Gross negligence manslaughter and duty of care in "drugs" cases: R v Evans

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Crim. L.R. 631 **Introduction**

In the United Kingdom, the majority of criminal offences require both a mens rea, which is the mental element of an offence, and an actus reus, described as the act or conduct element. The latter can be satisfied by way of a failure to act, as can be seen in some statutory "failing" offences, such as failing to provide a breath test, and in some commission offences which can be committed by omission, [1] such as the common law offences of murder and gross negligence manslaughter. However, unlike some European countries, there is no general accountability for omissions in the United Kingdom, and liability only lies if it can be shown that the person who omitted to act was under a duty to do so. [2]

Obviously, not everyone owes a duty towards everybody else, and although we know that there are certain categories of person who do owe duties to others, such as parents towards their children and doctors towards their patients, [3] there is no clear statutory or common law guidance as to who owes a duty to whom and in what circumstances such a duty can exist. [4] In fact, new categories of duty have been and continue to be created both by statute and at common law. For example, ***Crim. L.R. 632*** s.5 of the Domestic Violence Crime and Victims Act 2004 imposes liability for failing to protect a child or vulnerable adult from harm, and s.44 of the Mental Capacity Act 2005 creates an offence of ill treatment or wilful neglect of a person lacking capacity by anyone responsible for that person's care.

Examples of duties created by common law include the "voluntary assumption of responsibility" and "creation of danger". The case normally cited as authority for the former is the much criticised *Stone and Dobinson* where it was held that a duty exists where a person assumes responsibility for another. [5] The authority for the duty which arises upon a creation of danger is *Miller,* where a squatter inadvertently set fire to a mattress with a cigarette. Rather than tackling the blaze or calling the emergency services, he simply went to sleep in an adjacent room while the fire spread through the building causing extensive damage. The House of Lords upheld his conviction for criminal damage on the basis that, although he was initially unaware that he had brought about a train of events which would cause damage, "when he did become aware that the events in question had happened as a result of his own act, he did not try to prevent or reduce the risk [of damage being caused]". [6] The "legal effect of the decision" is that a person who has created a danger is under a duty to "take reasonable steps" to alleviate or negate its effects. [7]

More will be said about *Miller* and *Stone and Dobinson* later, but in the meantime, it is clear, first, that the duty categories are not clearly defined; secondly, that the parameters of the duty requirement are not clear; and thirdly, that there is no consistent basis for omissions liability.

Nowhere is this more evident than in the "drug homicide" [8] cases where a drug user dies following ingestion of drugs supplied by a dealer who is present at the time, but does not help or summon help prior to the user's death. Although there are very few cases where this has occurred, gross negligence manslaughter rather than unlawful act manslaughter has been the preferred charge, first because liability is based on the failure to summon help and not on the original drug supply, and secondly, because, following the authority contained in *Lowe,* unlawful act manslaughter cannot be committed by way of an omission. [9]

The requirements to be satisfied in gross negligence manslaughter cases are as set out in *Adomako,* [10] where it was held that in order to secure a conviction, it must be proved that:

• the defendant owed the victim a duty of care;

• the defendant breached that duty;

• the breach of duty caused the victim's death; and

• the breach was grossly negligent, i.e. negligence considered gross enough to be regarded as criminal.

Crim. L.R. 633 The criteria are problematic, not least because the latter is a circular test, [11] but the real dilemma has always been: (1) to ascertain whether or not a drug supplier/dealer owes his customer a duty of care (and, as a corollary of this, upon what basis such a duty could lie, and how it could be practically discharged) [12]; and (2) in proving the necessary causative

link between event and consequence. There are two issues here. First the difficulty in arguing that an omission can "cause" a result in the same way as an act can, [13] and secondly, the significance of the drug user's voluntary ingestion of the drugs as an intervening event. The House of Lords held in *Kennedy* [14] (reversing two previous Court of Appeal decisions) [15] that "the free, deliberate and informed choice of a responsible adult to self-administer the drug breaks the chain of causation", but Lord Bingham went on to say that: "This appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence." [16]

However, and as will be argued below, an intervening event does have the potential to break the chain of causation in gross negligence manslaughter as well as in unlawful act manslaughter drugs cases, but an examination of *Townsend and Evans* (Swansea Crown Court) and *Evans*, [17] the most recent drug homicide case to come before the Court of Appeal, will demonstrate how the court dealt with both this and the duty of care criterion. Following this, the case will be discussed in its wider social context.

被指控犯有嚴重過失過失殺人罪，因為他們在明顯服用過量服用海洛因時未能提供援助

Townsend and Evans

In May 2007, 16-year-old Carly Townsend died of a drugs overdose at her mother's home. Her mother, Andrea Townsend and her half-sister, Gemma Evans, were charged with manslaughter by gross negligence in that they failed to render aid when it was clear that Carly had overdosed on heroin. The facts--heavily disputed **Crim. L.R. 634* by the defence--indicated that Gemma Evans had acted as an intermediary in the provision of the drugs to Carly from the drug supplier, Andrew Taylor. The case was heard at the Swansea Crown Court in April 2008 where both defendants were convicted. Andrea Townsend was sentenced to two years' imprisonment, but Gemma Evans was sentenced to four years' imprisonment in order to reflect the finding that she had played a part in the supply of drugs to Carly.

Mr Huw Davies Q.C., then counsel for Gemma Evans, applied for leave to appeal, which was due to have been heard on November 25, 2008. The Court of Appeal, however, declined to hear the case then, in recognition of the conflicting authorities that needed to be reconciled. Reflecting its importance, the appeal was heard before a panel of five Court of Appeal judges on February 24, 2009.

In the Crown Court, the prosecution alleged that both Andrea Townsend and Gemma Evans owed Carly a duty of care, the former because she was her mother and the latter both in her capacity as Carly's half-sister and because she had assumed a duty to look after Carly once she had taken the overdose. In his summing up, Lloyd-Jones J., after directing the jury according to the *Adomako* criteria, reaffirmed that a parent does, as a matter of law, owe her child a duty [18]; that no duty arose from the sibling relationship; and that Gemma Evans had not assumed a responsibility. [19] At this stage therefore, there was no basis upon which it could be suggested that Gemma Evans owed Carly a duty of any kind.

However, Lloyd-Jones J. then went on to say, controversially, that acting as an intermediary in getting the drugs to her half-sister was a "matter which in law is capable of giving rise to a duty of care" [20] and "that the supplier of drugs may owe a duty of care to the customer in such circumstances [was] consistent with [the] authority" [21] contained in the cases of *Khan* [22] and *Sinclair, Johnson and Smith.* [23] Both were cases where there was a failure to call for aid after an overdose, but in neither case was it held that a drug supplier does owe a duty of care to his customer.

Khan and Sinclair

In *Khan,* the two defendants sold heroin to a 15-year-old prostitute who had never used it before. She took 10 times the amount she should have and fell into a coma. The defendants left her in their flat and, upon returning the next day, found that she had died. It was conceded that she would probably have been saved if medical assistance had been called for.

The defendants were convicted of gross negligence manslaughter, or as the trial judge called it, "manslaughter by omission", but their appeal was allowed because he had omitted to direct the jury that it is a condition of gross negligence manslaughter that the defendant owes the victim a duty of care and that that duty **Crim. L.R. 635* had to have been breached. However, in the Court of Appeal, Swinton Thomas L.J. said (obiter) that:

"To extend the duty to summon medical assistance to a drug dealer who supplies heroin to a person who subsequently dies on the facts of this case would undoubtedly enlarge the class of persons to whom, on previous authority, such a duty may be owed.

It may be correct to hold that such a duty does arise. However before that situation can occur, the Judge must first make a ruling as to whether the facts as proved are capable of giving rise to such a duty." [24]

A similar factual situation arose in *Sinclair* where the victim, Coleman, who was a friend of Sinclair, died after taking copious amounts of methadone. Both Sinclair and Johnson, the owner of the flat where the drug was taken and where the deceased fell ill, failed to summon medical assistance until 16 hours later, when it was too late.

Rose L.J., in the Court of Appeal, said (obiter) that there was no English authority whereby Johnson could have been said to owe a duty to the deceased; he did not know him, and their only connection was that the deceased had taken the methadone in Johnson's flat and had died there. Sinclair, on the other hand, was a close friend and he and the deceased had "lived together almost as brothers". [25] He was the only person with the deceased while he was unconscious and, as such "there was material on which the jury properly directed, could have found that Sinclair owed the deceased a legal duty of care". [26]

As Lloyd-Jones J. rightly noted in *Townsend and Evans,* both cases admit the *possibility* that a duty may arise, but they do not, as he then directed the jury, confirm that it does. The dicta from both clearly show that the court was unable to hold whether or not a duty of care existed, because the jury in both cases was misdirected.

Unsurprisingly therefore, Gemma Evans's primary ground of appeal was that the trial judge had wrongly found not only that she "was capable of owing a duty of care to the deceased" but also that it was consistent with authority that a supplier of drugs could owe a duty in such circumstances. [27] In fact, *Sinclair* was distinguishable because the foundation of any duty which may have been found to exist was based upon an assumption of responsibility and not on the supply of drugs, [28] and in *Khan* "the court was careful to take no position on the question of "*the enlargement of the class of persons to whom such a duty may be owed*"'. [29]

Deciding whether or not to impose a duty on a person who had been instrumental in supplying drugs; whether or not it would henceforth be held that a duty lies upon ***Crim. L.R. 636*** drug dealers generally (bearing in mind that Gemma Evans was not a "dealer" in the known sense); and formulating the basis of such a duty if it was found to exist, was without doubt the Court of Appeal's greatest challenge in the *Evans* appeal, but it was also argued that by leaving the jury to decide on the existence of a duty of care, both arts 6 [30] and 7 [31] of the European Convention on Human Rights had been violated. How therefore did the Court of Appeal answer these questions?

Evans: the Court of Appeal decision

In a single judgment delivered on behalf of the whole court, Lord Judge C.J. dismissed the appeal and held that "on the facts actually found by the jury on the supply issue, and the undisputed facts … the appellant was under a plain and obvious duty to take reasonable steps to assist or provide assistance for Carly". [32] This conclusion was reached by using a multi-layered combination of authorities including civil law cases, supplemented by both *Willoughby* [33] and the "disputed" and "undisputed facts" of *Evans,* together with the creation of danger principle from *Miller.*

Lord Judge C.J., quoting from both *Mitchell v Glasgow City Council* [34] and *Smith v Littlewoods Organisation Ltd,* noted that although the general principle in the United Kingdom is that no liability lies for "mere" omissions, an exemption to this could apply if additional factors in a case were sufficient to convert a mere omission into "a breach of a legal duty to take reasonable steps to safeguard, or try to safeguard … from harm or injury". [35]

Both were civil law cases, but the same point was further demonstrated in the (criminal) case of *Willoughby,* [36] where the additional facts taken "in conjunction" with the defendant's ownership of the property, were sufficient to give rise to a duty of care.

In *Evans,* there was one "disputed fact" [37] --the supply of the drugs to Carly, and a number of "undisputed facts". [38] Although the supply issue was disputed, ***Crim. L.R. 637*** without her involvement in that, the other undisputed facts would not have been sufficient by themselves to give rise to a duty on the appellant to act. Taken together, however, a duty did arise. [39]

Lord Judge C.J. also adopted Lord Diplock's reasoning in *Miller* that "conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created" should incur criminal liability and that:

"I cannot see any good reason why, so far as liability under the criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk … provided that, at the moment of awareness, it lies within his power to take steps … to … prevent or minimise the damage …". [40]

Finally, Lord Judge C.J. confirmed that deciding on the existence of a duty was a judicial and not a jury function, [41] which, although wrongly left to the jury in this case, was "not to be criticised" and did not render the conviction unsafe because the trial judge had simply followed *Willoughby* as it was then understood. To make it easier in the future though,

"in more complex cases, and assuming that the judge has found that it would be open to the jury to find that there was a duty of care, or a duty to act, the jury should be directed that if facts a + b and/or c or d are established, then in law a duty will arise, but if facts x or y or z were present, the duty would be negatived". [42]

Criticisms of the judgment and decision

The court's reliance on the *Miller* principle in the *Evans* case is problematic for a number of reasons. As has been said, the duty is an "exceptional category of duty", [43] the full reach and implications of which have not been comprehensively analysed. To begin with, and bearing in mind that *Miller* was a case on criminal damage, until *Evans* there was no certainty that it could be extended to homicide cases. Moreover, because any liability is omissions-based, there is always going ***Crim. L.R. 638*** to be a problem with proving causation [44] in light of both the voluntary self-administrating intervention by the "customer" and in deciding when the duty arises.

Despite these problems the use of the *Miller* principle in drugs cases has nonetheless been advocated by a number of academics [45] and it was embraced by the Court of Appeal in *Evans*. Unfortunately, however, the court did not adequately address nor satisfactorily explain the application of the *Miller* principle to a drugs homicide case. As to the mental element, and avoiding a full discussion of the implications, Lord Judge C.J. simply said that: "The mens rea necessary for arson was … recklessness. But the reasoning in the decision does not exclude liability where a different mens rea is required." [46]

On causation, what *Miller* does is to say that a person who creates a danger subsequently falls under a duty to alleviate or negate the effects of the danger which he created. What *Miller* does not say is when that duty arises. Lord Diplock's dictum from *Miller,* as quoted above by Lord Judge C.J., explains when the duty is breached (i.e. upon awareness) but not when it arises, although it clearly arises sometime between the creation of the danger and the awareness of its effects. If the duty arises upon creation of the danger [47] --and in drugs cases this could arguably be when the drugs were supplied [48] --the customer's subsequent intervening voluntary act of self-injection could break the chain of causation. This is the difference between *Miller* and drug homicide cases; in *Miller* there is no third person present who can potentially break the chain. In drug homicide cases, the distinguishing factor is the presence and voluntary self administration of the drugs by the customer. But this factor is not mentioned in *Evans* because it would, of course, lead to an unwanted result. [49]

The alternative, and, it has to conceded, easier option, is to argue that it is irrelevant when the duty arises as long as the *Adomako* criteria are present when the dealer becomes aware of the danger (i.e. after the customer self-administers the drugs and becomes ill) but does nothing to prevent it. This point was made by Christopher Clarke J. in the Court of Appeal hearing and is implicit in the Diplock passage quoted earlier. It would, however, require an unnatural reading of that ***Crim. L.R. 639*** passage in order to avoid the break in the causative chain, i.e. the "physical act" referred to therein would have to be interpreted as the failure to help and not as the original supply, because in *Miller* there was no intervening act between setting the place alight and failing to prevent the damage. In addition, it would be very limited in its application as it would only apply to dealers who stayed with their customer throughout the whole process.

The reason that this is the more favoured option is because it is a subtle method of sidestepping the potential break in the chain of causation in gross negligence manslaughter drugs homicide cases. The matter has been debated by, for example, Ormerod and Fortson who have suggested that in such situations, "[s]ince V's acts would be completed, the causation question could be circumvented" [50] and, previously, Ormerod had also commented that,

"the argument that the victim's act breaks the chain of causation may be less compelling in the context of gross negligence. In unlawful act manslaughter cases based on s.23, V's voluntary self-administration precludes the prosecution establishing this element of the s.23 offence. In gross negligence, it might be argued that the whole of D's course of conduct is in issue and that as such there is no break in the chain of causation." [51]

Certainly, looking at the whole of the defendant's conduct enables not just acts, but also any subsequent failure to counteract the effect of those prior acts, to be taken into account [52] but, unlike the *Miller*-type situation, where there was no third party intervention between setting the place on fire and the subsequent damage, in the *Evans*-type situation one cannot avoid the fact that there is an intervention by the drug user.

The second criticism of the judgment is that the court does not acknowledge that Lloyd-Jones J.'s reliance on *Khan* and *Sinclair* as authorities for his direction to the jury that the appellant "was capable of owing a duty of care" was erroneous. In fact, the court does not even acknowledge that this was a "direction of law given to the jury". Rather, it is interpreted as a "judge's ruling" which thereby enables the court to avoid the question of whether or not it was a misdirection which would have rendered the conviction unsafe. The only matter which is interpreted as a direction to the jury (and which is accordingly analysed in the context of its being a possible misdirection) was that the trial judge left it to the jury to decide upon the existence of the duty of care. [53]

To give it credit, the Court of Appeal rightly held that this was a judicial, as opposed to a jury decision, and that in the future, judges should give more detailed directions as to what specific facts should be present in order to establish a duty of care. However, he then muddied the waters again by saying that:

Crim. L.R. 640 "In this sense, of course, the jury is deciding whether the duty situation has been established. In our judgement this is the way in which *Willoughby* should be understood and, understood in this way, no potential problems arising from article 6 and article 7 of the ECHR are engaged." [54]

Thus are the allegations of incompatibility with arts 6 and 7 of the Convention peremptorily dispensed with. There is no acknowledgment by the court that, in this case, the appellant's conviction was compromised because the decision on the existence of the duty was made by the jury after an event which, when it was committed, was not recognised as constituting a criminal offence. [55]

That this can occur at all is facilitated by the *Adomako* criteria which by their very nature enable the circumstances where a duty of care might be held to exist to be extended, [56] and, although in *Misra* [57] the Court of Appeal found that the *Adomako* criteria did comply with the requirement for legal certainty under art.7 of the Convention, this is debatable in light of the issues raised in *Evans*; as O'Doherty rightly asks, "if there is no certainty of what the law is, can it be right to impose, in hindsight, a legal duty, for which the failure to perform will lead to conviction …?" [58]

Finally, it will be recalled that the court used a combination of authorities as a foundation for claiming the existence of the duty. This has been done before in, for example, *Willoughby* and *DPP v Santa-Bermudez.* [59] However, while there is nothing inherently wrong with this, the problem is that the combination used was made up of not only criminal, but also civil law cases. This is strange when it can be seen that the Court of Appeal in *Wacker*-- a case discussed in *Willoughby,* which in turn was used as an authority in *Evans*--itself discouraged becoming "embroiled" in the civil/criminal law duty combination. [60] Indeed, Virgo has gone as far as to say that "the tortious duty of care can serve no useful function in [the context of gross negligence manslaughter] … and anyway … is inappropriate in the criminal law". [61] That the Court of Appeal did embroil itself in this way is unfortunate, but more than this, the whole case demonstrated a missed opportunity on the court's part to address adequately and fully the difficulties inherent in transferring the *Miller* creation of danger principle to drugs homicide cases.

However, despite these numerous criticisms, it is easy to understand the reasons why the Court of Appeal did uphold the conviction. Perhaps the most obvious is the need to punish the person who "deals" in drugs and who is perceived to be ***Crim. L.R. 641*** the "criminal". [62] The focus is taken away from the part played by the victim in the course of events [63] because it is repugnant to our human nature and to our sense of decency that a person who could so easily have rendered, or at least called for, help, simply did not do so. This is plainly what a person in that situation would be expected to do and, as Wilson explains, it is this

"failure to live up to our expectations which provokes [our] punitive response, not his cognition, which, as she has not *acted* against reason, requires due regard to be paid to what is fair to expect the defendant to do given the context and her general capacity to appreciate how best to acquit herself as a morally responsible human being". [64]

So, theories of moral responsibility and expectation go some way towards explaining ours, and the court's reasons for wishing to pursue this particular kind of omitting offender.

Moral responsibility and expectation

Simester argues that "the importance of the … distinction between acts and omissions depends … upon questions of moral responsibility", [65] i.e. that although there is no legal obligation to assist someone in peril, both individual and social moral values would suggest that we should do so in certain circumstances. The question which then arises, of course, is whether the law can, and should, enforce morality. Wilson points out that "within the utilitarian tradition it is generally argued that punishment is not justified as a mechanism for enforcing … morality", [66] while in response to the utilitarian argument, Honoré claims that the law should enforce morality because, albeit we may not owe a universal duty towards everyone, we do have obligations towards some people or groups of people because of our connection with them. [67] This would be particularly true, say, where you are the only person around when something occurs which requires some kind of intervention. That being so, Honoré says that sometimes it may be necessary for an individual to be cared for and that: "In such a case, a special duty may be imposed, even if he is ***Crim. L.R. 642*** unwilling, on the person who is best placed to render this care or management." [68] Certainly therefore, if you are the only person who is present, there is a reasonable expectation [69] that you will at least call for help because not to do so simply flouts "accepted standards of behaviour". [70]

The *Evans* case, and those like it, illustrate that, unlike the wider duties which would be imposed on strangers to help another person, there are cases, as Smith argues, which are so narrow and defined that there is a known and identifiable "single victim in serious peril who can easily be saved by one person", where to call for help would "require only minimal action, minimal cost, minimal inconvenience and minimal effort". Smith goes on, "[i]f you happen to be the one who is present, you must act because someone must, and due to circumstances, you are the only one who can act". This gives rise to what she calls a "universal positive duty" which can be enforced against a limited category of persons, where there is a "clear immediate need" to act in order to prevent harm from occurring. [71]

There is much academic support for the creation of such a duty, [72] which, as can be seen, is more limited than the more general duty of "Good Samaritanism". [73] According to Freeman, for example, this "perfect moral duty to help others in distress" arises,

"when: (a) we have the clear opportunity and are in a privileged position to give aid; (b) we have knowledge of their jeopardy and knowledge of the means necessary to relieve it; (c) we have the ability to directly relieve their distress by immediate and well-circumscribed action; and (d) we can do so at negligible risk, minimal costs, and at little inconvenience to ourselves". [74]

Crim. L.R. 643 Honoré advocates something similar with his notion of "distinct duties". These are "created by special relationships, transactions, or circumstances that distinguish the agent from the rest of the world" [75] and include situations where a person is "better placed than others to meet the need of someone dependent on him" and where one "performs a harmful or risk-creating act". [76] This is exactly the scenario envisaged in creation of danger situations, because, unlike other omission categories, the perpetrator must have carried out an act prior to the blameworthy omission. [77] This is a form of antecedent-based omissions liability which is advocated by Gross. He argues that crimes of omission can only be committed when they follow a specific prior act. In this way, "[e]ven though liability is imposed *because* something was not done, liability nevertheless is *for doing* things without doing other things". [78] These are the only omissions which Gross recognises; in his view there are no such things as "pure" omissions [79] although it is clear that they do exist and that they differ in their scope and in their impact.

An omission is obviously a non-doing of some sort, but "not all non-doings are omissions". [80] A "mere" omission, as described in *Evans,* or a "simple" omission, as it is called by Smith, [81] would be something like not complying with a statutory duty to, for example, submit the annual tax return. This has no real consequences for anyone other than the omitter himself and does not attract liability in the same way that culpable omissions do. As explained in *Smith and Hogan,* mere omissions are simply

failures to act (and are conduct crimes), while culpable omissions are those which cause a result (result crimes).[82] With simple omissions therefore, the failure in and of itself comprises the crime, whereas culpable omissions have a consequence.

A culpable omission would include Honoré's "distinct" omissions and what Smith describes as "complex"[83] omissions. These are omissions which specify something which is not done where there is some reason or expectation that that thing be done.[84] More importantly however, what differentiates these omissions from the others is that these are omissions which cause harm--or, at least, do not prevent harm--and this is, for the most part, how culpable omissions are identified. For example, Fletcher says that "the substantive difference [between the *Crim. L.R. 644* two] is that liability [for the former] does not presuppose the occurrence of harm …".[85]

Harm prevention is a consideration that is taken into account in deciding whether or not certain conduct should be criminalised. However, whereas the notion of harm is central to this aim, it is not possible to clarify what "harm" is.[86] The harm principle was initially conceived by John Stuart Mill in the context of restricting individual liberty and autonomy. In essence, his hypothesis was that everyone should be permitted to say or do whatever he wants as long as "this does not harm the interests of others".[87] Feinberg subsequently elaborated on this by defining harm as a "thwarting, setting back or defeating of an interest …".[88]

Certainly within this definition, death is a recognisable "harm" and causing someone's death--or, as occurs in omissions cases, not preventing it--is therefore seen as being the main justification for imposing punishment for the consequences of the omission, but this is by no means clear cut. Indeed, what liability should accrue to omissions and whether or not the perpetrator should be punished merely for the omission or for its consequence, has in itself been the subject of some debate. For example, arguing "from culpability, responsibility and liberty", Tadros agrees that omissions should be criminalised but that this does not mean that everyone who omits to act should be criminally responsible for the consequences of not doing so.[89] However, where the harm caused has resulted in death, it is easy to see why the omitter is seen to be criminally responsible for that death especially in drugs homicide cases where policy considerations relating to the use and misuse of drugs and its criminalisation also have a part to play. Policy factors also provide a further reason as to why the court in *Evans* felt it had to uphold Gemma Evans's conviction.

Policy

There is no doubt that the judiciary--in line with public and academic opinion--is "driven by policy to punish those involved in drug misuse"[90] even if that means departing from established authority and twisting established legal principles, as the Court of Appeal did in the two *Kennedy* appeals in 1995 and 1999 respectively.[91]
Interestingly, in the *Evans* case, Mr Huw Davies Q.C. pointed out that whether or not to impose a duty was indeed a policy decision and that other courts have already "accepted that the considerations which determine whether a duty of care exists are public policy considerations".[92] Moreover, prosecuting counsel in his submissions at the appeal stage argued that there was a good basis in policy *Crim. L.R. 645* for encouraging dealers to care for persons rather than trying to avoid detection and "saving their own skin". The Lord Chief Justice's response was to admit that, in the absence of legislation, it would be very difficult to create a criminal offence based on public policy. It is all the more surprising therefore to see that in *Wacker,* the court did accept that "public policy considerations determine whether a duty exists" and that this was acknowledged by the Court of Appeal in *Willoughby.*[93]

If policy is to be a deciding factor (albeit a hidden one) in creating a duty of care in drugs homicide cases in the future, the court must:

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• ensure that policy does not supersede settled principles of English law[94];

• be clear as to its reasons for creating a duty[95];

• balance its "judicial desire to ensure the conviction of persons who hand over drugs to others"[96] against the wider aims of the criminal law which, even for utilitarian purposes, does not "enforce good behaviour",[97] and does not "make people virtuous"[98] or "perfect"[99] (much as we might like it to); and

• consider how interventionist/paternalistic it should be where victims have voluntarily taken the risk; as O'Doherty suggests, we should perhaps let the blame lie with victims. [100] This brings us full circle back to issues of harm, autonomy and criminalisation in the omissions context and it has to be conceded that there is no real solution to this ongoing balancing exercise.

Conclusion

Gemma Evans--as Mr Ian Murphy Q.C. commented--now occupies,

"the lonely position of being the only person in this jurisdiction to be convicted of gross negligence manslaughter on the basis that as the supplier of heroin to a person who subsequently dies, she owed a duty of care to summon medical assistance to that person".

As such, and as the first gross manslaughter case where liability has been imposed on a drug "supplier", one would have expected the Court of Appeal to have produced a fuller and more detailed explanation of its reasoning without glossing over a number of the key issues in relation to the authorities used. Because of this, and although it has to be conceded that the case is arguably limited to its ***Crim. L.R. 646*** facts, the decision may nonetheless open the floodgates to finding that all drug dealers will henceforth owe their customers a duty of care in drugs homicide cases. Certainly it seems as though the courts have taken it upon themselves to make the decision as to what categories of person should or should not owe duties to others. [101]

To a large extent, that this is possible at all is because the basis for omissions liability in England and Wales is in proving the existence of the prerequisite duty. That the concept of duty has this role is not universally accepted and whether it should continue to do so is open to discussion.

One alternative to duty-based omissions liability, recommended by the Law Commission in its 2006 Report on *Murder, Manslaughter and Infanticide,* is to replace the duty requirement in gross negligence manslaughter with a causation-based reasonable foreseeability test which would ask whether it would be obvious to a reasonable person in the defendant's shoes that the conduct involved a risk of death. [102] This is known to be workable, having already been successfully employed in cases such as *Roberts,* [103] *Santa-Bermudez, Wacker* and *Lewin,* but, despite the problems associated with duty, is this too drastic a change?

A less feasible causation-based proposal has been propounded by Leavens. His proposition entails abolishing the acts/omissions distinction and looking instead at who "caused" the prohibited harm. [104] There are two problems with this. First, and as mentioned earlier, it has always been problematic to show that omissions "cause" harm and, secondly, it is only because of the existence of a duty that the causative link can then be ascertained, i.e. duty must come first otherwise, as has been argued by some of the proponents of duty-based liability, "the causative link between the inactivity and the ensuing consequence would be too remote". [105]

However, it is clear that continuing with the duty concept has caused and will continue to cause problems. One solution might be to revisit, and expand upon, the Law Commission's 1985 proposal in its Draft Criminal Code, to specify the full range and scope of existing duties. [106] Clause 20 of that document set out the relevant crimes for which a duty existed, but all it did was to propose adopting in legislative form that which already existed at common law. Perhaps it was for this reason that the clause was removed ***Crim. L.R. 647*** four years later in the Law Commission's *A Criminal Code for England and Wales,* [107] which left it to the judiciary to continue deciding whether or not a duty existed.

While on the one hand cl.20 was too narrow, there is no reason to suppose that an updated version thereof would not be able to accommodate some of the newer duties and, more importantly, to provide a more detailed exposition of their practical use. Such a move might well avoid the uncertainty which surrounds those duties created at common law [108] and would satisfy other established principles such as fair labelling [109] and legality, [110] which are threatened by the present regime.

I am immensely indebted to Mr Huw Davies Q.C. for sending me all of his papers in connection with this case, and for his permission to use those papers in any way I see fit. Following his appointment to the judiciary, the appellant's case was taken over by Mr Ian Murphy Q.C. (who had, incidentally, acted as counsel for Andrea Townsend in the Crown Court) and Mr D. Ll. Thomas to whom I am also grateful.

Footnotes

1 This is what Fletcher calls "commission by omission" liability. G.P. Fletcher, "On the Moral Irrelevance of Bodily Movements" (1994) 142 *University of Pennsylvania Law Review* 1443, 1447. More will be said about the distinction between different types of omission and their relevance below.

2 This is not the same as owing a duty of care, but generally "where there is a duty to act there is almost inevitably a duty of care". J. Herring and E. Palser, "The Duty of Care in Gross Negligence Manslaughter" [2007] Crim. L.R. 24, 37.

3 Other situations where duties arise include duties arising under statute; law enforcement duties; contractual duties; and duties arising from ownership or control of property.

4 As J.C. Smith has said: "There is no authoritative definition of the categories of person who owe a duty to another for the purposes of the law of manslaughter". Commentary on *Khan and Khan* [1998] Crim. L.R. 830, 832.

5 *Stone and Dobinson* [1977] Q.B. 354 CA (Crim Div).

6 *Miller* [1983] 2 A.C. 161 HL, per Lord Diplock.

7 See J.C. Smith's criticism of the way in which the court reached its decision in his commentary on *Miller* [1982] Crim. L.R. 526, 528.

8 So called by C. Elliott and C. De Than, "Prosecuting the Drug Dealer When a Drug User Dies: *Kennedy* (*No 2*)" (2006) 69 M.L.R. 986, 995.

9 *Lowe* [1973] Q.B. 702 CA (Crim Div).

10 *Adomako* [1995] 1 A.C. 171 HL.

11 J. Herring, *Criminal Law. Text, Cases, and Materials,* 3rd edn (2008), p.293.

12 See the rhetorical questions asked by Mr Huw Davies Q.C. in his closing speech at [64C]-[65B].

13 See, e.g. M.S. Moore, *Act and Crime* (1993), pp.28-29; O. Kirchheimer, "Criminal Omissions" (1942) 55 *Harvard Law Review* 615; E. Mack, "Bad Samaritanism and the Causation of Harm" (1980) 9 *Philosophy and Public Affairs* 230; andD.N.Husak, "Omissions, Causation and Liability" (1980) 30 *Philosophical Quarterly* 318.

14 *Kennedy* [2007] UKHL 38; [2008] 1 A.C. 269.

15 In *Kennedy* [1999] Crim. L.R. 65 and *Kennedy* [2005] EWCA Crim 685; [2005] 1 W.L.R. 2159, and setting right earlier confused authorities such as *Cato* [1976] 1 W.L.R. 110 CA (Crim Div); *Dias* [2001] EWCA Crim 2986; [2002] 2 Cr. App. R. 5; *Rogers* [2003] EWCA Crim 945; [2003] 2 Cr. App. R. 10; and *Finlay* [2003] EWCA Crim 3868. The decision has been welcomed by, for example, D.C. Ormerod in his commentary on *Kennedy* (HL) [2008] Crim. L.R. 222, 224-225 and V. Thirlaway and A. James, "Manslaughter; Causation: Supply of Drugs" (2008) 72 J. Crim. L. 203, 205 as a return to basic principles. It can be surmised that the reason for the two previous convoluted decisions which came out of the Court of Appeal were in order to satisfy policy considerations of catching and punishing drug dealers. On this point see below; *Card, Cross and Jones: Criminal Law,* 17th edn (2006), p.81; and A. Reed, "Involuntary Manslaughter--Assisting Drug-abuse Injection" (2003) 67 J. Crim. L. 431.

16 *Kennedy* [2007] UKHL 38; [2008] 1 A.C. 269 at [6].

17 In the Swansea Crown Court, *Townsend and Evans* (Indictment No.T20077250), and in the Court of Appeal, *Evans* [2009] EWCA Crim 650.

18 Andrea Townsend, Carly's mother, did not dispute this, and she did not appeal her conviction.

19 Summing up (Mendip Wordwave Transcript), pp.8E and 9A, citing *Stone and Dobinson* [1977] Q.B. 354 CA (Crim Div) and *Ruffell* [2003] EWCA Crim 122; [2003] 2 Cr. App. R. (S.) 53 as authority; *Evans* [2009] EWCA Crim 650 at [34].

20 Summing up, p.9C; *Evans* [2009] EWCA Crim 650 at [34].

21 Ruling on submission of no case to answer, pp.13-14.

22 *Khan* [1998] Crim. L.R. 830 CA (Crim Div).

23 *Sinclair, Johnson and Smith* (1998) 148 N.L.J. 1353 CA (Crim Div).

24 *Khan* [1998] Crim. L.R. 830 CA (Crim Div).

25 Although this implies that the basis of the duty between the defendant and the deceased was their relationship as near brothers, a sibling duty has never been held to exist; S. O'Doherty, "Drugs, Users and Deaths" (2002) 166 J.P.N. 681 at para.5.

26 *Sinclair* (1998) 148 N.L.J. 1353 CA (Crim Div) at p.17 of the transcript. The appeal was allowed because the trial judge had not sufficiently explained that acceleration of death had to be more than minimal (Rose L.J.).

27 *Evans* [2009] EWCA Crim 650 at [14].

28 Grounds of application for leave to appeal, para.8(8).

29 Grounds of application for leave to appeal, para.8(3); both points were raised by counsel for the appellant.

30 Grounds of application for leave to appeal, para.5(3). In deciding this legal question (by returning a guilty verdict), the jury do not have to explain or give any reasons for their decision (Grounds of application for leave to appeal, paras 10(3) and 10(4)). It is for that reason, coupled with the fact that no allegation or separate charge of supply was made in the indictment that Gemma Evans's right to a fair trial was prejudiced and art.6 was engaged.

31 Grounds of application for leave to appeal, para.5(4). Article 7 of the Convention provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." Since the jury in *Townsend and Evans* did not decide that drug dealers were a category of person who owed a duty of care until it returned its guilty verdict, it follows that Gemma Evans's conduct did not amount to a criminal offence when it was committed.

32 *Evans* [2009] EWCA Crim 650 at [49].

33 *Willoughby* [2004] EWCA Crim 3365; [2005] 1 Cr. App. R. 29 and, to a lesser extent, *Wacker* [2002] EWCA Crim 1944; [2003] Q.B. 1207.

34 *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] 2 W.L.R. 481.

35 *Smith v Littlewoods Organisation Ltd* [1987] A.C. 241 HL.

36 In *Willoughby* [2004] EWCA Crim 3365; [2005] 1 Cr. App. R. 29, the appellant had engaged the deceased victim to help him burn his public house. The deceased was killed in the ensuing explosion; *Evans* [2009] EWCA Crim 650 at [29]

37 *Evans* [2009] EWCA Crim 650 at [11].

38 The undisputed facts, set out at [12], were that Gemma Evans had remained at her mother's house throughout the incident with Carly; that she had seen the effects of the overdose and realised it was serious; and that she and her mother both understood that they were responsible for Carly's care during the night.

39 *Evans* [2009] EWCA Crim 650 at [35].

40 *Evans* [2009] EWCA Crim 650 at [23].

41 Preferring the views expressed by F. Page and D. Ormerod, "Manslaughter by Illegal Act--Gross Negligence Manslaughter" [2005] Crim. L.R. 389, 392 rather than Herring and Palser, "Duty of Care in Gross Negligence Manslaughter" [2007] Crim. L.R. 24, 28.

42 *Evans* [2009] EWCA Crim 650 at [45]. See below for discussion of arts 6 and 7 of the Convention.

43 D. Ormerod (ed.), *Smith and Hogan: Criminal Law,* 12th edn (2008), p.65. Compare Wilson's description of it being a "specialised duty of intervention" in W. Wilson, *Criminal Law. Doctrine and Theory,* 2nd edn (2003), p.87.

44 This was acknowledged by Elliott and De Than, "Prosecuting the Drug Dealer" (2006) 69 M.L.R. 986, 990-991.

45 Including M. Nkrumah, "*Kennedy* Revisited" (2008) 72 J. Crim. L. 117; R. Williams, "Policy and Principle in Drugs Manslaughter Cases" (2005) 64 C.L.J. 66, 76-77; and J.C. Smith, "Liability for Omissions in the Criminal Law" (1984) 4 L.S. 88, 94-95.

46 *Evans* [2009] EWCA Crim 650 at [24].

47 A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine,* 2nd edn (2003), p.78, say that in *Miller,* the "unintentional starting of the fire *created* a legal duty".

48 This was argued by Lord Judge C.J. at the Court of Appeal hearing in *Evans.* It was counter argued by Mr Ian Murphy Q.C. that the danger only comes to fruition when the drugs are ingested by the customer.

49 Carly's age might have proved to be an issue as she was not an "adult". However, during the Court of Appeal hearing, Lord Judge C.J. commented that Carly knew exactly what she was doing; this was a decision she had made as to how she wished to live. Also, in *Khan,* even though the victim there was only 15 years old, Swinton-Thomas L.J. said that her self-administration of the drugs did break the chain of

causation. Moreover, Lord Bingham's limiting dictum in *Kennedy* (text to fn.16 above) could arguably apply here, but, as this was the first drug homicide case where the *Miller* principle was used, the court should, at least, have done something more than merely refer to that dictum.

50 D. Ormerod and R. Fortson, "Drug Suppliers as Manslaughterers (Again)" [2005] Crim. L.R. 819, fn.54.

51 C. Barsby and D.C. Ormerod, "Case Comment. Homicide: Offences Against the Person Act 1861 s 23 …" [2003] Crim. L.R. 555, 557.

52 B. Hogan, "Omissions and the Duty Myth" in P. Smith (ed.), *Criminal Law. Essays in Honour of J.C. Smith* (1987), p.88. This is somewhat like the "continuing act" found in *Fagan v Metropolitan Police Commissioner* [1969] 1 Q.B. 439 DC. No prerequisite duty is required for an act.

53 *Evans* [2009] EWCA Crim 650 at [13]-[15].

54 *Evans* [2009] EWCA Crim 650 at [45].

55 Nor that by a legal decision having been made by the jury, art.6 was potentially breached; see fns 30 and 31 above.

56 Grounds of application for leave to appeal, para.9(2).

57 *Misra* [2004] EWCA Crim 2375; [2005] 1 Cr. App. R. 21.

58 O'Doherty, "Drugs, Users and Deaths" (2002) 166 J.P.N. 681 at para.6.

59 *DPP v Santa-Bermudez* [2003] EWHC 2908; [2004] Crim. L.R. 471, and it is better than not identifying the basis of the duty at all. See Page and Ormerod's comment in this context on *Stone and Dobinson,* "Manslaughter by Illegal Act--Gross Negligence Manslaughter" [2005] Crim. L.R. 389, 391.

60 *Wacker* [2002] EWCA Crim 1944; [2003] Q.B. 1207.

61 C. Virgo, "Reconstituting Manslaughter on Defective Foundations" (1995) 54 C.L.J. 14, 15.

62 As Norrie has said: "There is a criminal, and the purpose of the causation rules is, quite simply, to attribute responsibility to him." A. Norrie, *Crime, Reason and History,* 2nd edn (2001), p.149.

63 A. Ashworth, *Principles of Criminal Law,* 5th edn (2006), p.293, fn.219.

64 W. Wilson, "Murder and the Structure of Homicide" in A. Ashworth and B. Mitchell (eds), *Rethinking Criminal Law* (2000), p.52. Two facts from *Evans* are relevant here. First, that Carly's mother was also present throughout (but as Lord Judge C.J. said in his judgment, even the appellant's presence alone was not enough by itself to impose a duty, she had to have been found to have been instrumental in the supply as well; *Evans* [2009] EWCA Crim 650 at [35]). Secondly, one reason why drug dealers may not call for help is that they fear being caught engaging in an illegal activity; Elliott and De Than, "Prosecuting the Drug Dealer" (2006) 69 M.L.R. 986, 991.

65 A.P. Simester, "Why Omissions are Special" (1995) 1 *Legal Theory* 311. For more on moral responsibility, see also A. Ashworth, "The Scope of Liability for Omissions" (1989) 105 L.Q.R. 424, 435; W. Wilson, *Central Issues in Criminal Theory* (2002), pp.82-86; E. Weinrib, "Omissions and Responsibility" (1980) 30 *Philosophical Quarterly* 118.

66 Wilson, *Central Issues in Criminal Theory* (2002), p.92.

67 A. Honoré, *Making Law Bind* (1987), p.263.

68 Honoré, *Making Law Bind* (1987), p.127. This suggests the notion of "seclusion" raised in *Taktak* (1988) N.S.W.L.R. 226 and indeed in the case of *Russell v City of Columbia* S.E. 2d, 1989 (S.C. App.) 1989 WL 200673. However, this was specifically rejected as being a component of the duty element in *Sinclair.* In a similar vein, see Wilson's example of Eve, the wicked jailor who does not feed Adam, her prisoner, in *Criminal Law. Doctrine and Theory,* 2nd edn (2003), p.83.

69 For more on expectation generally, see Simester, "Why Omissions are Special" (1995) 1 *Legal Theory* 311; A. Leavens, "A Causation Approach to Criminal Omissions" (1988) 76 *California Law Review* 547, 574; J. Kleinig, "Criminal Liability for Failures to Act" (1986) 49 *Law and Contemporary Problems* 161, 169; and C.T. Sistare, "In the Land of Omissions: An Opinionated Guide" (1994) 14 *Criminal Justice Ethics* 26, 33. On reasonable expectation, opportunity and ability see G. Mead, "Contracting into Crime: A Theory of Criminal Omissions" (1991) 11 O.J.L.S. 147, 148.

70 Wilson, *Central Issues in Criminal Theory* (2002), p.87.

71 P. Smith, "The Duty to Rescue and the Slippery Slope Problem" (1990) 16 *Social Theory and Practice* 19, 25-38.

72 By, e.g. J. Dressler, "Some Brief Thoughts (Mostly Negative) About "Bad Samaritan' Laws" (1999-2000) 40 *Santa Clara Law Review* 971, 984; and L.H. Frankel, "Criminal Omissions: A Legal Microcosm" (1964-65) 11 *Wayne Law Review* 367, 399.

73 Much has been written about Good Samaritanism. For some examples of the literature, see J.M. Radcliffe (ed.), *The Good Samaritan and the Law* (1966); E.J. Weinrib, "The Case for a Duty to Rescue" (1980)

90 *Yale Law Journal* 247; A.M. Linden, "Rescuers and Good Samaritans" (1971) 34 M.L.R. 241*I*; E. Mack, "Bad Samaritanism and the Causation of Harm" (1980) 9 *Philosophy and Public Affairs* 230; and L. Alexander, "Criminal Liability for Omissions: An Inventory of Issues" in S. Shute and A.P. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002).

74 S. Freeman, "Criminal Liability and the Duty to Aid the Distressed" (1994) 142 *University of Pennsylvania Law Review* 1455, 1477.

75 P. Smith, "Omission and Responsibility in Legal Theory" (2003) 9 *Legal Theory* 221, 221-222.

76 T. Honoré, "Are Omissions Less Culpable?" in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (1991), p.43. [The same chapter appears in Honoré's own book, *Responsibility and Fault* (1999).]

77 Ormerod (ed.), *Smith and Hogan: Criminal Law* (2008), p. 68.

78 H. Gross, *A Theory of Criminal Justice* (1979), p.65. In a similar vein, see G. Hughes, "Criminal Omissions" (1958) 67 *Yale Law Journal* 590.

79 And he is criticised by Smith because of this: J.C. Smith, "Liability for Omissions in the Criminal Law" (1984) 4 L.S. 88, 88-89.

80 Simester, "Why Omissions are Special" (1995) 1 *Legal Theory* 311, 320, fn.33, quoting Honoré.

81 Smith, "Omission and Responsibility" (2003) 9 *Legal Theory* 221, 224-225.

82 Ormerod (ed.), *Smith and Hogan: Criminal Law,* 12th edn (2008), pp.61-62.

83 Smith, "Omission and Responsibility" (2003) 9 *Legal Theory* 221, 224-225.

84 Or as Hart and Honoré describe it, an omission is "a failure to act in some way expected or required by the norm": *Causation in the Law,* 2nd edn (1985), p.38.

85 G.P. Fletcher, *Rethinking Criminal Law* (1978), p.421.

86 D.N. Husak, *Drugs and Rights* (2002), p.162.

87 Herring, *Criminal Law. Text, Cases, and Materials* (2008), p.22.

88 J. Feinberg, *Harm to Others. The Moral Limits of the Criminal Law* (1984), p.33.

89 V. Tadros, *Criminal Responsibility* (2005), pp.207-211.

90 This reference is in the 11th edn of *Smith and Hogan: Criminal Law,* p.60 but not in the current 12th edn.

91 *Kennedy* [1999] Crim. L.R. 65 and *Kennedy* [2005] EWCA Crim 685; [2005] 1 W.L.R. 2159.

92 Grounds of application for leave to appeal, para.9(5).

93 *Willoughby* [2004] EWCA Crim 3365; [2005] 1 Cr. App. R. 29 at [20].

94 Norrie, *Crime, Reason and History* (2001), p.149.

95 See, e.g. W. Wilson, "Dealing with Drug-induced Homicide" in C.M.V. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008), especially p.195.

96 A. Ashworth, *Principles of Criminal Law,* 5th edn (2006), p.290, commenting on *Kennedy* [2005] EWCA Crim 685; [2005] 1 W.L.R. 2159.

97 Wilson, *Central Issues in Criminal Theory* (2002), p.92.

98 Dressler, "Some Brief Thoughts (Mostly Negative)" [2000] 40 *Santa Clara Law Review* 971, 989.

99 And nor should it aim to; A. McCall Smith, "The Duty to Rescue and the Common Law" in M.A. Menlowe and A. McCall Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (1993), p.55.

100 As has occurred in "duties to drunks" cases such as *Griffiths v Brown* [1999] P.I.Q.R. P131 and *Lewin v CPS* [2002] EWHC 1049; O'Doherty, "Drugs, Users and Deaths" (2002) 166 J.P.N. 681.

101 As Wilson comments: "The courts have taken on the role of filtering cases suitable for the imposition of a duty from those who are not …". *Central Issues in Criminal Theory* (2002), p.97.

102 Law Commission, *Murder, Manslaughter and Infanticide,* 2006, Law Com. No.304, cl.3.60.

103 *Roberts* (1972) 56 Cr. App. R. 95 CA (Crim Div).

104 A. Leavens, "A Causation Approach to Criminal Omissions" (1988) 76 *California Law Review* 547 and B. Hogan, "Omissions and the Duty Myth" in P. Smith (ed.), *Criminal Law. Essays in Honour of J.C. Smith* (1987).

105 *Clarkson and Keating: Criminal Law: Text and Materials,* 6th edn (2007), p.115. Those who argue for a continuation of duty-based liability include Norrie, Clarkson and Keating and Ormerod, as Editor of *Smith and Hogan: Criminal Law.*

106 Law Commission, *Codification of the Criminal Law: A Report to the Law Commission,* 1985, Law Com. No.143. See also Hughes, "Criminal Omissions" (1958) 67 *Yale Law Journal* 590, 615: "What is needed is a highly organized dissemination of information about the duties which the law imposes on those who are engaged in special fields of activity."

107 Law Commission, *A Criminal Code for England and Wales,* 1989, Law Com. No.177, and see Glanville Williams' commentary in "What Should the Code Do about Omissions?" (1987) 7 L.S. 92.

108 See text to fn.58 above.

109 The principle of fair labelling states that "the description of the offence should match the wrong done". Herring, *Criminal Law. Text, Cases, and Materials* (2008), p.17.

110 Under Dicey's Rule of Law. The particular point is made by Williams, "What Should the Code Do about Omissions?" (1987) 7 L.S. 92, 94. The principle of legality asserts that criminal offences should be defined with sufficient clarity for people to know that they will "not be breaking the law", Herring, *Criminal Law. Text, Cases, and Materials* (2008), p.11.

