

# Manslaughter vs murder essay

[Experience](#), [Laughter](#)



In order to establish criminal liability, the external elements of that offence must be established. These external elements are known as the actus reus. After this has been proved, the mens rea must be proved in respect of each of those guilty elements. The actus reus and mens rea must occur at the same time, although the interpretation of this can vary with regards to the offence. There are three categories than an offence can fall into when examining the actus reus. The first is that there was a 'voluntary act', in which case the accused has voluntarily committed the act. The second possibility is known as 'the state of affairs'. This simply requires that a state of affairs be present which causes the accused to have committed an offence.

Offences arising in this manner are often ones of strict liability. An example of this is found in *Lassonneur*. Here, the police had brought a woman into the UK against her will, but she was found nonetheless to be an illegal alien. The final basis of liability is liability for failing to act in certain circumstances. There is no general duty to act, however there are a notable amount of specific circumstances where there is such a duty, as developed through the common law.

This is an area of law that presents several difficulties. The main difficulty that has arisen is the attempt to categorise the various duties. There has also been much debate over whether or not certain crimes are even capable of being committed by omission. While the common law has developed certain offences to the extent that they are capable of being committed by omission, such situations are rare.

In most cases, the common law has been hostile towards the idea of penalising a failure to act. As Smith and Hogan said “ It seems to have been thought that the function of the criminal law was to prevent men from doing positive harm and it was left to public opinion, morality and religion to encourage the doing of good works” Omissions have been made criminal in some cases by way of statutes. An example of this is found in s. 72(2) Road Traffic Act 1961. The section makes it an offence not to report a road traffic accident to the Gardai within twenty four hours of the incident.

There is a long list of similar offences such as driving without third party insurance or not displaying ingredients on food packaging, but it is pointed out that there is usually a positive action to accompany the omission in the case of statutes making an omission an offence. The particular wording of a statutory offence is often very important when deciding whether or not it can be committed by omission, but the case law is quite inconsistent in its interpretations. Another example of this is the British case of *R v Firth* . Here the defendant was found guilty of deception by omission as he avoided telling the NHS that patients using NHS facilities were in fact private patients thereby obtaining facilities without payment. Prosecutions for omissions are more prevalent under the common law.

There is a popular illustration that is used to try to display the common law attitude towards omissions. This illustration involves a group of people watching a young child, whom they could easily save, drown in a large puddle of water. Unless there is a special relationship between the one of the onlookers and the child, then no crime has been committed regardless of

how immoral it may seem. If one of the onlookers was a parent or guardian, then there would be a duty to act by way of their relationship. The difficulty arises in determining where to draw the line between a duty to act and no duty.

There is no general principle in this area and the only way to try to identify this line is by reference to the case law. Notwithstanding this traditional hostility, however, some examples of individuals being punished for inaction do exist. Usually, it is quite easy to make a distinction between a failure to act and a positive action; however this is not always the case. In *Fagan v Metropolitan Police Commissioner*, the defendant parked his car on a police officer's foot. The defendant claimed this was an accident, but when the police officer instructed him to move it, he refused to do so. When faced with charges of assault, the defendant claimed that parking on the officer's foot could not have been an assault due to a lack of mens rea, and that refusing to move the car could not have amounted to assault as it was an omission.

The Divisional Court held that the offence was not complete until the moment Fagan realised that he had driven onto the foot of the officer and, in deciding not to cease this continual act, formed an intent amounting to the mens rea for common assault. His conviction was upheld. A similar case to this is the New Zealand case of *Kaitamaki v R*. This case involved the appeal of a man who had been convicted of rape. His defence was that he believed the girl was consenting and only realised that this was not the case after penetration. He claimed that since the relevant legislation said that rape was

complete upon penetration, he could not be convicted as there was a lack of mens rea.

The court held that while rape was complete upon penetration, it could only be completed once the defendant withdrew. It was held that the defendant's failure to withdraw constituted a continuing action and thus his conviction was upheld. In both of the above cases, we can see that it was clearly an omission that led to the offence, yet the courts decided to construe the omission as part of a continuing action. I think it is quite clear that the courts took this approach as they did not wish to be seen to be convicting someone purely based on an omission.

These two cases may be examples of times when the courts have strayed from their usual hostility towards convictions based on omissions, but you can still see their unwillingness to uphold a conviction that is totally based on an omission. The debate regarding the difference between acts and omissions usually arises in the case of homicide. Homicide is the physical result of human conduct resulting in the death of a human being. If the death of one person can be attributed to the acts of another, and if the acts that were committed were ones which the law would seek to prevent by threat of punishment, then it forms the actus reus of homicide. Common law duties have traditionally arisen either due to one's status as a public official or one's relationship to the victim. Similar reasoning has been used in cases where the accused is employed in a position that concerns the safety of others.

An example of this is the case of R v Dytham . In this case, the defendant was a police officer. While on duty, he witnessed a man being attacked outside a nightclub. The man eventually died, but at no stage did the defendant attempt to assist. The court held that by failing to perform any of his common law or statutory duties, he was guilty of the common law offence called misconduct in a public office.

Provided that he was aware that his decision would lead to condemnation, then he could be convicted. In the Irish case of DPP v Bartley , Carney J in the High Court took the opportunity to endorse the decision Dytham, saying that it is a common law offence for a member of the gardai not to investigate a credible complaint. There are a variety of cases in which there is a non-statutory duty to act. The first one of these is known as ‘ Creation of a Situation of Danger’.

It covers situations where there is an initial act followed by an omission, as discussed earlier. It was over one hundred years ago in Clarence that Stephen J said (at page 45): “ If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault and of an actual assault as soon as the man fell in. ” Recently, this approach has become popular. An early case which dealt with some of the above issues was Pitwood . Here a railway crossing gate-keeper opened a gate to let a cart pass and then forgot to shut it again. A man was later killed while crossing the tracks.

The gate-keeper’s defence argued that he owed a duty to no-one but his employer, but the court held that he was guilty of manslaughter. Wright J

said in his conclusion “ there was a gross and criminal negligence, as the man was paid to keep the gates shut and protect the public . . .

A man might incur criminal liability from a duty arising out of contract”. The leading case in the area of ‘ creation of a situation of danger’ is the case of R v Miller . In this case a man fell asleep while smoking a cigarette and awoke to find his room on fire. Instead of putting out the fire, he simply moved rooms and slept in another bed.

The House of Lords upheld his conviction for arson. Lord Diplock said: “. . . I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one’s power to counteract a danger that one has oneself created, if at the time of such conduct one’s state of mind is such as constitutes a necessary ingredient of the offence.

I venture to think that the habit of lawyers to talk of actus reus, suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failures to act cannot give rise to criminal liability in English Law. ” The next category where there is a duty to act is when a special relationship exists. The parent-child relationship is the most common one in this area and there is quite a load of case law to go with it. Cases such as R v O’Connor show the courts willingness to prosecute for neglect of children which leads to death.

In Britain, the Children and Young Persons Act 1933 actually imposes a positive duty on parents and creates the offence of wilful neglect. The actual

age of the child does not seem to be an issue, as indicated by *Chattaway*. There are many other relationships in which a duty exists, but they are less common. *R v Squire* held that a master owed a duty to his servant.

*R v Smith* affirmed this ruling but also held that if the servant could have left under his own free will, then the master should not be found liable. *R v*

*Instan* is an interesting case as the ruling does not appear to rely totally on the familial relationship between an aunt and niece, but also the relationship of trust they build up. *Instan* failed to help her aunt when she fell ill and did not notify anyone of the situation. The defendant was found guilty of manslaughter. With relatively regular frequency, the courts have noted a duty to assist relatives or other for whom a defendant has undertaken voluntary responsibility for. *R v Gibbins and Proctor* was a case concerning the death of a child not being provided with adequate amounts of food.

Roche J directed the jury: “ if you think that one or the other of these prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury as the result of which she died, it is not necessary for you to find that he or she intended to kill the child then and there. It is enough if you find that he or she intended to set up such a set of facts by withholding food or anything as would in the ordinary course of nature lead gradually, but surely, to her death. In this case a man left his wife to live with another woman. This woman took charge of the man’s daughter as well as her own children.



He supplied her with ample funds, yet she specifically mistreated his daughter. They were both convicted of murder, with the man convicted for turning a blind eye to the mistreatment of his daughter and the woman convicted for her gross mistreatment of the girl she had assumed responsibility for. In *R v Stone and Dobinson*, housemates had such a relationship that they were held to owe a duty to the deceased. The woman who died was something of an eccentric who was responsible for her own downfall, but her housemates at one stage did attempt to contact a doctor unsuccessfully.

The court upheld the convictions for manslaughter as they were deemed to have taken responsibility for the woman. The fact that one of the housemates was a blood relative, that they knew of her condition, and that they had attempted to summon a doctor led the court to take the opinion that the housemates had assumed responsibility for her. While many of these cases relate to a duty between close relatives, this is not the only case in which a duty to act can arise. In *R v Nicholls*, the court held that ‘a grown up person who chooses to undertake the charge of a human helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without (at all events) wicked negligence’. The relatively recent Australian case of *R v Taktak* affirms this.

Omissions have been made criminal in many cases by way of statutes. An example of this is found in s. 72(2) Road Traffic Act 1961. The section makes it an offence not to report a road traffic accident to the Gardai within twenty four hours of the incident.

There is a long list of similar offences such as driving without third party insurance or not displaying ingredients on food packaging, but it is pointed out that there is usually a positive action to accompany the omission in the case of statutes making an omission an offence. The particular wording of a statutory offence is often very important when deciding whether or not it can be committed by omission, but the case law is quite inconsistent in its interpretations. Despite the definition of homicide involving the word ‘killing’, there has been no difficulty in establishing liability for omissions to act. Manslaughter is the primary area in homicide cases in which defendants can be found to have committed an offence by omission, though the same has occurred occasionally in the case of murder .

There are several words which have been interpreted to impose liability. In *Speck* , the word ‘act’ in the phrase ‘act of gross indecency’ was concluded to include an omission. However in *Ahmad* , the English Court of Appeal held that the word ‘act’ does not include an omission. Due to the conflicts that have arisen, words have been examined in their own contexts, rather than trying to formulate rules for which words include the possibility of committing an offence by omission and which do not.

It has been suggested that due to the apparent difficulties in classifying words, it may be a better approach to try to concentrate on the categorisation of duties to act in certain circumstances. I feel that attempts to create a ‘list’ of words that allow convictions for omissions would be of little use to any party concerned. A duty may also arise where the defendant is responsible for the creation of a dangerous situation. For example, if a

defendant locked a man in a room by accident and then failed to let him out, he would be liable for false imprisonment. The difficulty in drawing a line between acts and omissions is prominent in no area more than in the area of medical treatment. If a surgeon decided that he was going to take industrial action in the middle of a surgery, and the patient subsequently died as a result of this, then the surgeon would obviously be guilty of manslaughter.

However if a doctor decides to ‘pull the plug’ on a patient who is being kept alive by a life support machine, few concerns will be raised. It is agreed that the doctor is entitled to do so as, by commencing treatment, he has not subjected the patient to risks he would not have otherwise been exposed to. There are two lines of argument that attempt to exempt doctors from liability. The first of these is by saying that the patient was already dead, so turning off a life support machine does not in fact kill him. However for some time there was no definitive test as to whether a person was dead or not. For a long time the medical community debated on whether a person was dead when their heart stopped, or whether it was when brain activity had ceased.

In 1976, the Conference of Medical Royal Colleges and their Faculties of the United Kingdom decided that when it is established by certain tests that none of the vital centres of the brain are functioning, then a person may be declared dead. A definition is important in areas such as transplants. A doctor would be guilty of assault if the patient was not dead. The courts are satisfied to follow the lead of popular medical opinion. The second argument that can be used to exempt doctors from liability is to say that turning off a life support machine is an omission rather than an act.

It can be argued that it is not reasonable for a doctor to fight for every single heartbeat and that there is no benefit to simply having the most basic of body functions working at a given time. In 1975, the case of Karen Quinlan came before the Supreme Court of New Jersey . This was related to a young woman who was being kept alive by totally artificial means but the hospital, against the will of her father, refused to cease treatment for fear of being sued. The court held that the father could exercise her right to refuse further treatment and the respirator was subsequently disconnected. Religious beliefs are not an excuse for someone in a special relationship to deny medical help to the person dependant on them.

This was held in the case of R v Downes . This case dealt with a religious sect called the Peculiar People who believed that sickness should be cured through prayer rather than by medical attention. However Bramell B held that the child had been wilfully neglected and that the parent was thus guilty of manslaughter. He said ' It is found that the prisoner thought it was irreligious to do it, but the law does not allow him to break its provisions'.

This decision was affirmed in R v Senior .