

I would like to thank Alex Colvin for his permission to reproduce his part of the brief.

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Omissions

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How the criminal law deals with omissions is a question that goes to the heart of our conceptions of morality and crime. One may feel outrage at a failure to punish a person who neglects to throw a rope to someone drowning when it would be easy to do so. Yet, one may also feel outrage if a person is prosecuted for mere wrongful thoughts when they are not acted out. Setting duties under threat of criminal sanction may cause legitimate fears of diminishing liberty and increasing totalitarianism..

The broad issue of where "omissions" belong in the criminal law may be broken up into a series of questions. The basic question is whether or not omissions should attract criminal liability. If the legislature decides as a general rule there will be no liability for omissions, then it must also decide whether to allow any specific exceptions to the rule. A particularly significant exception that some have proposed is the creation of a criminal offence of failure to rescue. If one may be culpable for certain omissions, it must also be considered whether to provide for defences relating to the inability to perform the act required. Assuming that the difference between an act and an omission has significance for the criminal law, it is important to differentiate between the two.

The Current State of the Law

At present, Canadian criminal law follows the general rule that omissions do not constitute culpable behaviour. This rule is not set out in the *Criminal Code*. Instead, it is a common law rule that is deeply rooted in the English criminal law.

There are a number of specific exceptions to this general rule, such that liability is imposed for specific omissions. These exceptions, which can be found both in the common law and in the Code, may be divided into three groups. The first group consists of duties arising out of relationships of care and protection. These duties are given statutory expression in section 215 of the present Code under the heading "Duty of Persons to Provide Necessaries". A second group of exceptions are duties arising from specific undertakings to act. This has also been included in the present Code in section 217. A third group of exceptions has arisen through the common law. It creates duties to act when a person was causally responsible for the creation of a dangerous situation. While these three groups may mark the traditional limits of criminal liability for omissions, there are also a number of exceptions to the general rule arising out of non-cooperation with law enforcement authorities. An example of this is s.252, which makes it an offence to fail to remain at

the scene of an accident for a person who was operating a vehicle involved in the accident. These exceptions may arise out of policy concerns relating to difficulties in enforcing the law²⁵.

It has been suggested that a defence of impossibility, which is particularly relevant to crimes of omission, exists at common law²⁶. This defence arises in situations where a duty to act exists, but the performance of that duty is physically impossible.

The Law In Other Jurisdictions

The other common law countries have maintained the traditional common law position that there is generally no criminal liability for omissions. The New Zealand Crimes Bill contains provisions similar to those in the General Part of the Law Reform Commission of Canada's (LRCC) Draft Code, providing for liability for omissions only where specified in the offence, or where death results from omission to perform a duty. In the Australian Draft Criminal Code, duties that will incur criminal liability are specifically enumerated²⁷. The list does not appear to be exhaustive, but rather covers duties similar to those the LRCC has included in its Draft Code. The duties in the Australian Draft Code are listed at the beginning of the part dealing with "Offences Relating to Persons". The list of duties contains both situations where there is a special relationship with the person to whom the duty is owed²⁸ and situations where there is a course of conduct in which there is a duty of care²⁹. An interesting feature of the Australian proposals is that along with the particular duties enumerated, they include three interpretive provisions listed in the same section. The first provides that for duties to persons in a special relationship, it is immaterial how the charge arose. The second is that the effect of a breach of any of the duties is that the person committing the omission is held to have caused any consequences to the life or health of any person to whom he owes the duty. Thirdly, the breach of duty does not itself give rise to any civil action.

In contrast, the English Law Commission's Draft Code only deals cursorily with omissions, but seems to allow for offences where the definition indicates they may be committed by omission. The American Law Institute's (ALI) Model Penal Code provides for criminal liability for omissions only where such is expressly specified in the definition of the offence or where a duty to perform the act is otherwise imposed by law. The ALI's treatment of the question of omissions is very brief. It contains no enumeration of what general duties are imposed by law.

²⁵ E. Colvin, Principles of Criminal Law (1st ed.) (Toronto: Carswell, 1986) at 54; D. Stuart, Canadian Criminal Law: A Treatise (2nd ed.) (Toronto: Carswell, 1987) at 77-8.

²⁶ *Ibid.*, Colvin at 205, Stuart at 427-8.

²⁷ Law Council of Australia, Draft Criminal Code for the Australian Territories (Parliamentary Paper No. 44) (Canberra: Commonwealth Government Printing Office, 1969) at 22, 68-70.

²⁸ Including: a "Duty to Provide Necessaries" to those under one's charge who are unable to provide for themselves; and a "Duty of Person in Charge of a Child".

²⁹ Including: a "Duty of Persons Engaging in Dangerous Conduct"; a "Duty of Persons in Charge of Dangerous Things"; and a "Duty to do Certain Acts", which covers failures to carry out undertakings.

None of the above formulations contain significant variations on the current law in Canada. One common law jurisdiction that has altered the traditional rule regarding omissions is the State of Vermont. There, it is an offence to refuse aid to those exposed to grave physical harm.³⁰ As of yet, however, there do not appear to have been any reported uses of the provision in cases.³¹ This may be due to the penalty for violations being limited to a \$100.00 fine. Minnesota has now joined Vermont in enacting a law that makes it an offence to fail to render aid in an emergency, when this can be done without danger to the rescuer or other persons³².

While the provisions in Vermont and Minnesota are unusual among common law jurisdictions, they have parallels in most civil law jurisdictions. In a process that began in Russia in 1845, nearly all European civil law jurisdictions have included a duty to rescue provision in their criminal codes. A major reason for the widespread enactment of these provisions in civil law countries is that the civil law has traditionally not made the sharp distinction between acts and omissions that exists in the common law. As a result, there is a lack of a corresponding reluctance on principle to penalize omissions in the civil law countries.

It should also be noted that a duty to rescue has been included in section 2 of the Quebec Charter of Human Rights and Freedoms:

2. Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or by calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.³³

³⁰ Vt. Stat. Ann. tit. 12, S.519 (1973) provides:

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others...

(c) A person who wilfully violates subsection (a) of this section shall be fined not more than \$100.00.

³¹ A case where it could possibly have been used was State v. Valley 571 A.2d 579 (Vt. 1989), where an eighteen year old mother failed to obtain necessary medical treatment for her infant child. She was convicted of involuntary manslaughter based on the common law duty between mother and child.

³² A.D. Woolzley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69 Va. L. Rev. 1273 at 1274.

³³ Charter of Human Rights and Freedoms, S.O. 1975, c.50, s.2.

The wording of this section closely parallels that used in the duty to rescue provisions in other civil law jurisdictions.³⁴ However, since Canadian criminal law is based on common law, not civil law, it may be that this section has no effect on criminal liability.³⁵

Recommendations

Recommendations for reform will be set out in relation to the proposals contained in the LRCC Draft Code. A general statement in s.2(3)(b) regarding omissions not attracting liability unless there is some legal duty to act should be enacted as stated in the Draft Code:

2.(3)(b) Omissions. No one is liable for an omission unless:

- (i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or**
- (ii) it consists of a failure to perform a duty specified in this clause.**

Putting a list of duties into the General Part of the Code is a useful proposal of the LRCC that would allow people to more easily know the extent of the duties incumbent upon them. A clear and concise statement of duties in the General Part would attract general attention and would be in an accessible format. The concern about ensuring that the public is informed about the criminal law is heightened in relation to omissions. In relation to criminal acts one can always do the right thing by refusing to become involved. With criminal omissions one must be aware of what course of action one must follow.

The list of duties proposed by the LRCC should be enacted with one exception. This is the proposed duty to those in shared hazardous enterprises, which is the only duty on the list representing a new duty which does not exist under the present Code or at common law. Situations where this duty might arise would generally be covered by the duty to carry out undertakings given or assumed. Where it cannot be said that any undertaking was assumed, the new duty would in effect create a duty to rescue without any special relationship to justify it. If a

³⁴ For example, the French Criminal Code imposes liability for, "Any person who wilfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others....".

³⁵ For an argument that it does have this effect, see Stuart, *supra*, note 25 at 82. In addition, the LRCC refers to a case in Quebec using Article 2, where a homicide conviction was based on failure to provide the necessities of life to a common law spouse: *R. v. Fortier* (17 November 1980), Longueuil, Quebec 500-01-00501-805 (Sup. Ct.). Stuart suggests, however, that such results violate s.15 of the Canadian Charter of Rights and Freedoms, since they would lead to unequal treatment by the criminal law in different parts of the country.

duty to rescue is desired, it should be enacted as a separate provision. With the shared hazardous enterprises provision removed, the Draft Code list of duties would be:

2.(3)(c) Duties. Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:

(i) provide necessaries to

(A) his spouse,

(B) his children under eighteen years of age,

(C) other family members living in the same household, or

(D) anyone under his care

(ii) carry out an undertaking he has given or assumed;

(iii) rectify dangers of his own creation or within his control.

The medical treatment exception proposed by the LRCC should also be enacted. It would serve an important function in protecting medical professionals from potential criminal liability for failing to provide necessaries in situations where it is justifiable to withdraw medical treatment:

2.(3)(d) Medical Treatment Exception. No one has a duty to provide or continue medical treatment which is therapeutically useless or for which informed consent is expressly refused or withdrawn.

In its chapter on defences, the Draft Code includes a defence of physical impossibility for crimes of omission. A defence of impossibility is really just a denial of the *actus reus* for crimes of omission. The *actus reus* of a crime of omission consists of not doing an act which could have been performed even though there was a legal duty to perform it. If the act could not have been performed, there is no *actus reus*. As a result, the provision of a specific defence of impossibility is redundant. In addition, a specific provision might be restrictive in that by providing for situations of physical impossibility it might suggest that there would be no defence of impossibility arising in situations where the required act could not be performed due to a genuine psychological condition. Given these problems, the proposed defence of impossibility should be removed from s.3(1)(a) of the Draft Code.³⁶

Problematic situations arise where the act is being performed through a machine and the omission is the failure to change the situation of the machine. In Fagan v. Metropolitan Police Commissioner³⁷ a conviction of assault was upheld against a person who had refused to move his car that he had accidentally driven onto a police officer's foot. It might be advisable to include in the General part of the Code a statement that for purposes of differentiating between acts and omissions, a machine operated by a person should be considered as an extension of that person.

The LRCC has proposed that a specific offence of Failure to Rescue be included in the Special Part of the Draft Code. This would create a sharp break from past legal practices in the common law world. It would throw into doubt the general rule that acts may attract criminal liability, while omissions generally will not. If such a change were made, it would be of sufficient importance that it should be included in the list of duties in the General Part. Some of those who are critical of the common law reticence to punish omissions argue that this reflects outdated, individualistic ideas of laissez-faire liberalism. This individualism is said to contradict the contemporary ethic in the welfare society of social responsibility. But this change should not be made. There has long been a concern about the degree of state control that could arise under the criminalization of omissions. Failing to act in the best way is a general human weakness. The modern state has a variety of regulatory tools at its disposal to encourage its citizens to act in a more responsible fashion. Its most severe sanction, the imposition of criminal liability, should generally be retained for anti-social acts and only imposed for omissions where the acceptance of some special relationship by the person justifies a higher standard being imposed on them. More particularly with regard to failures to rescue, it has long been a concern of the common law that it is impossible to know the mind of a person. Where an act has been committed, it is generally possible to infer that a decision has been made to commit it. With a failure to rescue, no such state of mind can be inferred. The accused person may have had a malicious frame of mind or may simply have panicked or suffered a lack of courage when faced with an emergency situation. It is right that people should be encouraged to be resolute and to assist in an emergency situation. That does not mean that the criminal law should be used to be vindictive towards those whose human weaknesses are exposed in such an emergency situation.

Therefore, it is proposed that the Draft Code should not include s.10(2), the proposed Failure to Rescue provision. However, it is believed that if the provisions supported above are adopted by the Subcommittee on Justice and the Solicitor General, this will lead to much greater clarity with respect to the law in relation to omissions.

³⁶ After the removal of the impossibility defence, the section would state:

3(1) Lack of Control.

(a) Compulsion, Automatism. No one is liable for conduct which is beyond his control by reason of:

(i) physical compulsion by another person; or
(ii) factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances.

³⁷ [1969] 1 Q.B. 439, [1968] 3 W.L.R. 1120, 52 Cr.App.R. 700, [1968] 3 All E.R. 442.