup> states that it is important to distinguish between the 'prevention of acts of positive harm', which is a legitimate concern of the criminal law, and the 'encouragement of acts of positive good', which is not a concern of the criminal law<sup>208</sup>. This argument is based on the idea that the criminal law should not be concerned with acts that are considered to be merely immoral, rather the focus of the criminal law should be on positive acts which are criminal in nature. This view suggests that a failure to act, however immoral that failure may appear to be, is not the concern of the criminal law.

Norrie suggests that this is a narrow and outdated view and that the law should recognise obligations between individuals in a much broader sense<sup>209</sup>. This view is supported by Hughes who suggests that the development of the contract of employment and individuals being placed into

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<sup>203</sup> G.Williams, *Textbook of Criminal Law*, (2<sup>nd</sup> edn, 1983), at 146

<sup>204</sup> Antony Duff, *Answering for Crime*, (Oxford: Hart Publishing c2007), at 49

<sup>205</sup> *Ibid* at 100

<sup>206</sup> H.Morris, 'Punishment for Thoughts' (1965) *CL Chicago* 346, at 48

<sup>207</sup> Lord Macaulay, 'Introductory Report upon the Indian Penal Code, Note M' *The Works of Lord Macaulay*, (vol XI, 1898)

<sup>208</sup> *Ibid*

<sup>209</sup> A.W. Norrie, *Crime, Reason and History* (2<sup>nd</sup> edn, 2001), at 124

positions of responsibility over others has created a 'growing interdependence in modern society'<sup>210</sup> and a new 'legal consciousness' should be developed in order to reflect this change in societal attitudes<sup>211</sup>. This development of a concept of social responsibility and consciousness suggests that the law should reflect contemporary concepts of morality and the developed social views that society is now deemed to hold. The argument rests on the basis that society's moral values will change and develop over time and it would appear logical that the law should develop in the same way to reflect the interests of the society which it exists to serve, much in the same vein that the criminal law developed in the nineteenth century. It is also true that the character of these changing values matters to the criminal law. The values of society and the nature of the criminal law should not be considered as two abstract and independent concepts, they should be considered together and the changing values of society should play a part in shaping the criminal law. The character of the values we hold as a society are of essential importance to the criminal law as once we move away from theoretical and academic discussion from the criminal law it is important to recognise that the criminal law exists to serve and protect society. The criminal law attempts to protect society from harm and wrongdoing, however just as the criminal law serves this function it should also develop to recognise the growing interdependence of society.

This argument may be further strengthened by considering the various laws passed by Parliament which now impose liability for a failure to act and as a result, impose positive obligations to act on individuals in certain circumstances as well as acts which attempt to increase community supervision of individual actions<sup>212</sup>. This argument is *prima facie* persuasive, however it is important to consider the fact that it would be extremely problematic in its implementation. It may be true that the law needs to develop in order to reflect the moral values of contemporary society, however it is unclear how such a development would occur, unless it is realistically suggested that judges make moral judgements based on general conceptions of morality and the views of common society in relation to the facts of each case, as opposed to making judgements based on law.

Ashworth argues that criminal liability should fully embrace the concept of 'social responsibility' and extend to cases where intervention to prevent harm would be 'easy' and it would not be unreasonable to expect an individual to act in such circumstances<sup>213</sup>. He states that the basis for extending the law to such cases is based on the 'communitarian ideology of criminal responsibility' as opposed to the 'narrow and individualistic approach' that the current law adopts<sup>214</sup>. Feinberg states that this approach derives from the 'social responsibilities' that an individual has as a result of living as part of a community<sup>215</sup>. This approach is certainly idealistic, if not unrealistic. It would of course be desirable for individuals to help one another when it would appear reasonable to do so; It becomes problematic however to establish where the limits of this duty would be. Consider the example of a rich man refusing to give a seriously ill beggar shelter from the cold for the night when he knows that refusal of shelter is likely to result in the death of the beggar. It could be argued that it would not be unreasonable to expect the rich man to offer shelter, and he may be subject to moral condemnation; however it would be, according to some, entirely unsatisfactory for the rich man to

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<sup>210</sup> G.Hughes, 'Criminal Omissions' (1958) 67 *Yale Law Journal* 590, at 634

<sup>211</sup> *Ibid*

<sup>212</sup> *Children and Young Persons Act 1933*

<sup>213</sup> Andrew Ashworth, "The Scope of Criminal Liability for Omissions", (1989) *L.Q.R.* 424 at 424

<sup>214</sup> *Ibid*

<sup>215</sup> J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, (Oxford University Press, USA; 2nd Printing, (1987)), at 96

be held criminally responsible for the death of the beggar<sup>216</sup>. It would perhaps be more acceptable to hold the rich man criminally responsible for some lesser crime of 'failing to assist', the question is essentially whether the criminal law ought to go this far and where the line should be drawn in determining criminal liability in such situations.

There is a great deal of ambiguity in the term 'reasonable' and it is difficult to ascertain how the limits would be set with regards to what is reasonable, particularly as this approach is based on perceived social responsibilities and moral considerations. Feinberg suggests that the solution to this problem would be to restrict the criminal liability to 'extreme' cases where the individual would not be subject to any 'unreasonable risk, loss or inconvenience whatsoever'<sup>217</sup>. It is unlikely that there could ever be a situation where it could not be reasonably argued by the individual who has failed to act that he was subject to some level of risk, loss, or inconvenience, as opposed to none 'whatsoever' which appears to set the threshold extremely high, in terms of attempting to criminalise the omission. Whatever the criticisms of this suggestion, it does appear to attempt to expand the proposed criminal liability for the omission from 'prior assumed duties of self-interested individuals' towards a concept of a 'common social responsibility' and it must also be noted that these type of cases are essentially 'failure to rescue cases', whereby the individual is held criminally responsible for their omission and not necessarily the result of that omission with the likely result that any criminal sanction would be less severe under the circumstances. This is an attempt to expand the duty to act beyond a 'private responsibility' towards a 'public duty'<sup>218</sup>. The problem with expanding the concept of duty is that it is an unsatisfactory concept to begin with. The best approach is to consider conduct and normative theory of causation to attempt to create a sounder conceptual framework for the criminal law of omissions. When this is achieved we can begin to discuss increasing the scope of liability for omissions.

In relation to the concepts of autonomy and social responsibility, the argument is largely political in nature. One's opinion on the matter will largely depend on where one stands on the spectrum between libertarianism and communitarianism. However, as it will be asserted in the next chapter, the concept of a duty to act in criminal law is conceptually flawed and a new approach towards omissions liability is needed in Scots law. The duty theory is an artificial construction of criminal liability based on a perceived need to limit omissions based liability on many of the grounds mentioned. It is inconsistent with most principles of criminal law and it is not clear how such an approach is an appropriate criteria or constraint for criminal liability in Scots law.

Lord Macaulay apologises for the leniency of the criminal law in relation to omissions and explains<sup>219</sup>:

"[W]e do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such

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<sup>216</sup> A.W. Norrie, *Crime, Reason and History* (2<sup>nd</sup> ed, 2001), at 130

<sup>217</sup> J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, (Oxford University Press, USA; 2nd Printing, (1987)), at 96

<sup>218</sup> A.W. Norrie, *Crime, Reason and History* (2<sup>nd</sup> ed, 2001), at 130

<sup>219</sup> Lord Macaulay, 'Introductory Report upon the Indian Penal Code, Note M' *The Works of Lord Macaulay*, (vol XI, 1898) at 496

a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice ... The distinction between a legal and an illegal omission is perfectly plain and intelligible; but the distinction between a large and small sum of money is very far from being so, not to say that a sum which is small to one man is large to another".

The difficulty facing the criminal law is the attempt to set plausible constraints on the scope of criminal liability for omissions. It is submitted that in the context of legal duty to act, it is almost impossible to widen the scope of liability under the current conceptual framework due to the fact that the current framework is uncertain and incoherent. The concept of a legal duty also does not sit comfortably within the wider principles of criminal law. Establishing criminal liability based on such criteria is not justifiable, especially given regard to the unsatisfactory position the law is now in as a result of such an approach. Until this obstacle is overcome, it will be extremely problematic to achieve certainty, coherence and principle in relation to the criminal law of omissions. The criminal law must discard the duty theory in relation to omissions liability and begin to establish omissions liability in the same way that all other types of criminal liability is established and that is by considering the conduct of the accused and whether that conduct caused a particular result.



## CHAPTER 5

### ACTS, OMISSIONS AND DUTY OR CONDUCT AND CAUSATION?

The present position in Scots law is to require a legal 'duty to act' before an individual can be held criminally liable for any omission. Scots criminal law has broadly followed the approach adopted by Gerald Gordon however, as has been previously argued, this approach is not consistent with the historical development of Scots criminal law in this area. This chapter will examine the 'duty theory', as the theory which has generally been adopted in Scots criminal law with respect to liability for 'omissions'. The alternative 'normative theory' of conduct and causation will then be examined and advanced as a more appropriate theory for Scots law to consider in relation to 'omissions' liability as this would recognise the historical development of Scots law in this area and would ultimately lead to a more satisfactory and principled legal framework.

#### 5.1 The 'Duty' Theory

The concept of the duty theory began to develop in Anglo-American legal systems in the twentieth century. This now appears to be the standard position of the criminal law in relation to omissions. Scots law has broadly adopted the criteria for duty as set out by Gerald Gordon. As has been demonstrated, the courts have taken a rather restrictive approach when determining whether an individual may be under a duty to act in certain circumstances<sup>220</sup>. A duty is usually only applied in situations where there is a personal relationship involved between two parties<sup>221</sup> or in other circumstances whereby the duty can be inferred from the circumstances of a particular case<sup>222</sup>.

It has been suggested that the concept of 'duty' should extend to a wider set of circumstances and situations<sup>223</sup>. Ashworth argues in favour of a greater sense of social responsibility and an expansive interpretation of the concept of 'duty', in order to cover circumstances whereby someone is under a duty to act by virtue of their status as a member of society. This argument is not without its merits and is largely borne out of dissatisfaction with the present position of the law and a belief that the scope of the law relating to omissions is far too narrow and does not reflect the reality of modern life.

Otto Kirchheimer stated:

"The concept of an isolated individual whose legal obligations are few compared to his range of possible activity deviates from the facts of present day society. A greater amount of group dependency on the part of each individual as well as a steady increase in the number of affirmative duties established by statute is discernible everywhere. The problem of finding

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<sup>220</sup> *Paterson v Lees* (1999) JC 159

<sup>221</sup> *R v Russell* (1933) 39 Argus Law Rep 76

<sup>222</sup> *R v Instan* [1893] 1 Q.B. 450

<sup>223</sup> Andrew Ashworth, "The Scope of Criminal Liability for Omissions", (1989) L.Q.R. 424

sufficient legal basis for affirmative duty thus becomes less acute than it was under a more individualistic form of society”<sup>224</sup>.

What Kirchheimer is essentially arguing is that as society develops us, as members of that society begin to rely on each other to a far greater degree than we have previously. It therefore follows that the criminal law should reflect this growing interdependence by widening the scope of omissions liability to emphasise the need for us to co-operate and assist each other as part of our role as citizens and members of society.

However, once one moves away from the types of relationship in which a duty to act is generally accepted, establishing which duties may be owed to one another for the purposes of the criminal law is not necessarily capable of legal definition<sup>225</sup> at least in any substantive and meaningful sense. Such duties tend to be too wide and lack the degree of certainty that is demanded by the criminal law.

It is submitted that this is due to the fact that the concept of a ‘duty’ does not sit comfortably with general principles of criminal law. To determine criminal liability on the basis of one’s relationship with another, or one’s status and role in society is an entirely artificial method of setting plausible constraints on criminal liability. It also demonstrates a lack of any clear principle or certainty. It therefore becomes questionable if the concept of a ‘duty’ is an apt criterion for establishing, or indeed constraining, criminal liability.

To assert that a particular course of conduct constitutes an act if that person is a stranger and it is an omission if that person is a medical professional<sup>226</sup> and subsequently employing the concept of ‘duty’ to avoid passing criminal sanction defies all logic. How can the concept of an act or omission be defined based on who the individual, who is alleged to have acted is? Arguing that someone’s conduct would have been criminal if they had been married to another person, rather than merely being casual lovers<sup>227</sup> is an artificial method of constructing criminal liability around a set of facts. This does not sit comfortably with general concepts of criminalisation and criminal responsibility. The courts appear to adopt the approach of achieving the desired judgement in whatever manner is possible. This has involved manipulating the definition of act and omission depending on the circumstances of a case<sup>228</sup> and utilising the duty theory as a means of restricting criminal liability to a narrow range of circumstances regardless of how absurd and illogical the reasoning in coming to that decision may be.

Kirchheimer argues that this illustrates that the dichotomy between law and morality is a question of ‘demarcation’ rather than principle<sup>229</sup>. The primary focus of the ‘duty theory’ is to attempt to set plausible constraints on the scope of criminal liability for omissions. It is therefore unsurprising that case law discussing the ‘duty concept’ has developed by way of inconsistent patterns and reasoning, with a lack of any clear principle being established.

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<sup>224</sup> Otto Kirchheimer, "Criminal Omissions," 55 *Harv. L. Rev.* 615, 636 (1942), at 642

<sup>225</sup> *Ibid* at 629

<sup>226</sup> *Airedale NHS Trust v Bland* [1993] AC 789 (HL)

<sup>227</sup> *People v Beardsley* (1907) 150 Mich. 206

<sup>228</sup> *R v Miller* [1983] 3 All ER 978 HL

<sup>229</sup> Otto Kirchheimer, "Criminal Omissions," 55 *Harv. L. Rev.* 615, 636 (1942), at 629

It is submitted that the 'duty concept' functions predominantly in a manner designed to set boundaries and constraints on the scope of criminal liability for omissions. In the absence of any suitable or workable alternative theory, the duty concept provides a framework in which conduct can be judged and criminal liability can be established in relation to omissions. This may establish an element of certainty in the law, which in itself is debateable, however this implied certainty is at the expense of any guiding principle. The term 'legal duty' is also ambiguous and there is no strong argument which establishes the term 'legal duty' as an appropriate criterion for criminal liability<sup>230</sup>. There is no clear link between the concept of 'legal duty' and the criminal prohibition against causing harm<sup>231</sup>.

Leavens provides two cases as examples to illustrate the inconsistent manner in which the courts in the United States have imposed omissions liability.

The first case referenced is that of *Barber v Superior Court*<sup>232</sup>. In this case it was held that a doctor is under no legal duty to provide food or drink to patients who are under their care and supervision in certain circumstances. The state had brought homicide charges against a surgeon and internist after they had discontinued the intravenous nourishment provided to a patient who was in a coma. The patient subsequently died. The trial court dismissed the charges and stated there was no legal duty to provide life sustaining fluids if the doctor has judged, in consultation with the family of the patient, that there was no reasonable chance that continuation of treatment would provide benefits outweighing the burdens<sup>233</sup>. The doctor was deemed to be under no legal duty to provide the treatment and his conduct was deemed to be an omission, therefore he could discontinue the treatment and allow the patient to die and no criminal liability would befall the doctor. Leavens recognises sensitivity surrounding this case as California does not recognise legal euthanasia<sup>234</sup>.

The difficulty presented by this judgement is that it is unclear how the doctor's conduct could be considered an omission? Presumably the intravenous tube would have to be removed from the patient's veins and machinery would have to be turned off? It is at this point that the exercise of distinguishing between acts and omissions in this context becomes rather futile. The decision is undoubtedly the correct one, however the reasoning adopted in arriving at this decision is flawed. If the courts are going to persist with the act/omission distinction as a central consideration in their legal reasoning and judgements, it follows that this distinction has to be applied consistently, otherwise it merely becomes a mechanism by which judges can retrospectively decide what is an act and what is an omission, based on the judgement that such a determination would lead them too and what overall decision they would deem to be appropriate. Of course, if the overall conduct of the doctor was to be considered, then one could view the conduct as a whole and deem whether the conduct is criminal or not, without the arbitrary task of attempting to define which specific occurrences were acts or omissions.

This case, according to Leavens, can be contrasted with the case of *Pope v State*<sup>235</sup>. A much more expansive view of legal duty is adopted in this case. The defendant stood in her house and watched

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<sup>230</sup> Arthur Leavens, "A Causation Approach to Omissions", 76 Cal. L. Rev. 547 (1988) at 583

<sup>231</sup> *Ibid*

<sup>232</sup> 147 Cal App 3d 1006; 195 Cal Rptr 484 (1983)

<sup>233</sup> 195 Cal Rptr 491, 493

<sup>234</sup> Leavens at 550

<sup>235</sup> 284 Ad 309, 396 A 2d 1054 (1979)

an infant's mother beat her to death without attempting to stop the beating. The woman was acquitted of homicide charges; however the court did hold that the defendant was under a legal duty to act in such a case. If it could be established that she had the necessary mens rea, then this failure would be an appropriate basis for liability for homicide.

In his analysis of this case, Leavens accepts that the woman could certainly be condemned in a moral sense for her lack of action, however he does not believe that such a case could be said to attract liability for homicide<sup>236</sup>. These cases were presented to emphasise how inconsistently applied the law is in this area. It does seem rather odd that the courts would find that a doctor did not owe a legal duty to a patient, however a complete stranger could be said to owe a duty to a child to whom she has no connection.

Criminal legal theory should be primarily concerned with legal principle, before concerns about pragmatism are considered. The 'duty theory' operates in such a manner that these two considerations are considered in the opposite order. It is submitted that there is an alternative approach to the 'duty theory' which provides legal certainty, whilst managing to provide a principled framework in which a theory of criminalisation in relation to omissions can be developed. The primary aim of the legal duty theory is to attempt to set clear boundaries in relation to omissions liability in the criminal law. The failure of this approach, however, is that it attempts to obtain such certainty at the expense of developing any sound conceptual framework under which omissions liability can be established. The criminal law functions in order to prevent and punish harmful conduct that produces harmful consequences. The duty theory fails to give sufficient consideration to this function and instead operates as a means of constraining criminal omissions liability. A more effective way of considering omissions liability is to state that criminal liability should only attach to omissions that cause a particular harmful result. This approach is to consider the concepts of 'conduct' and 'causation'<sup>237</sup>.

## **5.2 Omissions as 'Causes' of Criminal Results**

It may initially seem rather curious to suggest that one who 'omits' can be said to 'cause' a result. It must be clearly stated that there are of course many failures to act in which an individual can never be said to have caused a result; however there are clear situations whereby we can appropriately say that someone who fails to act has caused a result.

The issue of causation has historically plagued the area of omissions in the criminal law. This is largely based on the widely held view that an omission cannot be said to cause a result.

"Omissions do not initiate causal processes. Instead, they permit other causal processes to bring about the harm"<sup>238</sup>.

For the purposes of causal enquiries it is important to separate causation into two parts. The first part is factual causation and the second part is legal causation.

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<sup>236</sup> Arthur Leavens, "A Causation Approach to Omissions", 76 Cal. L. Rev. 547 (1988) at 551

<sup>237</sup> B. Hogan, 'Omissions and the Duty Myth' in P. Smith (ed) *Criminal Law: Essays in honour of J.C. Smith* (London, 1987) 85 at 85

<sup>238</sup> A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine*, (Oxford: Hart Publishing, 4<sup>th</sup> ed, 2010) at 103

Factual causation is relatively simple to establish in relation to omissions. The sine qua non test can be satisfied by stating “But for” the conduct of A, a particular harmful result would not have occurred. For example, if A watches B drowning in a shallow pool, we can say that “But for” A’s failure, B would have survived. This is enough to satisfy the test of factual causation. However, this is not enough to establish legal causation<sup>239</sup>. Essentially, factual causation is not strictly causation at all; it is more of a proposition of logic. It is logical to state that if A had simply removed B from the pool in which he was drowning, it is almost certain that B would have survived. Fletcher states:

“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 traditional of homicidal tainting”<sup>240</sup>.

Fletcher’s assertion that an omission can never truly cause a result in the legal sense can be challenged, however it does raise immediate concerns as to how an omission can be said to cause a result in the legal sense. It is, however asserted that omissions can cause results in the legal sense and this matter will be explored further. Of course, courts have historically avoided the issue of establishing legal causation in relation to omissions by appealing to the conventional ‘duty theory’<sup>241</sup>.

The ‘duty theory’ will only deem A to be responsible for the death of B if A was under a duty to assist B. In this sense the ‘duty theory’ operates in a way that avoids the need to establish legal causation. If it can be shown that A had a duty to assist B, then as long as factual causation is established there is no need for any further causal enquiry. A can be held responsible for the death of B as he had a duty to intervene and assist B. However, it has been argued that there is no conceptual link between such duties<sup>242</sup>. It is not clear how someone can be deemed to have caused the death of another because he had a duty to intervene to prevent harm against that person based on some relationship between the two individuals. It is also not immediately clear what the term ‘legal duty’ actually means.

Leavens argues that such a concept is almost impossible to define. He states that if we are to say that a legal duty is a duty enforceable by criminal law, this is tautological and the theory merely describes itself<sup>243</sup>. If we are to state that a legal duty is a ‘civilly enforceable obligation’<sup>244</sup> then this is clearly inaccurate as not all civil duties are enforceable in the criminal law. It is astonishing that, given its status as the conventional theory on criminalising omissions, the term ‘legal duty’ has never been clearly defined in the context of omissions liability and the criminal law. It is bewildering that the law is able to operate under such uncertainty and with such a lack of clear principle.

Hall comments on the vacuous nature of the duty theory. Hall’s criticism is based on the fact that there can be no clear understanding of the term ‘legal duty’ in this context. Similar to the criticism by Leavens, he asserts that a neglect of duty is often a matter for civil and not criminal law and so the

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<sup>239</sup> B. Hogan, ‘Omissions and the Duty Myth’ in P. Smith (ed) *Criminal Law: Essays in honour of J.C. Smith* (London, 1987) 85 at 85

<sup>240</sup> G. P. Fletcher, *Rethinking Criminal Law*, (Boston MA: Little, Brown, c1978), at 371

<sup>241</sup> JC Smith, “Liability for Omissions in the Criminal Law”, *Legal Studies* 88 at 89

<sup>242</sup> Arthur Leavens, “A Causation Approach to Omissions”, 76 *Cal. L. Rev.* 547 (1988) at 557

<sup>243</sup> *Ibid* at 554

<sup>244</sup> Lord Macaulay, ‘Introductory Report upon the Indian Penal Code, Note M’ *The Works of Lord Macaulay*, (vol XI, 1898) at 159

principle cannot be said to found within criminal law. It also cannot be said that criminal liability must be founded on an express mandate, either within the criminal law, or based on a legal duty outside criminal law. If this was the case, it provides no criteria to establish when a civil breach may become criminal. The statement lacks the necessary information required to define the principle<sup>245</sup>. The attempts to define the concept of 'legal duty' are totally ambiguous and unhelpful in establishing what the term means. Although there is perhaps an argument for stating that proponents of the conventional view are content with the ambiguity of the term 'legal duty' as it prevents any detailed analysis of the concept.

If we return to the issue of legal causation and omissions, it is of primary importance to recognise the two broad categories of omissions liability. Graham Hughes states that criminal law may be extended into the field of omissions liability in two ways. Firstly, by the express legislative creation of new offences of omission. Effectively this is cases of 'pure' omission whereby the individual who 'omits' to do something is penalised for their failure and not the subsequent results of that failure<sup>246</sup>. This type of omissions liability presents no problem in relation to causal enquiries as the omission itself is the offence and there is no need to establish causation in such circumstances. The offence is committed as soon as the omission takes place<sup>247</sup>. It is the second type of omission based liability that is of importance here.

This second type of omissions based liability is created 'by a judicial process which may interpret offences superficially seeming to be those of commission as ones capable of perpetration by omission'<sup>248</sup>. This type of case is generally known as cases of 'commission by omission'. In such cases, the individual is held liable for the result of their failure to act. As has been previously stated, this creates an immediate problem if one considers the conventional view that an omission cannot be said to cause a result. Herring states:

"A failure to act places an individual in the same position as everyone else. They have merely failed to alter the status quo"<sup>249</sup>.

This is a persuasive argument and one that is not easy to overcome if one considers the issue of omission and causation in relation to the conventional view. However, if the issue of causation is considered from a different perspective, the task of overcoming the obstacle of legal causation becomes less onerous.

### **5.3 The Normative Theory of Causation**

Hart and Honore<sup>250</sup> consider the issue of causation and omissions from a different perspective than proponents of the 'duty theory'. They assert that we can understand omissions liability by considering the distinction between events that are 'normal' and those which are 'abnormal'. If one

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<sup>245</sup> Jerome Hall, *General Principles of Criminal Law*, (1<sup>st</sup> ed, 1947) at 210

<sup>246</sup> Graham Hughes, "Criminal Omissions", 67 YLJ 590 1957-58, at 620).

<sup>247</sup> J. Dressler, 'Some brief thoughts (mostly negative) about "Bad Samaritan" laws', (2000) *Santa Clara Law Review* 971 at 981-9

<sup>248</sup> *Ibid*

<sup>249</sup> J. Herring, *Criminal Law: Text, Cases and Materials*, (4<sup>th</sup> ed, Oxford University Press, 2010) ch5, p112

<sup>250</sup> H.L.A. Hart and A. Honore, *Causation in the law*, (2<sup>nd</sup> ed, 1985) at 31-32

considers the 'duty to act'. Essentially what is being said here is that the failure of the individual to act under certain circumstances is regarded as an 'abnormal' event and therefore a cause of the subsequent harm. The potential problem with this normative theory of conduct and causation is that it may be plagued by the same ambiguity that has befallen the 'duty theory'. It is not immediately apparent what the phrase 'normal' means in the context of the criminal law. Herring states that if this is to be a matter of statistical analysis, it is difficult to determine and quantify. If we define 'normal' in relation to what would be expected to occur, then this definition could itself be deemed to be vacuous as we are simply stating that someone should be punished because they should be. This lacks the necessary information<sup>251</sup>.

However, a distinction can be made between what Hart and Honore term 'causes' and 'conditions'. They state<sup>252</sup>:

"In distinguishing between causes and conditions, two contrasts are of prime importance ... between what is abnormal and what is normal in relation to any given thing or subject matter, and between free and deliberate human action and all other conditions. The notion in this pair of contrasts lie at the root of most of the metaphors which cluster and the notion of cause ..."

In effect, this is another method of distinguishing factual and legal causation. We can say that all 'conditions' will satisfy the sine qua non test, however, only legal causes can be properly considered as causes.

They continue:

"Voluntary human action ... has a special place in causal inquiries ... because, when the question is how far back a cause shall be traced through a number of intervening causes, such as voluntary action, is often regarded as a limit and also as still the cause even though other later abnormal occurrences have provisionally been recognised as causes"<sup>253</sup>.

This is considering the principle of mens rea. What Hart and Honore are asserting is that even where conduct is considered to be 'abnormal', it cannot properly be said to be a cause in the legal sense unless such conduct is voluntary. It is true that terms such as 'abnormal' and 'voluntary' may be considered ambiguous in this context, however, one can begin to understand the concept if one considers the 'wilted flowers' example given by Hart and Honore in order to illustrate their normative principle of causation<sup>254</sup>.

In this example, flowers have been left to wilt in a garden. One individual who has failed to water the flowers is the gardener who is employed to do so. Proponents of the conventional view, who object to omissions being considered as causes, would no doubt argue that we cannot consider the conduct of the gardener as a cause of the flowers wilting as, if the gardeners failure to water the flowers is a cause, so is the conduct of everyone else in the world who have not watered the flowers. Hart and Honore state that this view fails to take into account the distinction between factual and legal

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<sup>251</sup> J. Herring, *Criminal Law: Text, Cases and Materials*, (4<sup>th</sup> ed, Oxford University Press, 2010) at 113).

<sup>252</sup> H.L.A. Hart and A. Honore, *Causation and the law*, (2<sup>nd</sup> edn, 1985) pxxxix/iiip p33

<sup>253</sup> *Ibid*

<sup>254</sup> *Ibid* at 38

causation<sup>255</sup>. Of course we can say that everyone on the planet who did not water the flowers have caused the flowers to wilt in the “But for”/factual sense. Had they watered the flowers, the flowers would most likely have lived. The conduct of everyone who failed to water the flowers can be considered a ‘condition’, in the sense that their failure to water the flowers was a necessary condition if the flowers were to have died. However, the omission by the gardener, according to Hart and Honore, can be identified as the cause of the flowers wilting. They do not consider this in the sense of the gardener having a duty to water the flowers and subsequently breaching that duty. They state:

“[The gardener’s omission] is not merely a breach of duty but also a deviation from a routine. It is however true that in such cases there is a coincidence of a deviation from a usual routine with a ... dereliction of duty”<sup>256</sup>.

Therefore, the concept of a duty is not relevant here. The gardener is not deemed to have caused the death of the flowers by breaching his duty to water them, rather, he is deemed to have caused the death of the flowers as his conduct in not watering the flowers is deviating from his normal routine and is thus ‘abnormal’. It would have been ‘normal’ to expect the gardener to water the flowers. His failure to do so is not framed as a breach of a duty, but rather as a disappointment of some legitimate expectation that he would water the flowers.

The advantage of this approach is that it abandons the conventional and artificial concept of a duty to act and allows for the consideration of the conduct of the gardener and whether that conduct was ‘normal’ and ‘abnormal’. This can be established by considering the overall conduct of the gardener in relation to what was expected of him.

This approach, however, is not entirely without its flaws. Beynon highlights the potential difficulties in the definition of normal, voluntary conduct<sup>257</sup>. One would assume that conduct which is ‘normal’ is not, prima facie, criminal. This is not made entirely clear by Hart and Honore and so Beynon attempts to define the relationship between ‘abnormality’ and ‘voluntariness’ in order to assist in the interpretation of this principle. She states that conduct which is a “but for” cause of any harm must be voluntary if it is to have any potency for the purposes of legal causation. She then states that if we consider conduct to be both ‘voluntary’ and a “but for cause” of some relevant harm, then it is prima facie ‘abnormal’ in terms of legal causation. Finally she states that if ‘voluntary’ conduct is either ‘normal’ or ‘insufficiently abnormal’ it is unlikely to be considered a legal cause of any harm<sup>258</sup>. Essentially what Beynon is stating is that in order for the conduct of an individual to be considered a cause of harm, the conduct must be voluntary and also ‘sufficiently abnormal’.

Naturally any consideration of a normative theory will depend on what one considers to be ‘normal’. However, the potential ambiguity of this concept is by no means fatal to Hart and Honore’s theory. They submit that what is deemed to be normal is largely a question of probability<sup>259</sup>. We must consider what disturbed the previous “at rest” conditions or normal state of affairs in order to determine what caused a result. For the purpose of omissions liability, the chain of events must be

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<sup>255</sup> *Ibid*

<sup>256</sup> *Ibid*

<sup>257</sup> Helen Beynon, “Causation, omissions and complicity”, (1987) *Crim Law Review* (Aug 539-552), at 540

<sup>258</sup> *Ibid* at 550

<sup>259</sup> H.L.A. Hart and A. Honore, *Causation and the law*, (2<sup>nd</sup> edn, 1985) pxxxix/iiip, at 29-32



traced back to the initial cause and then consideration has to be given as to whether particular events after the initial cause were more like normality than not<sup>260</sup>. In order to establish this consideration must be given to the probability of a particular condition occurring in the particular circumstances and then a value judgement has to be made in light of the initial cause, if the subsequent condition occurring is more like normality or abnormality. In essence, the question is whether the omission is a departure from normality. In order to establish this we must determine whether it would be more likely than not that the individual would be expected to act.

In order to develop a logical and practical understanding of the issue of causation, one must consider the reality of the causal argument and the function that it provides in the context of the criminal law. There may be a common tendency to view the issue of causation as some type of scientific equation that can determine for certain whether a particular course of conduct caused a particular result. In reality, it is almost impossible to determine definitively whether a particular action or omission caused a particular result. However, this is not the true function of the causal argument. The causal argument has been described as 'the policy of imputing or denying liability'<sup>261</sup>. If one considers the situation where a father witnesses his son drowning and does nothing to assist him. Conventional theory will state that the father is responsible for the child's death if he allows him to drown<sup>262</sup>. The father is held criminally liable and deemed responsible for his son's death. No causal inquiry is undertaken here. The father is deemed to have caused his son's by failing to act when he was under a duty to do so.

The causal argument operates in largely the same way. In the same circumstances, the father would be held responsible for his son's death as he had disappointed an expectation to assist his son, who was in peril. The father's conduct would be categorised as 'abnormal' and he would be deemed to have caused the death of his. No one can say for definite that any attempt to assist would have been successful however the causal argument is not necessarily about confirming that an individual definitely caused a result. The causal argument, much like the 'duty theory', is another mechanism of attempting to define the scope of criminal liability. The causal argument merely provides a more principled and logical view of criminal liability for omissions without appealing to an artificial and uncertain concept of duty.

Brian Hogan is critical of the causal argument in relation to omissions. He states that:

"It would be ludicrous to make the shirker a party to the crimes involved for he has played no part in their commission. He is to be punished for an omission to prevent harm; he is not to be artificially treated as its cause."<sup>263</sup>

Hogan's criticism of the causal argument is not an argument against omissions liability. What Hogan argues is that the only way in which omissions liability can operate is for the 'omitter' to be held criminally responsible for his "dereliction" and not as a cause of the event<sup>264</sup>. Therefore, Hogan agrees with omissions liability in principle, however he does not agree with any concept which

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<sup>260</sup> *Ibid*

<sup>261</sup> Graham Hughes, "Criminal Omissions", 67 YLJ 590 1957-58, at 633

<sup>262</sup> *R v Russell (1933)* 39 Argus Law Rep 76

<sup>263</sup> B. Hogan, 'Omissions and the Duty Myth' in P. Smith (ed) *Criminal Law: Essays in honour of J.C. Smith* (London, 1987) 85 at 86

<sup>264</sup> *Ibid*

recognises an omission as causing a result. Liability can only be for the omission in itself and not for any result that may stem from the omission. Hogan's argument is perfectly acceptable; however it does not acknowledge a realistic account of the causal argument. Hogan appears to view the causal argument as a type of scientific or mechanical formula when in reality; the causal argument merely serves to set the limits of criminal liability. It is a mechanism for either establishing or denying liability in any particular circumstances.

Hogan is also critical of the way in which the common law has developed the theory of omissions liability. He argues that any change in the law in relation to omissions should be enforced by parliament and not be left to "judges finding such a rule in the *bran tub* of the common law"<sup>265</sup>. However, is this not the beauty of the common law? The common law can adapt and develop along with changes in societal attitudes towards particular conduct. The common law is able to operate in a flexible manner and develop principle which is consistent to how the law has developed over the centuries. This is surely one of the great advantages of a common law system as opposed to a codified system of law?

The most persuasive aspect of Hogan's argument is his insistence that in considering whether or not an individual should be subject to criminal liability, the courts should consider the 'totality of the defendant's conduct'<sup>266</sup>. This, of course, includes both what the defendant has done and what he has failed to do. Analysing each individual part of the defendant's course of conduct and attempting to establish whether the defendant acted or omitted at any particular stage is not what is relevant for the purpose of the criminal law. The courts must consider whether the totality of the defendant's conduct caused a particular harmful result, and whether the defendant conducted himself with the necessary *mens rea*<sup>267</sup>.

This analysis of conduct and causation begins to develop a coherent and principled account of how the law should formulate criminal omissions liability. This theory is not radically different from the 'duty theory'. The difference is that the conduct and causation based argument focuses on the issues which are relevant for the purposes of the criminal law namely conduct *mens rea* and causation. These are the issues which should dominate the discussion in relation to omissions liability. Attempting to establish whether conduct is an act or omission, followed by the attempt to establish a duty merely complicates such cases in a way which is not necessary or relevant<sup>268</sup>.

If the criminal law is to merely focus on the final link in the causal chain, and whether that particular link was an act or omission, followed by the exercise of appealing to the ambiguous concept of a 'legal duty' in order to consider the complicated issue of omissions liability, then this is an entirely artificial way to consider criminal liability. It is also undertaking a time consuming inquiry into issues that do not concern the criminal law in any practical or meaningful sense. The criminal law must refocus the inquiry towards the issues that are relevant to the criminal law. The 'duty concept'

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<sup>265</sup> B. Hogan, 'Omissions and the Duty Myth' in P. Smith (ed) *Criminal Law: Essays in honour of J.C. Smith* (London, 1987) 85 at 88

<sup>266</sup> *Ibid*

<sup>267</sup> *Ibid* at 89

<sup>268</sup> *Ibid*

merely confuses the matter at hand<sup>269</sup> and fails to focus on what truly is the concern of the criminal law. That is prohibiting conduct which causes harmful results.

Hart and Honore state:

“We shall provisionally ... treat statements that a person caused harm as one sort of non-tautologous ground or reason for saying that he is responsible”<sup>270</sup>.

As has been previously stated, causation must be understood as a means of assigning or denying criminal liability. It is about assigning blameworthiness and responsibility and is a mechanism for defining the exact scope of the criminal law. Causal analysis and the ‘duty theory’ are merely two methods of defining the scope of omissions liability. It is submitted that the ‘duty theory’ relies too heavily on the consideration of issues which are not of particular interest to the criminal law, and in any event is an artificial method of assigning criminal liability which does not appear to be consistent with general principles of criminal law. The causal argument allows for the development of a conceptual framework whereby a new principle of omissions liability in the criminal law can be developed in a way that provides consistency, certainty and focuses on the relevant factors and principles that are of paramount concern to the criminal law.

Arthur Leavens provides an effective and persuasive summary of the conduct and causation based theory of criminalising omissions when he states that:

“If, however, we examine the whole of a particular actor’s course of conduct visa-vis a harm that she is said to have caused, we can assess whether the criminal prohibition that harm fairly applies to her course of conduct ..... We thus can avoid the often difficult and arbitrary task of determining whether conduct is an act or omission and in the latter case whether there is a legal duty to act”<sup>271</sup>.

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<sup>269</sup> *Ibid* at 91

<sup>270</sup> H.L.A. Hart and A.M. Honore, *Causation in the Law*, (Oxford: Clarendon Press, 1959) at 62

<sup>271</sup> Arthur Leavens, “A Causation Approach to Omissions”, 76 *Cal. L. Rev.* 547 (1988) at 52

## CONCLUSION

It is submitted that Scots criminal law must abandon the conventional theoretical considerations in relation to liability for omissions. The focus on the act/omission distinction followed by the uncertain and incoherent application of the 'duty theory' has left Scots law in an unsatisfactory position in this area of criminal liability. If one evaluates the reasoning deployed by the courts in England, Scotland and the United States in relation to omissions liability it is almost impossible to find a consistent principle to be applied in this area of the law. It is too often the case that theories, such as the duty theory, are used as a tool to constrain the criminal law and incoherent reasoning is used to justify the application of the theory. Adopting a theory in order to constrain the criminal law is not necessarily an entirely unsatisfactory application of such a theory, however using a particular theory in a plainly pragmatic manner is counter-productive when one considers what is really at stake in this debate. Of course the law must set plausible constraints on criminal liability and to some extent the act requirement and duty based approaches may provide the law with an element of certainty and may serve a pragmatic purpose, but this should not be the primary aim of such an approach.

The criminal law should be based on principled considerations that can withstand both legal and moral scrutiny. Without such guiding principles the criminal law fails in its purpose to serve and protect the public in any meaningful way. If it is desirable that the criminal law should primarily be concerned with pragmatism and rational legal principles should be a secondary consideration then this would seem to convey a legal system that is not fit for purpose. It is true that principles of legality and fair warning are of significance to the criminal law, however as has been displayed there is no reason to suggest that omissions liability creates substantially more problems in this regard than laws which prohibit positive action. It is also true that the criminal law should not impose heavily burdensome obligations on citizens in a way that severely restricts personal liberty and autonomy, however such consideration should not take precedence over principled and rational legal reasoning and judgement.

What is at stake is far greater than an attempt to categorise an area of the criminal law that may be considered to be of comparatively little importance in the sense that cases concerning omissions of interest to the criminal law are rare occurrences. There are issues of a much greater importance than this. There is firstly the question of what kind of society we wish to live in. At one end of the spectrum is the libertarian argument which is predicated on the assumption that the state should not compromise individual freedom and autonomy except from in exceptional circumstances. Proponents of this ideology would argue that a system of criminal law which imposes obligations and burdens on citizens within its jurisdiction is an example of an oppressive state and that such principles of individual freedom are of such significant importance that the criminal law should respect these principles and be restricted to preventing positive acts which cause harm to others and society as a whole. This, according to libertarians is the true function and role of the criminal law in a free society.

At the other end of the spectrum are those who advocate the principle of social responsibility, believing that the criminal law should promote a more communitarian form of society that compels us to act in a certain manner by virtue of our status as citizens who wish to be part of that society. Advocates of this view also present the argument that individual autonomy and freedom is actually enhanced by this communitarian philosophy in the sense that by looking out for one and others

individual interests, we advance our own at the same time. These two different ideological views are essentially political and moral in nature. This goes to the core of what type of society we create and live in. The choice between the two is rather stark in contrast and to this extent whichever approach is adopted can shape the everyday lives of us all. When one refers to 'principles' in this context, the principles are not really legal principles at all, they are essentially moral and political principles which have a wide reaching effect on society in terms of how it is governed and policed by the state and authorities.

The nineteenth century cases provide a perfect example of the shift between the two philosophies. The common law began to intervene in the lives of individuals at this time in a way that could be seen to promote public health and welfare in a time of minimal laissez-faire Victorian government. As government intervention in individual affairs increased into the early twentieth century, parliamentary legislation began to replace the common law by introducing legislation which attempted to tackle the very issues that the common law had been attempting to address throughout the years. The same was happening in the English courts at this time and illustrates the paradigm shift that was beginning to take place in the United Kingdom, the shift away from minimal government towards a state that recognised its responsibilities towards its citizens and the ultimate establishment of the welfare state. The role of the criminal law should not be underestimated in terms of its influence on such monumental change. This change, after the industrial revolution, demonstrates a decrease in the level of importance placed on liberal individualism and an increase in significance placed on concepts of social responsibility, in terms of the responsibilities owed by the state to the citizens of that state and the responsibilities of individual members of society towards each other.

Scots law remained largely unchanged, until the hugely influential work of Gerald Gordon in 1967. Perhaps concerned by the direction in which the law had been travelling up until this point, Gordon essentially recalibrated the law of omissions in Scotland towards an approach only vaguely articulated by Hume and the nineteenth century Scots law cases. Gordon firmly introduced the 'duty theory' into Scots law. Of course the concept of 'duty' had been recognised by the Scots courts in earlier cases, however there was no clear legal principle on which Gordon could base his theory and so he took influence from the work of Glanville Williams, Graham Hughes, and the precedent set out in other common law systems. The basic principle that, in Scots criminal law, an individual can only be held liable for an omission if he was under a duty to act at the time has been followed by the Scots courts ever since the publication of Gordon's work.

Unfortunately, as has been displayed, no clear precedent has been established as most cases were decided largely on facts unique to the circumstances of the individual cases. The present position of Scots law in this regard is therefore unsatisfactory. There are no clear legal principles that the Scots courts can follow. It is true that the four criteria set out by Gordon have not been subject to any major challenge by the Scots courts, however it is unclear why Gordon selected these particular four criteria. Glanville Williams and other proponents of the duty theory had advanced other potential criteria which Gordon did not choose to follow and the case has been advanced, by writers such as Andrew Ashworth, that the scope and range of such legal duties should be widened from what is considered to be the conventional view. There are also of course those who propose a legal framework based on normative theories of conduct and causation which abandons the concept of legal duties in the conventional sense.

These principles are quite different from the moral and political principles discussed previously. These are legal principles concerned with how the criminal law of omissions should be structured and upon which principles such liability should be based. What is now considered the conventional view, based on a clear distinction between acts and omissions, is the present position taken by Scots law. Under this reasoning acts are considered to be the proper concern of the criminal law. Omissions should only be considered as subject or objects of criminal liability if the ommitter was under a duty to act at the time of the omission. If no such duty exists, there can be no criminal liability. The alternative to this theory is a theory based on normative principles advanced by Hart and Honore. An individual can only be held liable for an omission if he has disappointed some societal expectation that he would have acted. If his actions are voluntary and sufficiently abnormal then he can properly be deemed to have caused the result. His overall conduct is therefore considered and the courts have to decide whether this conduct caused the particular criminal result.

Essentially one could argue that if an individual has disappointed an expectation that he would act, this is another way of stating that he was under a duty to act. However the crucial difference is that a normative theory deals with the issue of causation in a way that the duty theory does not. The normative theory is more consistent with wider principles of criminal law. When we consider whether an individual is criminally liable for something we consider whether he conducted himself with the necessary mens rea, and whether that conduct caused a particular criminal result. The duty theory is an artificial way to consider criminal liability based on individual relationships, or the respective status of individuals. There is no convincing argument to explain why this is an appropriate criteria for criminal liability in Scots law.

It is submitted that the aim of the duty theory is to attempt to set a plausible constraint on the criminal law of omissions. However, as has been displayed, this has led to inconsistent judgements and unsatisfactory development of the law in both Scotland and England, with the courts at times manipulating the law and advancing irrational and unprincipled legal arguments in certain cases in order to achieve the desired result. In this sense the courts seem to have decided the outcome and then worked backwards in order to make the reasoning match the result. If the law has to be manipulated in this way to avoid absurd results then it cannot be said to be satisfactory.

It is submitted that Scots law should abandon the duty theory, and the weight given to the act/omission distinction, which is not of specific interest to the criminal law, in favour of a normative theory of criminal omissions based on the conduct and causation of the accused. It is argued that this approach would allow for plausible constraints on the criminal law to be set, however this would not be done at the expense of coherent and rational legal principle. There are two decisions to be taken. The first is the decision as to what kind of society we wish to live in. These moral and political considerations will determine the scope of the criminal law of omissions in Scotland. The second decision is how such a law of omissions should be constructed. This consideration of legal principle will determine how the law of omissions is framed and which theories should be applied in order to create that framework. The law of omissions in Scotland must be expanded to reflect the reality of modern day society, to this end the restrictive concepts of legal duties must be abandoned in favour of a normative theory of conduct and causation. This would allow for the criminal law of omissions to be expanded in a sensible way that allows for a plausible constraint on the law but most importantly, the law will be based on sound legal principles of conduct, mens rea and causation that are consistent with wider principles of criminal law in Scotland.

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