

Certain omissions regarded as criminal conduct in scotland law essay



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There are certain restricted circumstances in Scots Law that an omission is regarded as criminal conduct. The key question to look at is do we have a positive duty to act? In Scots Common law there is no legal obligation if one individual finds another in peril to intervene and assist. However in some circumstances a situation will arise where failure to intervene will result in criminal liability[3]. So it is not what the accused did it is what they did not do. The situations where such intervention is legally required fall into three categories that have to be examined closely with particular reference to specific crucial cases. In addition looking at the significance of the actus reus and the mens rea in relation to appropriate cases. The actus reus has no official definition but it is the physical element of a crime, which includes conduct, omission or situation. The mens rea accompanied by the actus reus would result in criminal liability.[4] To illustrate both in terms of omission I have highlighted specific cases that explain the significance of both

The first circumstances that a failure to act can give rise to criminal liability is " where a dangerous situation has been created by the accused or where the prior actions of the accused has created danger"[5] This type of omission generally follows a positive act, this may be criminal or not. In *HM Advocate v McPhee* (1935) the accused was charged with murder. McPhee had carried out a violent serious assault on a woman, beating her, repeatedly kicking her, knocking her down and left her unconscious in an open field.[6] Lord Mackay upheld the murder conviction on the grounds that it could be asserted that the accused " wickedly and feloniously exposed the woman regardless of consequences to the inclemency of the weather, and if she died in consequence... both of the beating and exposure"[7] This case found

the accused guilty of culpable homicide. In cases similar to McPhee's an omission will not arise if it can be proven that the accused initial criminal actions caused the victims death. However because McPhee's assault on the woman had weakened her he had a responsibility to remove her from that situation or aid her in the particular situation which the he had all ready created[8]

An important case to highlight under this section is MacPhail v Clark (1983). This situation is a little more complicated as the actions of the accused are not criminal but instead his actions were negligent and reckless. However the actions that caused this situation may be regarded as criminal if they cause harm and in this case endanger lives.[9]The farmer in this case had set a fire to burn straw in a field that was upwind from a dual carriage way. The fire had spread causing the smoke to carry onto the road causing bad visibility. This resulted in two vehicles colliding causing injury.[10]The farmer was convicted of recklessly endangering the lieges.[11]It was highlighted that the farmer did nothing wrong in setting the fire in the field, it was the failure to ensure that the fire was safe and would not spread. Reports found that the burning of the straw continued for at least twenty minutes and the farmer continued to plough right up until the arrival of the emergency services.[12]The Farmer had done nothing to stop the fire spreading and continued to allow it to spread onto the road without taking any action to stop the dangerous situation that he had created.

The second circumstances that can give rise to criminal liability are where the accused status or contractual obligation results in a duty to act.[13]This status or contractual obligation is when a person in a public office or position <https://assignbuster.com/certain-omissions-regarded-as-criminal-conduct-in-scotland-law-essay/>

or responsibility has a duty to prevent the occurrence of harm, fails to do so.

[14] This means that an onlooker is under a position and duties were they have a responsibility to prevent the offence. If the onlooker fails to do this it may result in criminal liability. [15] Bonar and Hogg v McLeod (1983) highlights a failure to prevent an offence. Mr Bonar was an older and more experienced senior officer who by being present at the scene of the crime and failure to intervene led to art and part guilt. [16] Hogg the officer who assaulted the prisoner, grabbed him by the throat and pushed his arm up his back, then 'quick marched' him down the corridor. The excessiveness of the force was unnecessary as the prisoner was neither resisting nor struggling with the officer. [17] During this offence Bonar did not only stand back and allow this to happen but was an active participant in the 'quick march' down the corridor. [18] Bonar was regarded as art in part liable for the assault upon the prisoner. [19]

The third and final situation that intervention is legally required is "where a prior relationship between the accused and the victim which is such that there is a legal obligation to act." [20] An example of a special relationship would be a mother and child. In Bone v HM Advocate the mother was charged with culpable homicide of her daughter by witnessing and countenancing criminal conduct. [21] The allegations made against Bone were that she wilfully failed to protect her child and also to ensure that her wellbeing was intact or seek medical attention for her injuries. However Bones appealed the conviction and the appeal went in her favour and was quashed [22]. This was on the basis that the "trial judge misdirected the jury by failing to give significant directions of the question of the assessment of

whether the appellant had failed to take the reasonable steps to protect her child and ensure her wellbeing".[23]Due to this it was found that there was a miscarriage of justice and allowed the appeal against the conviction.

Another case of relevance is to look at the relationship between a doctor and a patient. In this particular English case *Adamako* in 1993 was an anaesthetists in an eye operation where the tube from the ventilator had been detached. Adamako did not notice this for roughly six minutes when the patient went into cardiac arrest.[24]During the trial Adamako was charged with manslaughter by gross negligence, where the accused breached a duty of care towards the patient that resulted in death.[25]Adamako appealed to the House of Lords where the conviction was upheld. Lord Mackay stated that " gross negligence... depends on the seriousness of the breach of the duty committed by defendant in all circumstances in which he was placed when it occurs and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all circumstances as to amount in the jury's judgement to a criminal act or omission".[26]For an involuntary manslaughter by breach of duty to be proved firstly there has to be proof of the existence duty which was apparent in this case - anaesthetists and patient. Secondly, a breach of duty resulting in death. This again occurred when the accused failed to see the detachment of the ventilator which led to cardiac arrest. Finally the jury must consider the gross negligence as justified for a criminal conviction.[27]

In *HM Advocate v McPhee* a case mentioned earlier it is important to consider the significance of actus reus and mens rea. *McPhee* omits to the assault on the woman so therefore this can constitute to the actus reas of <https://assignbuster.com/certain-omissions-regarded-as-criminal-conduct-in-scotland-law-essay/>

the crime. McPhee had severely beaten the woman and therefore weakening her putting her in a dangerous situation which lead to her death.

[28] Paterson v Lees is a case of relevance that highlights the significance of the mens rea applied in a case of omission. Paterson was charged with inter alia, conducting himself in a shamelessly indecent manner. Paterson was babysitting his neighbour's children a 9 year old little girl and an 11 year old boy. The original statement made was that the appellant 'did conduct [himself] in a shamelessly indecent manner towards [the female complainer aged 9 and the male complainer aged 11] and did show them a film of an obscene and indecent nature which depicted acts of human sexual intercourse'. [29] What was illustrated in the case was that the appellant had allowed the children to continue watching the video - he omitted to stop the children viewing the video. The Appeal Court was unanimous in the decision that the charge of shameless indecency could not be committed in this way. The issue here was that it was not a crime to permit children to view indecent material. [30] In common law shamelessly indecent conduct is an offence therefore it involves the element of mens rea. Therefore it must be proved that Paterson has the appropriate mens rea in this case it would be an intention to commit the offence - this would involve switching on the material either intending to corrupt or deprave or knowledge that the material is liable to corrupt or deprave. [31] Due to this element of mens rea Paterson's appeal was allowed.

To conclude, the failure to act in some circumstances can under Scots law lead to criminal liability. When looking at omissions it is important to establish the requirements that lead to an omission and the elements of

actus reus and mens rea. They all play vital roles in illustrating the complexity of being liable in certain circumstances and the wide variety of cases that involve omissions.