Homicide by neglect

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Homicide by Neglect

"This is as bad a case of neglect as I have ever come across. You have been found guilty on clear evidence of gross neglect of [V] which caused her death in dreadful circumstances." These words were recently spoken by a judge when sentencing a man for the manslaughter of his sister. The case serves to raise again the question of the proper approach of the criminal law to harm caused by neglect. There are, of course, some specific offences of neglect—such as the offence of wilfully neglecting a child in a manner likely to cause unnecessary suffering or injury to health, under section 1 (1) of the Children and Young Persons Act 1933. But the offences against the person do not distinguish between neglect and other means of causing harm. Cases of neglect are usually classified under the heading of "omissions," since they involve a failure to take certain action. Liability for an omission cannot be established unless there was a duty on the individual to take action. Much of the legal argument about homicide by neglect has therefore concerned the circumstances in which such a duty can be said to exist.

This is indeed an important issue, and is one on which English law differs from the somewhat wider laws of other European countries. But there is an equally important issue which has attracted insufficient attention: granted that a duty was owed by D to V, and that D's failure to fulfil that duty led to V's death, on what principles should the court decide whether D has committed murder, manslaughter, or no offence at all? At first sight, the answer to this question seems to be supplied by a straightforward application of general principles. Thus murder may be committed by neglect when D (having a duty towards V) fails to carry out his duty and knows that this is likely to cause death or really serious harm to V. This was the gist of the trial judge's direction in the notorious case of *Gibbins and Proctor*: "if you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury," then their offence would be murder. This direction met with the approval of the Court of Criminal Appeal (1918) 13 Cr.App.R. 134, and would still be satisfactory. A verdict of manslaughter would be proper if D, whilst not actually appreciating that death or serious harm was likely to ensue, was grossly negligent in failing to carry out his duty towards V. If D did not display carelessness to such a degree, then (subject to one possible exception) criminal homicide has not been committed.

The possible exception arises from the common law doctrine of manslaughter by unlawful act. If the neglect itself constituted a criminal offence, and if death was caused by this neglect, then this doctrine might lead to a conviction for manslaughter without proof of any negligence on D's part. As long as a reasonable person would have realised that the neglect subjected V to the risk of some harm, albeit not serious harm, that is sufficient to establish liability for manslaughter: *Church* [1966] 1 Q.B. 59. But the

"wilful neglect" involved proof that he intended the consequences of the neglect.

Court of Appeal recoiled from applying this doctrine to a case of neglect in *Lowe* [1973] Q.B. 702. In that case D was convicted of the statutory offence of wilfully neglecting his child, and a conviction for manslaughter was also returned on the basis that death foreseeably followed from the neglect. The Court of Appeal quashed the conviction for manslaughter, holding that such a verdict is not inevitable where death ensues as a consequence of the offence of wilful neglect.

Now the common law doctrine of manslaughter by unlawful act has frequently been criticised, and many would applaud the restrictive approach to that doctrine adopted by the Court of Appeal in *Lowe*. But the judgment in that case contains a passage of much wider import. Phillimore L.J., said this:

> "We think there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position in regard to the latter it does not follow that the same is true of the former. In other words if I strike a child in a manner likely to cause harm, it is right that if the child dies I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate."

Taken as a general assertion of a material difference between acts of omission and acts of commission, this is questionable. Let us suppose that there is an intentional striking of a child in case A, and an intentional failure to feed a child in case B. Let us also suppose that in case A the striking was likely to cause harm, and in case B the starving was likely to cause harm. Is there any reason for treating the behaviour in case B as less culpable than the behaviour in case A? Certainly not. Indeed, far from arguing that neglect deserves lenient treatment because the harm arises from an omission, the circumstances of most neglect cases indicate far more malevolence than is to be found in some cases of actual violence. As one eighteenth century writer remarked, "this mode of killing is of the most aggravated kind because a long time must unavoidably intervene before the death can happen, and also many opportunities for deliberation and reflection": 1 Hawkins, *Pleas of the Crown*, 119 (6th ed. 1787).

The judgment in *Lowe* can perhaps be explained as an (unconvincing) attempt to cut down the doctrine of manslaughter by unlawful act, which the court found abhorrent. But the sentiments expressed in the passage quoted seem to have been genuinely held, and this distinction between acts of omission and acts of commission also holds sway with some prosecutors. In some cases which are quite unaffected by the doctrine of manslaughter by unlawful act, prosecutors apply the distinction by drawing an indictment for manslaughter and not for murder, thus depriving the court of the opportunity to apply the law and to determine the proper classification of the homicide. The sympathetic use of the discretion to prosecute is not being questioned here: there are certainly cases in which an initial charge of murder would be oppressive. What is being questioned is the apparent assumption that killing by neglect is somehow less serious than other forms

of killing, so that it takes a really bad case before murder is charged. *Gibbins and Proctor* was such a case and murder was charged; the decision firmly dispelled any doubts that murder by omission is unknown to the law. The next step is to establish in the legal consciousness that the elements of murder by omission are essentially the same as those of murder by any other means, once the existence of a duty has been proved. As long as English law continues to divide criminal homicides into murder and manslaughter, then this distinction should be faithfully applied—particularly when cases of killing by neglect exhibit those features of deliberation and of slow humiliating death which are generally regarded as increasing the gravity of killings by other means. In the absence of strong and clear arguments in favour of treating homicide by neglect as less serious than other forms of homicide, the distinction set out in *Lowe* can only be based on superstition. How will historians explain the persistence so far into the twentieth century of the quaint notion that homicide is less serious when D caused death *without actually doing anything* to his victim?

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