Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

# omissions, negligence and endangering

Working Paper 46

Canada

# Reports and Working Papers of the Law Reform Commission of Canada

## Reports to Parliament

1. *Evidence* (December 19, 1975)
2. *Guidelines – Dispositions and Sentences in the Criminal Process** (February 6, 1976)
3. *Our Criminal Law* (March 25, 1976)
4. *Expropriation** (April 8, 1976)
5. *Mental Disorder in the Criminal Process** (April 13, 1976)
6. *Family Law** (May 4, 1976)
7. *Sunday Observance** (May 19, 1976)
8. *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada** (December 19, 1977)
9. *Criminal Procedure – Part I: Miscellaneous Amendments** (February 23, 1978)
10. *Sexual Offences** (November 29, 1978)
11. *The Cheque: Some Modernization** (March 8, 1979)
12. *Theft and Fraud** (March 16, 1979)
13. *Advisory and Investigatory Commissions** (April 8, 1980)
14. *Judicial Review and the Federal Court** (April 25, 1980)
15. *Criteria for the Determination of Death* (April 8, 1981)
16. *The Jury* (July 28, 1982)
17. *Contempt of Court** (August 18, 1982)
18. *Obtaining Reasons before Applying for Judicial Scrutiny — Immigration Appeal Board* (December 16, 1982)
19. *Writs of Assistance and Telewarrants* (July 22, 1983)
20. *Euthanasia, Aiding Suicide and Cessation of Treatment* (October 11, 1983)
21. *Investigative Tests: Alcohol, Drugs and Driving Offences* (November 10, 1983)
22. *Disclosure by the Prosecution* (June 15, 1984)
23. *Questioning Suspects* (November 19, 1984)
24. *Search and Seizure* (March 22, 1985)
25. *Obtaining Forensic Evidence* (June 12, 1985)
26. *Independent Administrative Agencies: A Framework for Decision Making* (October 23, 1985)

## Working Papers

1. *The Family Court** (1974)
2. *The Meaning of Guilt: Strict Liability** (1974)
3. *The Principles of Sentencing and Dispositions** (1974)
4. *Discovery** (1974)
5. *Restitution and Compensation** (1974)
6. *Fines** (1974)
7. *Diversion** (1975)
8. *Family Property** (1975)
9. *Expropriation** (1975)
10. *Limits of Criminal Law: Obscenity: A Test Case* (1975)
11. *Imprisonment and Release** (1975)
12. *Maintenance on Divorce** (1975)
13. *Divorce** (1975)
14. *The Criminal Process and Mental Disorder** (1975)
15. *Criminal Procedure: Control of the Process** (1975)
16. *Criminal Responsibility for Group Action** (1976)
17. *Commissions of Inquiry: A New Act** (1977)
18. *Federal Court: Judicial Review** (1977)
19. *Theft and Fraud: Offences* (1977)
20. *Contempt of Court: Offences against the Administration of Justice* (1977)
21. *Payment by Credit Transfer* (1978)
22. *Sexual Offences** (1978)
23. *Criteria for the Determination of Death** (1979)
24. *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons* (1979)
25. *Independent Administrative Agencies* (1980)
26. *Medical Treatment and Criminal Law* (1980)
27. *The Jury in Criminal Trials** (1980)
28. *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982)
29. *The General Part: Liability and Defences* (1982)
30. *Police Powers: Search and Seizure in Criminal Law Enforcement** (1983)
31. *Damage to Property: Vandalism* (1984)
32. *Questioning Suspects* (1984)
33. *Homicide* (1984)
34. *Investigative Tests* (1984)
35. *Defamatory Libel* (1984)
36. *Damage to Property: Arson* (1984)
37. *Extraterritorial Jurisdiction* (1984)
38. *Assault* (1985)
39. *Post-seizure Procedures* (1985)
40. *The Legal Status of the Federal Administration* (1985)
41. *Arrest* (1985)
42. *Bigamy* (1985)
43. *Behaviour Alteration and the Criminal Law* (1985)
44. *Crimes against the Environment* (1985)
45. *Secondary Liability* (1985)

The Commission has also published over seventy Study Papers on various aspects of law. If you wish a copy of our catalogue of publications, please write to: Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario K1A 0L6, or Suite 310, Place du Canada, Montréal, Québec, H3B 2N2.

* Out of print. Available in many libraries.

# OMISSIONS, NEGLIGENCE AND ENDANGERING

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
K1A 0L6

or

Suite 310
Place du Canada
Montréal, Québec
H3B 2N2


Catalogue No. J32-1/46-1985
ISBN 0-662-54082-4

Law Reform Commission
of Canada

Working Paper 46

# OMISSIONS, NEGLIGENCE AND ENDANGERING

1985

# Commission

Mr. Justice Allen M. Linden, President
Mr. Gilles Létourneau, Vice-President
Ms. Louise Lemelin, Q.C., Commissioner
Mr. Joseph Maingot, Q.C., Commissioner
Mr. John Frecker, Commissioner

## Acting Secretary

Harold J. Levy, LL.B., LL.M.

## Co-ordinator, Substantive Criminal Law

François Handfield, B.A., LL.L.

## Principal Consultant

Patrick Fitzgerald, M.A. (Oxon.)

## Consultants

Lita Cyr, LL.B.
Donna White, B.A., LL.B.

# Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Canada
K1A 0L6

# Table of Contents

# Introduction

This Paper is a follow-up to Working Paper 29. That Paper recommended rules on criminal liability and general defences for a new Criminal Code. Subsequent consultations and our later work on vandalism and homicide showed the need for further exploration of three particular topics — omissions, negligence and dangerous conduct falling short of actual harm.

Each of these topics falls outside the mainstream of our criminal law. Traditionally, that law dealt with acts done with "malice" and causing harm to persons or to property. It focused on malfeasance rather than non-feasance, on intent and recklessness rather than carelessness and on damage rather than danger.

Of course there were exceptions. Homicide, for example, could be committed not only by an act but also in certain circumstances by an omission. It could also be committed not only with intent and recklessness but also by gross or criminal negligence. And there were other crimes, for example, incitement and attempt, which focused less on actual injury than on risk and danger.

The scope and rationale of these exceptions, though, is hard to determine. No clear guidance emerges from our present *Code* or from the common law that underpins it. Apparently, the law in question results more from history than principle.

Clearly, however, such matters need treatment in terms of principle. A fully rational code of criminal law can only be drafted after full exploration of the basis and extent of crimes of omission, negligence and endangering. Such exploration is the object of this Paper.

# CHAPTER ONE

# Omissions

Omissions were briefly discussed in Working Papers 29, *The General Part: Liability and Defences*, and 33, *Homicide*. In those discussions we noted the general principle that criminal liability attaches to acting rather than not acting — malfeasance rather than non-feasance. At the same time we remarked that exceptionally such liability can attach to non-feasance which the law looks on as failing or omitting to act — not acting when there is a duty or an obligation to perform the act in question.

In that regard we made three recommendations: (1) that no criminal liability should be incurred by a person who is *unaware* of the circumstances giving rise to the duty to act; (2) that no such liability should be incurred except on account of failure to perform a *legal* duty; and (3) that the legal duties spelled out at the beginning of Part VI of the present *Criminal Code* (Offences against the Person and Reputation) should, because of their more general application, be *transferred* to the General Part.

This Paper now seeks to establish the rationale for the general principle, to explain the basis for allowing some crimes of omission and to formulate rules regarding positive duties.

## I. Rationale for Common Law Reluctance on Not Acting

In principle, our criminal law — whether in the present *Code* or in the common law preceding it — has always been concerned with doing rather than not doing.[1] As has often been said, at common law, "not doing is no trespass." Murder consists in killing and not in letting die; arson consists in setting fire to and not in allowing to burn; and theft consists in taking property and not in its non-restoration to its owner. The law requires me not to hurt my neighbour, rather than to love him — it does not make me my brother's keeper.

Now why should not criminal law treat acting and not acting in the same way? Why should not killing and letting die both qualify as culpable homicide? Why should not setting fire to and letting burn both qualify as arson? And why should not taking property and non-restoration of it to the owner both qualify as theft?

1. J. Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960), p. 171; S. Milsom, "Not Doing Is No Trespass: A View of the Boundaries of Case," [1954] *Camb. L.J.* 105.

One reason sometimes suggested is the lack of obvious links between not acting and resulting harm.[2] In the case of a killing, given that all the facts are known, it will be fairly clear who did it, where he did it, when and how he did it. In the case of letting die, these things are far less obvious. In many instances we could well ask: (1) Why impute the letting die to this person rather than that person or anyone else whose intervention could have saved the victim's life? (2) Did the letting die take place where the victim was or where the defendant was? (3) Did it happen at the time of the death or at some earlier time when intervention was a possibility? (4) Finally, how did it occur? As Fletcher points out, paraphrasing *Anna Karenina*,[3] every person who kills does so in a different manner, but all those who "let die" do so in the same way. In short, the link between non-feasance and resulting harm is often far from clear — there is often little to connect the "non-doer" clearly with the victim.

This raises the question of causation.[4] Except where the law expressly criminalizes not acting in itself, criminal liability for not acting requires a causal link between it and some prohibited harm. The not acting must bring about the harm forbidden by some result-crime such as murder.

But what is a cause? By lawyers it is often viewed as a mere necessary condition — a cause of X is anything *but for which* X would not have happened. This view, however, runs clearly counter to our ordinary intuitions. To take the parable of the Good Samaritan, it would hold that the sufferings of the man who fell among thieves were caused not only by the latter but also by anyone and everyone who could have helped him and did not do so, whether or not they knew about his injuries — you can cause something unwittingly as well as wittingly. Ordinarily, however, we would not go that far.

In ordinary discourse, "cause" has a different meaning. It is used to denote a necessary condition singled out as unusual or abnormal in the circumstances.[5] If a fire breaks out in a store-room, the cause is taken to be some abnormal factor such as a spark[6] from a shorting electric cable and not such normal factors as the presence of

---

2. Best discussion in G. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), p. 602. For further reading see: T. Benditt, "Liability for Failing to Rescue" (1982), 1 *Law and Philosophy* 391; H. Beynon, "Doctors As Murderers," [1982] *Crim. L.R.* 17; J. Feinberg, "The Moral and Legal Responsibility of the Bad Samaritan" (1984), 3 *Justice Ethics* 56; H. Gross, "A Note on Omissions" (1984), 4 *J. Legal Stud.* 308; A. Linden, *Canadian Negligence Law* (Toronto: Butterworths, 1972), p. 216; A. Linden, *Canadian Tort Law* (Toronto:Butterworths, 1982), p. 368; A. Linden, "Rescuers and Good Samaritans" (1972), 10 *Alta. L. Rev.* 89; A. Linden, "Tort Liability for Criminal Nonfeasance" (1966), 44 *Can. Bar Rev.* 25; R. Lipkin, "Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue" (1983), 31 *U.C.L.A. L. Rev.* 252; J.C. Smith, "Liability for Omissions in the Criminal Law" (1984), 4 *J. Legal Stud.* 88; E. Weinrib, "The Case for Failing to Rescue" (1980), 90 *Yale L.J.* 247; A. Woozley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983), 69 *Va. L. Rev.* 1273.

3. Fletcher, *supra*, note 2, p. 601.

4. Fletcher, *supra*, note 2, pp. 588-602; H. Hart and A. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1956); H. Hart and A. Honoré, "Causation in the Law" (1956), 72 *L.Q. Rev.* 58, pp. 260 and 398.

5. Hart and Honoré, *Causation in the Law*, *supra*, note 4, p. 31; Fletcher, *supra*, note 2, p. 595.

6. Hart and Honoré, *Causation in the Law*, *supra*, note 4, p. 32.

oxygen. By contrast, if a fire breaks out in a vacuum chamber used for monitoring electric sparks, the cause would be the unusual presence of oxygen seeping in by accident and not the sparks whose presence was fully intended and expected in that situation.

"Cause" also is applied to deliberate human actions. Now in most situations, action tends to be the abnormal feature and hence a causal factor, whereas inaction tends to be the normal feature and hence a mere necessary condition. Action interferes with the *status quo* and makes a difference; inaction leaves things as they are and makes no difference. This is why the sufferings of the traveller in the parable would normally be taken to be caused by the actions of the thieves, not the inaction of the passers-by. Causally, harm is more clearly linked to interference than non-interference.

Sometimes, however, non-interference is itself abnormal. In certain circumstances we would expect and perhaps even require a bystander to intervene, and would regard non-intervention as abnormal and hence a causal factor. If a small child drowns in a bath-tub while its mother stands by doing nothing, the death can clearly be attributed to her non-intervention. Such inaction, both in and outside the law, counts as a *failure* or *omission* — not doing what morally or legally, as the case may be, one ought to do.

Here law and morality do not always go hand in hand. An omission may well be immoral without being criminal. Suppose the child in the bath-tub dies not because of the non-intervention of its mother but the non-intervention of some unrelated bystander. Morally, that bystander would be held to blame. Under our law, by contrast, he commits no crime, tort or other legal wrong.[7] "The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal."[8]

This legal tenderness towards omissions has been defended on several grounds. In the first place, it is contended, any other view would lead to vagueness and uncertainty. If the law prescribed "rules of beneficence,"[9] imposed a positive duty to rescue and

---

7. J.F. Stephen, *A Digest of the Criminal Law*, 4th ed. (London: MacMillan, 1877), p. 212; Fletcher, *supra*, note 2, p. 584; Hall, *supra*, note 1, p. 195.

8. *R.* v. *Miller*, [1983] 1 All E.R. 978 (H.L.), p. 980, *per* Lord Diplock.

9. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1823), pp. 322-3:

> In many cases the beneficial quality of the act depends essentially upon the disposition of the agent; that is, upon the motives by which he appears to have been prompted to perform it: upon their belonging to the head of sympathy, love of amity, or love of reputation; and not to any head of self-regarding motives, brought into play by the force of political constraint: in a word, upon their being such as denominate his conduct *free* and *voluntary*, according to one of the many senses given to those ambiguous expressions. The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him? This accordingly is the idea pursued in the body of the work.

made non-intervention tortious and criminal, then in any given case, argued Macaulay,[10] the duty could be quite uncertain. If a surgeon is the only person qualified to perform a life-saving operation, must he perform it any and every time he can, regardless of his own personal inconvenience — "What is the precise amount of trouble and inconvenience which he is to endure?"[11] To avoid this difficulty, Macaulay claimed, the law "must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible."[12]

Vagueness, however, is not the whole story. A "rule of beneficence" requiring *reasonable efforts* to assist those in danger would fit in comfortably with the various already existing legal rules concerning reasonable care, reasonable force, reasonable time and so on. As we have pointed out elsewhere, such standard-setting rules are no strangers to the common law.[13]

More significant is the matter of liberty. The most common argument, says Fletcher,[14] for distinguishing between acts and omissions in moral and legal theory is that penalizing omissions raises a more acute problem of circumscribing liberty than does punishing affirmative acts. As proponents of individualism and the minimal state argue, to prevent one man from harming another is little restriction on his liberty, but to make him serve another, even temporarily, is like making him a slave. To forbid a positive act such as killing closes off one avenue of conduct but leaves all others free; to forbid an omission such as letting die closes off all other avenues till that one has been taken — nothing else can be done till the death has been prevented. A criminal law meant to serve the interests of society must reflect that the freedom of that society's members is one of those interests and must strike a balance between the interests of those to whom good is to be done and the liberty of those required to do that good.

Without subscribing fully to the "minimal state"[15] approach, we can acknowledge a difference between interference with the rights of others and failure to allocate goods and services to others. Killing interferes with another's rights; refusal "to strive officiously to keep alive" does not interfere with the individual's rights but merely fails to allocate goods and services to him.[16] The law restricts itself to saying: "Do not harm others — do not worsen their lot in life," and refrains from adding "and do good to others — go and improve their lot." It leaves such altruism to volunteers or

10. Hall, *supra*, note 1, p. 191; see also Bentham, *supra*, note 9, p. 313; H. Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), pp. 27-9.

11. Hall, *supra*, note 1, p. 191.

12. *Ibid.*

13. Law Reform Commission of Canada, *The General Part: Liability and Defences* [Working Paper 29] (Ottawa: Minister of Supply and Services Canada, 1982), pp. 87 and 99.

14. Fletcher, *supra*, note 2, p. 602; P.J. Fitzgerald, *Criminal Law and Punishment* (Oxford: Clarendon Press, 1962), p. 96.

15. M. Levin, "A Hobbesian Minimal State" (1982), 11 *Phil. & Pub. Affa.* 338; see generally, R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

16. Fletcher, *supra*, note 2, p. 603; J. Rawls, *A Theory of Justice* (Massachusetts: Belknap Press of Harvard University Press, 1971).

else to private arrangement usually through the law of contract. By this approach it serves to maximize the liberty of the individual.[17]

Liberty alone, however, can hardly be a total justification. Maximizing liberty, it could be contended, was justifiable in an earlier era when entrepreneurship was at a premium, when *laissez-faire* was the prevailing ideology and when conventional wisdom was that if you want another to do you good you have to pay him, but not in these days when people are more interdependent, when consumers have to rely on suppliers' expertise and when everyone is plugged into complex interlocking systems of transport, utilities and so on. Today in Canada, as in all similar countries, everyone must to some extent become his brother's keeper.

This said, reason remains for legal caution regarding omissions, on two counts. First, acts differ from omissions in that there is usually a clearer personal relationship between an agent and his victim than between an omitter and his would-be beneficiary. If X kills Y, he wrongs a victim who is clearly identifiable and standing in a personal relationship with him.[18] If he merely refrains from helping people in need, he fails to benefit an indefinite number of people who are neither identifiable nor standing in any clear relationship with him. For this reason morality, let alone the law, must leave us to choose whom we help and where and how we help them.

There is, however, a more fundamental reason for legal caution as to omissions. If everyone were forced to better the lot of anyone whenever he could, then just as Mencken's puritan was haunted by the constant fear that somewhere, somehow, someone might be happy, so each of us would be continually distracted from his own life-plan by the need to go doing good to others — none of us could live a life of his own.[19] Yet is this not what being a human being is? As Weinrib observes:

> The requirement of aid assumes that there is some other person who has at least a minimal core of personhood as well as projects of his own that the altruist can further. In a society of perfect and general altruism, however, any potential recipient of aid would himself be an altruist, who must, accordingly, subordinate the pursuit of his own projects to the rendering of aid to others. No one could claim for his own projects the priority that would provide others with a stable object of their altruistic ministrations. Each person would continually find himself obligated to attempt to embrace a phantom.[20]

For these reasons we conclude that the general common law approach is sound. There should in general be no criminal liability for omissions.

## RECOMMENDATION

**1. That in general there be no criminal liability for not acting.**

---

17. Weinrib, *supra*, note 2, pp. 168-79.
18. Woozley, *supra*, note 2, pp. 1278-89.
19. Lipkin, *supra*, note 2, pp. 275-93.
20. Weinrib, *supra*, note 2, p. 282.

## II. Basis for Exceptional Crimes of Not Acting

Exceptionally, the common law imposed criminal liability for omissions.[21] It did so in three cases. One is where the conduct is not really not acting but rather part of some wider course of acting — what has been termed "pseudo-nonfeasance." Another is where the not acting is expressly designated by the law as an offence — a specifically prohibited omission. The third is where prohibited harm results from an omission to perform a legal duty — what has been called "commission by omission."

### A. Not Acting within a Wider Course of Acting

Acts and non-acts are not always easily distinguishable. In *Fagan* v. *Metropolitan Police Commissioner*, D, directed by P, a policeman, to park nearer the kerb, accidentally drove his car onto P's toe. In reply to P's remonstrations, D then switched off the ignition and refused to move. Charged with assault, D argued that there was no *actus reus* — when applying force he acted unintentionally and when he did have an intention, he in fact did nothing — he merely did not remove the car. The appeal court divided on the issue. Two judges found him guilty because his keeping the car on P's toe was an *actus reus*. One would have acquitted him because the application of force was unintentional and D's intentional keeping of the car where it stood was simply not acting.

As was said in Working Paper 29, *The General Part: Liability and Defences*,[22] in such a case the problem cannot be solved by seeking the definitive description of D's act. Acts do not come neatly labelled — "An act has no natural boundaries" — so the description must depend ultimately on context and on policy. So, while legal theorists have sometimes sought answers to such problems in scholastic definitions of "act" and thereby helped to complicate the learning on *actus reus*, the best approach is to inquire whether D's conduct in its overall context should be assimilated to doing nothing and not penalized or should be assimilated to doing something and counted as assault.

The fact is that many instances of not acting may more appropriately be looked on as ways of acting and many acts as ways of not acting. Many cases of not acting can be regarded as spurious non-acts — as pseudo-nonfeasance. Conversely many acts can be regarded as spurious acts — as pseudo-feasance.

---

21. Weinrib, *supra*, note 2, p. 251; Fletcher, *supra*, note 2, pp. 422, 589, 628 and 825.

22. *Supra*, note 13, pp. 180-2.

(1) Spurious Non-Acts: Pseudo-Nonfeasance

Examples of pseudo-nonfeasance suggested by Fletcher are: a driver failing to turn on his lights, a railroad switchman failing to keep a lookout and a surgeon failing to remove a sponge from a patient at the end of an operation.[23] Though each of these examples could be regarded as not doing something, a more appropriate way of looking at them is as a wrongful or improper way of carrying on some wider activity, namely, the activity of driving, manning the railroad signals and performing surgical operations; for each failure is embedded in a larger activity which then turns out to be performed improperly, and converted into a hazard.

In our view, one important instance is non-rectification of a dangerous situation by its creator. This was in fact what happened in *Fagan* and also in *Miller*.[24] Having accidentally started a fire, Miller later discovered what he had done, but then took no steps to extinguish it. Convicted of arson, he argued that he had not knowingly set fire to the property, that he had merely omitted knowingly to put it out and that arson could not be committed by such omission. Affirming his conviction, the House of Lords held that the creator of a danger must try to minimize the harm resulting from it — he had a positive duty to counteract the peril he himself has caused. There is

> ... 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 that offence.[25]

Now the problem posed in both these cases could be solved in two different ways. The problem is that what each defendant could be blamed for — the thing he had *mens rea* for — was not acting (not removing the car, not putting the fire out), and causing harm by not acting is no offence unless there is a legal duty to act. Accordingly, the problem could be solved by holding, as was done in *Miller*, that the creator of a danger has a legal duty to act to minimize the harm he caused and that failure to perform it can result in liability for an omission; or it could be solved, as suggested in *Fagan*,[26] by holding that the accused's behaviour is not to be divided artificially into discrete bits of acting and not acting but rather is to be considered as one continuous course of acting.

Each solution has its attractions. The "continuous act" approach has two advantages. It chimes in partially with common sense. Would we not say that "of course Fagan continued the assault?" It also saves addition to the list of legal duties which are so far recognized and which prescribe prevention of harm primarily to persons. The "duty" approach has also two advantages. It accords with the ordinary moral intuitions

23. Fletcher, *supra*, note 2, p. 586.

24. *Fagan* v. *Metropolitan Police Commissioner*, [1968] 3 All E.R. 442; *R.* v. *Miller*, *supra*, note 8.

25. *R.* v. *Miller*, *supra*, note 8, p. 981.

26. *Fagan* v. *Metropolitan Police Commissioner*, *supra*, note 24.

that it is up to those who cause harm, albeit unwittingly, to try and counteract it. In addition, it spares us having to worry about the fact that part of the accused's conduct that is intentional is in reality inaction.

On balance we feel these latter advantages outweigh the former and make the "duty" approach preferable to the "continuous act" approach. We therefore consider that: first, when someone creates a dangerous situation, wrongfully or otherwise, he should be under a duty in criminal law to take reasonable steps to rectify the situation; second, when someone without causing a dangerous situation has control over it, he should be under the same duty; but third, otherwise it should be left as a judgment call for the trier of fact to decide whether a piece of inaction embedded in a wider positive act be treated as omission or act — no automatic application of some codified formula will really solve the problem.

(2) Spurious Acts: Pseudo-Feasance

Less obvious, but equally important, may be cases of spurious acts — "pseudo-feasance." Suppose a person is trying to avert some harm, for example, put out a dangerous fire. Eventually, for one reason or another, he decides to abandon the endeavour. He may do this by simply ceasing to pour more water on the flames — simply not doing anything more. On the other hand, if using a hose-pipe, he will in all probability turn off the water — a positive act. But is there any real difference between the two situations? Are both in reality not cases of non-continuance? In other words, is the act in the second example not embedded in the larger non-act or non-feasance of not carrying on the fire fighting?

The problem of pseudo-feasance is particularly important with cessation of medical treatment. Sometimes such cessation consists in mere non-continuance of the treatment; sometimes it involves a positive act of discontinuance. How far should the two be differently regarded?

A clear and unsophisticated example, suggested by Helen Beynon, is provided by the "drip."

> The drip, as its name implies, is used to introduce vital fluids into patients by gravitational flow from a suspended bag from which a tube is inserted nasally or intravenously. As well as helping patients who have a very good chance of full recovery from their complaint, the drip may also sustain life in patients who are desperately ill and who will never make any real recovery. Of course the crucial point for present purposes is that the bags supplying the fluids empty themselves and need to be replaced. It may be readily surmised therefore that a decision to discontinue the use of a drip may be put into effect *either* by withdrawing the tube from the patient's body *or* by failing to replace an emptied bag of fluid. It will often in fact be pure chance which method of discontinuing the drip is adopted. For, although it is a doctor's job to set up a drip, dismantling a drip is a nurse's job, and a busy nurse may well let the bag remain empty for some time before removing the tube. In the case of

> an intravenous drip, after a mere one hour's delay the patient's own bodily processes will have ensured that the "act" of removing the tube can have no causal efficacy, since in that period the tube will have become occluded by blood clots, so that if it is desired to continue the drip after all a new one will have to be set up.[27]

How, then, should discontinuance of the drip be characterized? As an act if the tube is removed but as a non-act if the bag is simply not replaced? Or should the law avoid a distinction so smacking of artificiality?

In his discussion of omissions, Fletcher[28] warns against viewing the difference between act and omission as simply a difference between moving and not moving. Rather, especially as regards the criminal law, the difference is between harming and not helping. Now discontinuance of treatment, for example, the "drip," however effected, surely falls not under harming but rather under not helping — a non-act which can only result in liability if there is a duty to continue treatment. The wider non-act surely subsumes the narrower act of tube disconnection which otherwise could result in liability regardless of the existence of a duty of continuance. This approach appropriately assimilates different methods of cessation of treatment and also appropriately distinguishes between tube disconnection as part of cessation of treatment and tube disconnection by a third party without any authority in the matter — the latter's act is in no way embedded in a larger non-act.

Here too, just as with pseudo-nonfeasance, it will ultimately be a judgment call. Triers of fact will have to decide in the circumstances whether to look on the act in question as a simple act or as part of a wider piece of not acting. In so deciding, they will have to rely on common sense rather than automatic application of some general formula.

**RECOMMENDATION**

**2. That a person who creates or is in control of a danger should have a duty to take reasonable steps to prevent harm to others therefrom.**

## B. Non-Acts Explicitly Prohibited As Omissions

Some non-acts have been specifically defined as crimes of omission by law. The best-known common law examples were misprision of treason and felony[29] — failure to report a treason or a felony of which one was aware. A well-known *Criminal Code* example is failure, without reasonable excuse, by a motorist to provide a breath sample on request, contrary to subsection 234.1(2).

---

27. Beynon, *supra*, note 2, pp. 20-1.
28. Fletcher, *supra*, note 2, pp. 420-6.
29. J.C. Smith and B. Hogan, *Criminal Law*, 4th ed. (London: Butterworths, 1978), p. 802.

In these cases, the law provides *original* liability for not acting. The non-act itself is what incurs such liability. Contrast the position of the third sort of non-act, discussed below.

Explicit criminal omissions call for no special provision. Where criminal law expressly penalizes a specific omission, liability for it is obvious and automatic. At one and the same time, the law prescribes a duty to act and proscribes non-performance of that duty as a criminal omission. Suffice it to say that the reasons which led common law to treat omissions gently should caution legislators to do the same. A criminal code should always concentrate, as does our present *Code*, on positive actions.

## C. Non-Acts Causing Result-Crimes: Commission by Omission

"Commission by omission" as it is called by civilian lawyers, is the commission of a result-crime by failure to perform a legal duty.[30] As we saw earlier, the harm prohibited by such a crime may be imputed legally to not acting where the act in question is required by law. A child's death by starvation, for instance, could be imputed to its parents' failure to feed it because the latter have a legal duty to provide it with the necessaries of life. Such failure would make them guilty of a crime of homicide.[31]

Now commission by omission involves *derivative* liability for not acting.[32] Whether or not the omission itself attracts liability, in commission by omission it is the causation of harm by the omission that qualifies as an offence. In the starvation situation mentioned above, the failure to provide necessaries of life to one's child, though also a crime in its own right, becomes, when causing death, the more serious crime of homicide.

Now since the most conspicuous result-crimes are homicides, it was within this context that the common law developed rules imposing positive duties. Those rules were then included by Stephen[33] as a preface to his draft mini-code on homicide. Later expansion of that draft into a complete code, known as the English Draft Code, kept them in the homicide chapter. In consequence, our *Criminal Code*, based largely on the English Draft Code, retains them in the same location — unfortunately, as pointed out in Working Paper 33 on *Homicide*, because they involve general principle more appropriate for the General Part.

30. G.H. Gordon, *Criminal Law of Scotland*, 2nd ed. (Edinburgh: W. Green, 1978), p. 61.

31. *Gibbins and Proctor* (1918), 13 Cr. App. Rep. 134.

32. Fletcher, *supra*, note 2, p. 581.

33. Stephen, *supra*, note 7.

At common law such duties fell into two categories. Some stemmed from natural relationships — a father was bound to provide necessities for his children of tender years. Others arose from voluntarily assumed relationships — a doctor was bound to provide medical treatment for his patients.[34]

Our *Criminal Code* has gone still further. It has imposed: (1) a "necessaries of life" duty on parents, foster parents and guardians towards children under sixteen, on spouses towards each other and indeed on anyone, given certain conditions, to another person under his charge; (2) a duty of reasonable knowledge, skill and care on those undertaking to administer surgical or medical treatment; and (3) a general duty on anyone undertaking an act to do it if its omission would endanger life.

Clearly the *Code* has usefully extended common law in several respects. It has, in effect, widened the notion of "parents"; it has clarified the age of the children to whom the duty is owed; it has created a general duty owed to anyone in one's charge; it has specified the duty of care of doctors and the like; and, it has added the universal duty of completing acts where non-completion might be dangerous.

Despite all this, the *Code* still leaves room for uncertainty. Is the parental duty owed to children under fifteen who have voluntarily left home, who are living with the other parent or who are for some other reason no longer under the parent's charge? Does the spousal duty still continue between couples no longer living together? Does "surgical and medical" treatment cover nursing as well as "doctoring"?

What is more, the *Code* has lost the basic simplicity of the common law. Instead of a simple division into natural and assumed duties, it provides a complex, unduly detailed and possibly overlapping category of obligations resting on no apparent principle. The medical duty may be trebly covered — by the general duty to persons under one's charge, by the doctor's "reasonable knowledge, skill and care" duty and by the universal duty of completing undertaken acts.

Surely, however, there is at work here just one basic principle. This is that you have a duty to act for another's benefit whenever, by reason of your own *commitment*, that other is dependent on you and entitled to rely upon you so to act — when you are what certain lawyers term a "guarantor" of that other's safety.[35] As seen by common law, dependence and entitlement arise: (1) where there is a family relationship; (2) where there is an assumed relationship whereby one person has led another to rely on him; (3) possibly where there is a community of shared risks; and (4) possibly in special situations of danger.

---

34. J.W.C. Turner, *Kenney's Outlines of Criminal Law*, 19th ed. (Cambridge: Cambridge University Press, 1966), p. 124.

35. Benditt, *supra*, note 2, p. 416; Lipkin, *supra*, note 2, p. 265.

(1) Family Relationships

In our society the basic social unit is the family. Most people live in families — these serve the needs of sexual commitment, companionship and child care. Naturally, then, the family enjoys considerable autonomy and privacy, but correspondingly it bears considerable responsibilities. Society, which comes in only by way of last resort and in a supervisory capacity, leaves child care, care of spouses and so on largely to the family unit.

Accordingly, most people's basic needs, we think in our society, should be taken care of — as in fact they are — within the family context. As a society we rely on parents to look after children, spouses to look after each other and so on. This leaves children primarily dependent on their parents, and spouses primarily dependent on each other. Accordingly, because of this social factor and because of the resulting voluntary commitment implicitly involved in marriage and procreation, the moral duty ascribed to parents and spouses is also recognized by law. In such contexts, the question of acting for another's benefit is, we believe, not a fit subject to be left to contract.

The main problem here is that of defining who should be included in the family. Clearly parents and children should be. So too should spouses. But what about other relatives living in the family household, for example, brothers, sisters, step-parents, uncles and aunts, grandparents? In our view all these, if living under the same roof, should be included and could aptly be described as "those living in the same household." Finally, what about guardians, step-fathers, step-mothers and foster parents? These too would usually be covered by the same description, but they would also have a duty by reason of their having undertaken it. Of course in all cases the duty would be to do what is reasonable in the circumstances — the duty of a father in his prime, a thirteen-year-old son or an elderly grandmother may all differ in extent and gravity.

## RECOMMENDATION

**3. That the General Part specify that all people have a duty to take reasonable steps to provide necessaries of life to their spouses, to their children and to other family members living in the same household with them.**

(2) Assumed Relationships

Dependency duties can arise not only from natural but also from voluntarily assumed relationships. In such relationships one person makes a commitment, sometimes but not always through contract, which leads another to rely on him rather than on anyone else and so, to this extent, to become dependent on him. A doctor leads his patient to rely on him, a ship's captain his passengers and so on. In such cases, by mutual agreement the "client" entrusts his safety to the "professionals."

Most, but not all of these dependency duties, then, involve professionals — for example, doctors and nurses. Some will involve people of non-professional status who undertake duties, leave others dependent on them and therefore know that non-performance could cause harm. Examples are people such as baby-sitters and life-guards. These too have been entrusted with the safety of others.

By virtue of this trust, together with their own commitment, the persons assuming the undertaking shoulder a special responsibility. For now those under their care, who well might have looked to someone else for help, have become dependent on the former. Morally then, we think they have a right to rely on them and that those persons have a special duty towards them. Essentially, this duty is also recognized by law.

## RECOMMENDATION

**4. (1) That the General Part specify that all people have a duty to take reasonable steps to carry out any undertaking, gratuitous or otherwise, whose non-performance will cause serious danger to life.**

**(2) That there be no duty to carry out an undertaking to give medical treatment where such treatment is therapeutically useless or is contrary to the patient's wishes.**

### (3) Other Relationships: Community of Shared Risks

Less clear are the duties arising from joint enterprises. On principle, however, it is arguable that whenever two or more people agree to take part in a common endeavour involving risk or danger, they commit themselves to helping each other out of difficulty. As Fletcher puts it:

> ... the binding together of people to confront common risks entails reciprocal duties of aid. The common cases would be seamen going to sea, mountaineers joined in a single party, astronauts in a single space ship — these would be fairly clear cases of joint enterprises entailing reciprocal duties. It would not follow, however, that a mountaineer would be duty-bound to everyone on the mountain who might get into a dangerous situation. The range of interdependent duty is limited to those who by jointly undertaking the venture, implicitly commit themselves to each other.[36]

Clearly in such cases there is commitment, dependency and title to reliance. Clearly too, some duty of "beneficence" is recognized by morality. It may be argued that it should be also recognized by law.

---

36. Fletcher, *supra*, note 2, p. 614.

**RECOMMENDATION**

**5. That the General Part should specify that all people have a duty to take reasonable steps to provide necessary asssistance to those with whom they share in a dangerous enterprise.**

(4) Situation Duties

Duties of beneficence may also arise sometimes without commitment but simply by virtue of the situation which both parties are in and which makes one dependent on another. A person who creates a danger has a duty to do what he can to safeguard others from it. So does a person who does not himself create a danger but has control over it, and so perhaps may a person who neither creates nor has control of a danger but who can help in an emergency.

*(a) Creating a Danger*

Clearly a person who creates a danger has a moral obligation towards those exposed to it. This was the view taken by the House of Lords in *Miller*. It is also the view put forward earlier in this Paper.

*(b) Controlling a Danger*

Next, a person in control of a danger he has not created may be morally obliged to take steps to save others from it. Here too is a situation where those others are dependent on him and entitled to rely on him for their protection. If, say, X knowingly buys land with a dangerous hazard on it, the fact that he did not make it himself surely would not justify his sitting back and leaving it as a danger to others known to be likely to frequent that land. On the contrary, those others are dependent on him and entitled to rely on him to take care for their safety. Again, limited statutory recognition is found in subsection 242(2) of the *Criminal Code*, which provides that anyone leaving "an excavation on land that he owns or of which he has charge or supervision is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the excavation exists." Common law recognition is to be found in tort law concerning occupier's liability,[37] which forms a notable exception to the general principle that doing nothing is no trespass. At common law, a person occupying land is sometimes under a legal duty to take positive action for the safety of others coming on his land and failure to take such action may make him liable, if harm results, in tort. (See Recommendation 2 on page 11.)

37. Linden, *Canadian Tort Law*, *supra*, note 2, pp. 647-72; J. Fleming, *The Law of Torts*, 6th ed. (Sydney: Law Book Co. 1983), pp. 416-58.

*(c) Rescue from Danger*

More controversial is the position of the person who neither creates nor controls the danger but is best placed to protect against it. Suppose X falls into a lake and starts to drown; Y could easily save him; Y does nothing and X drowns. Is Y in breach of any moral or legal duty?

Morally, the question need only be asked for it to be answered: there is a duty to give aid and assistance. Our ordinary intuitions condemn the priest and Levite in the parable. Emergencies rendering others wholly dependent on us entitle them to rely on us for help and oblige us to give it to them. In such cases, if not in others, we think we are our brother's keeper.[38]

Notoriously, however, this is not so under our law. Case-law and legal literature make it quite clear that, absent one of the relationships or situations so far mentioned, there is no duty to act for the benefit of others. It is in general no crime, tort or other kind of legal wrong, for instance, for a mere bystander to let a drowning swimmer die. In *Miller*,[39] said the House of Lords, if "the role of the accused was at no time more than that of a passive bystander, there could have been no conviction." Neither at common law, then, nor under the *Criminal Code* does there exist a duty to rescue.

Not every criminal code, however, is so at odds with ordinary moral intuitions. The penal codes of Belgium, France, Germany, Greece, Italy and Poland, for example, all make it an offence to fail to render reasonable aid in case of danger. The Austrian code makes it a crime to fail to give help in case of an accident for which you are responsible. The Swedish code provides that when a person handling fire, explosives

---

38. Weinrib, *supra*, note 2, p. 232, said it nicely:

> An emergency marks a particular person as physically endangered in a way that is not general or routine throughout the society. An imminent peril cannot await assistance from the appropriate social institutions. The provision of aid to an emergency victim does not deplete the social resources committed to the alleviation of more routine threats to physical integrity. Moreover, aid in such circumstances presents no unfairness problems in singling out a particular person to receive the aid. Similarly, emergency aid does not unfairly single out one of a class of routinely advantaged persons; the rescuer just happens to find himself for a short period in a position, which few if any others share, to render a service to some specific person. In addition, when a rescue can be accomplished without a significant disruption of his own projects, the rescuer's freedom to realize his own ends is not abridged by the duty to preserve the physical security of another. In sum, when there is an emergency that the rescuer can alleviate with no inconvenience to himself, the general duty of beneficence that is suspended over society like a floating charge is temporarily revealed to identify a particular obligor and obligee, and to define obligations that are specific enough for judicial enforcement.

39. *R.* v. *Miller*, *supra*, note 8, p. 980.

or poison creates a danger, he commits an offence if he neglects to do everything he can to avert that danger. In the United States, the Vermont penal code makes it an offence to refuse aid to those exposed to grave physical harm.[40]

Meanwhile, in Canada, one dent is to be seen in the law's hostility to a rescue duty. The Québec *Charter*[41] provides that every human being whose life is in peril has a right to assistance and that when someone's life is in peril, everyone must come to his aid unless it involves danger to himself or another or unless there is some other valid reason not to give assistance. Admittedly, such provincial legislation does not itself create a criminal offence. On the other hand, it may render the causing of harm by its breach criminal: failure to provide necessaries to a dying common law "spouse" resulted in a homicide conviction in the Québec case of *R.* v. *Fortier*[42] — a result impossible in any of the common law provinces.

However, even in the *Criminal Code* itself there has been some acknowledgment of specific duties of assistance. Attention has already been drawn to subsections 242(1) and (2) of the *Criminal Code* concerning openings in ice and dangerous excavations on land. Note should be taken also of subsection 233(2) which makes it an offence for anyone in charge of a vehicle involved in an accident to fail "to stop his vehicle, give his name and address and, *where any person has been injured, offer assistance* ..." [Emphasis added] if the intent of such failure is to escape civil and criminal liability. These sections, of course, impose a duty of assistance in specific situations by explicit creation of an offence of omission — an omission of type B within our classification.

In defence of common law hostility to a general duty of assistance, various reasons are put forward. One is the well-known objection concerning vagueness: How much must the rescuer do and at what cost to himself? Another is the problem of identity and the lack of personal relationship between the duty-bearer and the beneficiary: Who has the duty and to whom does he owe it — to everyone he knows to be in danger? Yet another is the question of liberty: Should the law compel altruism and force one man to serve another, or should it more properly leave such matters to the law of contract?

All these questions admit of easy answers. As to vagueness, a law providing a duty to take *reasonable* steps in the circumstances to help those in danger would, as noted above, harmonize with many other laws using such standard-setting terms. As

40. *Code Pénal* (Belgium) (Brussels: Bruylant, 1975, revised to 1981), art. 422, p. 69; *Code Pénal* (France), 7th ed. (Paris: Dalloz, 1972-73), art. 63, p. 35; *The German Draft Penal Code* (South Hackensack, N.J.: Fred B. Rothman, 1966), art. 232, p. 130; *The Greek Penal Code* (South Hackensack, N.J.: Fred B. Rothman, 1973), art. 307, p. 149; *The Italian Penal Code* (Littleton, Colo.: Fred B. Rothman, 1978), art. 583, p. 199; *The Penal Code of the Polish People's Republic* (South Hackensack, N.J.: Fred B. Rothman, 1973), art. 144, p. 75; *The Penal Code of Sweden* (South Hackensack, N.J.: Fred B. Rothman, 1972), s. 10, p. 39; see generally, A. Rudzinski, "The Duty to Rescue: A Comparative Analysis" in J. Ratcliffe, ed., *The Good Samaritan and the Law* (New York: Anchor Press, 1966), p. 91.

41. See section 2 of the *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12.

42. *R.* v. *Fortier*, November 17, 1980, File No. 500-01-050-805, Superior Court, Longueil, Qué.

to identity, in clear situations of urgency there is no doubt who can assist and who needs assistance — indeed the very situation surely creates a personal, if temporary, relationship between an identifiable victim and an identifiable potential rescuer. As to the question of liberty, two things can be said. First, it will surely be seldom that one person will be called upon to forego his own freedom for the benefit of others. But second, in the "easy rescue" situations, where one person's life can only be preserved at the cost of another's small inconvenience, the community conscience would be shocked at a refusal to shoulder that inconvenience and at attempts to make such rescue the subject of a contract.

Accordingly, we think our criminal law should now go further. It should complete the journey made by common law in imposing duties on those who create a danger. It should generalize the specific duty already recognized by our present *Code* as falling on motorists involved in accidents. It should follow the example of the majority of Continental penal codes. And it should come into line with present-day moral intuitions and make easy rescue in emergencies a matter of general obligation rather than a subject for private contract. For as we said in Working Paper 26, *Medical Treatment and Criminal Law*,[43] "... the general public reasonably expects assistance when available in an emergency."

Of course, the existence of a legal duty of easy rescue could, unless care is taken by the lawmaker, face the citizen with a dilemma. He would have to choose whether on the one hand to embark on rescue, risk making matters worse, and thereby incur civil liability for negligence or even criminal liability for causing death or injury by an act of gross negligence, or on the other hand to do nothing, risk letting the victim die or suffer an injury and thereby incur criminal liability for causing death or injury by failure to perform a legal duty. To guard against this problem, there would need to be written into criminal and civil law a "Good Samaritan" provision exempting those attempting *bona fide* rescue from criminal and civil liability for negligence.

With this one caveat we would recommend the statutory enactment of a rescue duty. Remembering, as we observed, quoting Joseph Gusfield in Working Paper 26 at page 86, that "laws are statements of public policy and opinion as well as instruments for courts to implement and police to enforce. The very passage of a law is an act of public definition of what is moral or immoral," we conclude that criminal law should recognize a general duty to give reasonable aid and assistance to anyone in instant overwhelming danger.

This could be done in two different ways. The law could contain within the "duty" section of the General Part a provision creating an "easy rescue" duty parallel to the other duties there included. Alternatively it could provide within the Special Part, under "Endangering Offences" and alongside the offence of impeding rescue, a special offence of failure to provide rescue.

---

43. Law Reform Commission of Canada, *Medical Treatment and Criminal Law* [Working Paper 26] (Ottawa: Minister of Supply and Services Canada, 1980), p. 86.

On balance we favour the second alternative. The problem with the first is that it would mean that the non-rescuer would incur both too little and too much liability. Where no harm results to the person imperilled, he would go scot-free. By contrast where death results he could be liable for some form of homicide. But while the citizen may be prepared to regard the parent or doctor in such a case as guilty of homicide, we do not think him ready so to regard the non-rescuer. Meanwhile the second alternative avoids both objections. A special non-rescue offence could apply even where the person in danger escapes harm. It could also, given a suitably lesser penalty, constitute a lesser offence than homicide or causing bodily harm.

## RECOMMENDATION

**6. That the Special Part provide that everyone commits a crime who fails to take reasonable steps to assist another person whom he sees in instant and overwhelming danger, unless he is incapable of doing so without serious risk to himself or another or there is some other valid reason for not giving assistance.**

# CHAPTER TWO

## Negligence

Negligence was treated with some ambivalence in Working Paper 29, *The General Part: Liability and Defences*.[44] Under the rules of liability it was excluded as a ground of culpability unless otherwise specifically provided in an offence-creating section. Under mistake of fact it was ruled out as being irrelevant — genuineness was seen as the sole requirement.[45] By contrast, in mistake of law, intoxication and automatism, it was given a role since reasonableness was made necessary for acquittal on these defences.[46] Meanwhile, Working Paper 33 on *Homicide* deliberately left open, for the time being, the question of whether there should be any offence of causing death by negligence.[47]

Now arguably our uncertainty here reflects the general ambivalence of the criminal law itself, which constitutes an uneasy compromise between two radically different approaches. One sees crime as wilful wrongdoing. The other sees it as also covering wrongdoing without wilfulness.

Undoubtedly, our central criminal law principle is: no criminal liability without fault — *actus non facit reus nisi mens sit rea*.[48] Accordingly, as Stephen pointed out, definition of each crime contains expressly or impliedly a reference to a state of mind.[49] Usually that state consists of intent or recklessness. At common law some crimes, such as theft, fraud and burglary, could only be committed by someone acting with a particular intent or purpose. Others, such as murder and arson, could be committed by someone acting with intent or recklessness. However, with one exception, none could be committed by mere carelessness or negligence.

The exception of course was homicide. So serious is the harm involved here that intent and recklessness were not essential for criminal liability. Killing without such intent or recklessness was murder if done in the course or furtherance of a violent felony, and manslaughter if done in the course of some other crime or with gross negligence.[50]

---

44. *Supra*, note 13.
45. *Id.*, section 9 of draft legislation, pp. 74-5.
46. *Id.*, sections 6 and 7 of draft legislation, pp. 59 and 67.
47. Law Reform Commission of Canada, *Homicide* [Working Paper 33] (Ottawa: Minister of Supply and Services Canada, 1984), pp. 57-60.
48. *R.* v. *Tolson* (1889), 23 Q.B.D. 168.
49. *Id.*, p. 187.
50. For further discussion see *supra*, note 47.

Other exceptions have been added by statute. Under our *Criminal Code*, for instance, it has been made a crime to injure another person by criminal negligence.[51] Another crime requiring neither intent nor recklessness is dangerous driving.[52] But these remain exceptions to the general rule that negligence is not enough for criminal liability.

Three questions, then, arise concerning negligence. (1) Should there be crimes of negligence in a rational Criminal Code? (2) Should negligence form a general ground of liability or serve to negative any general defences? (3) If the answer to any of these questions is "yes," then how much negligence should be required?

## I. Should There Be Crimes of Negligence?

As observed above, crimes generally require intent, knowledge or recklessness — mere negligence is not enough. The simpler, less industrialized society that saw the formation of the criminal law was primarily concerned with acts of direct hostility such as slaying, wounding, raping, robbing and so forth. Carelessness and indirect threats to others' safety were left to the civil law. There was in general no place for negligence in the traditional approach of criminal law.

Arguments supporting this approach have been advanced on grounds of doctrine, expediency and morality. The argument from doctrine is as follows. Crimes require *mens rea*. *Mens rea* consists of intent, knowledge or recklessness — some wrongful state of mind. Negligence (inadvertence) is not a state of mind but rather an absence of a state of mind. It cannot therefore constitute *mens rea*. Accordingly there cannot in principle be crimes of negligence.[53]

This argument rests on three misapprehensions, one relating to the meaning of negligence, one to the meaning of *mens rea* and one to the moral status of negligence. The first underlies the claim that negligence is not a state of mind. This claim is only tenable if negligence is the same as inadvertence. But they are not identical: inadvertence means not noticing or paying attention; negligence means not taking enough care perhaps through inadvertence but perhaps also through other things, such as misjudging or using insufficient skill.[54] So, while inadvertence can be looked on as the absence of a state of mind, negligence cannot, although it may sometimes result therefrom.

The second misapprehension concerns the meaning of *mens rea*. As we have argued elsewhere,[55] this concept is not just descriptive but also normative: to say that someone

51. *Criminal Code*, R.S.C. 1970, c. C-34, s. 204.

52. *Criminal Code*, R.S.C. 1970, c. C-34, s. 233(4).

53. J.W.C. Turner, "The Mental Element in Crimes at Common Law," cited in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), pp. 137-40.

54. See P. Fitzgerald, "Road Traffic As the Lawyer Sees It," in J.J. Leeming, *Road Accidents — Prevent or Punish?* (London: Cassell & Company Ltd., 1969), p. 157.

55. *Supra*, note 13, pp. 24, 182-4.

had *mens rea* is not simply to describe his state of mind but rather to ascribe fault or culpability to him. Admittedly such fault or culpability often arises by reason of a state of mind such as wrongful intent, knowledge or recklessness. But must it necessarily do so?

Why should inadvertent and other kinds of negligence not count as fault? One reason could be that civil negligence takes no notice of the defendant's "personal equation."[56] The tort of negligence can, for example, be committed by failing to take reasonable care through being too clumsy to do so, that is, through lack of care you cannot help. But what you cannot help you are not at fault for. So is not legal negligence a ground for liability without fault?

Appearances, however, sometimes deceive; here there seems to be a misconception as to the moral status of negligence. Outside the law, fault is not automatically ruled out in cases of negligence. A driver causing an accident through congenital clumsiness is not necessarily excused from blame. Rather, he is told: "If you are as clumsy as that, you should not be driving — you cannot help being clumsy but you can help making your clumsiness a source of danger to others." Likewise, an inadvertent motorist is not exonerated for not noticing things. Rather, he is told: "You must stay awake at the wheel, pay attention and keep your eye on the road." In ordinary life mere carelessness, inadvertent or otherwise, is criticized and blamed.

All the same, not every immorality is appropriate for criminal sanction. As Bentham pointed out, some conduct may be unfit for punishment because all punishment will be ineffective.[57] This, runs the argument from expediency, is the case with inadvertent negligence. Because an inadvertent person will *ipso facto* not advert to the fact that he is breaking the law and thereby risks incurring a penalty, the threat of punishment cannot deter him.[58]

This claim too rests on misconceptions, one being that laws penalizing inadvertence cannot deter, the other being that a criminal law is purposeless and so unjustifiable without deterrence. The first of these is obvious. For while an inadvertent offender cannot have the law in mind when acting, he can at other times, and punishment now may help him at those other times. It may stimulate him, and others, to keep awake, pay attention, take due care and not be negligent. It can deter.[59]

The other misconception sees deterrence as the sole function of the criminal law. But is there not also room for reformation, prevention and support for values? Even if punishing carelessness did not deter, could it still not reform and teach offenders to take more care in future, prevent further carelessness and publicly affirm the value set on carefulness?[60]

---

56. Oliver Wendall Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1964), p. 108.
57. *Supra*, note 9, pp. 170-5.
58. Hall, *supra*, note 1, pp. 135-41.
59. Hart, *supra*, note 53, pp. 133-4.
60. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Information Canada, 1976), p. 16.

Finally, there is the retributivist argument. Punishment, being *prima facie* evil, needs justification. It cannot be wholly justified on utilitarian grounds, for these could allow punishment although generally unjustifiable, for example, punishment of the innocent. It can only be justified on the retributive ground that the offender denies the existence of a basic right belonging to his victim, therefore automatically denies as a rational agent (who must universalize) the existence of that right altogether and accordingly denies the existence of that right in himself — by his own choice he forfeits his own right. If D kidnaps V, he denies V's right to freedom, automatically denies everybody's right to freedom and therefore denies his own right to freedom; so, when punished by imprisonment, he cannot complain at that denial of freedom, his own wrongdoing, recoiling upon him. By contrast a negligent agent, particularly an inadvertent one, does not deliberately deny or directly challenge the rights of anyone, but only fails to show sufficient respect for them, and so does not forfeit his own rights but only incurs an obligation to undo the harm so far as he is able — an obligation best left to civil law.[61]

Attractive as this argument may seem, there are objections. For one thing, surely there is a right to freedom from injury by others' negligence. Why cannot violation of this right justifiably be punished by forfeiture of one of the offender's rights, for example, his right to freedom? For another, the rights violated and forfeited need not be — and rarely are — identical. An offence of violence (denying the right to bodily integrity) is not properly punishable only by counter-violence (denying the offender's right to bodily integrity) but rather by imprisonment (denying the offender's right to liberty).

In our view criminal law has room for negligent offences. Though properly restricted to acts involving culpability, it can recognize negligence as a type of culpability. Though unable immediately to deter the negligent offender, it can deter generally by punishing him. Moreover, though normally concerned with deliberate violation of rights, it can rightfully punish negligent disrespect for them.

Nevertheless, since criminal law should be used with restraint,[62] not every act of negligence — not every human slip and error — should constitute a crime. Only acts causing or threatening serious harm should so qualify. These clearly include acts negligently causing death or serious bodily harm. They also, in our view, include acts negligently causing risk of death or serious bodily harm (discussed in Chapter Three: Endangerment). How far they should include also acts negligently causing serious harm or risk thereof to property, for example, by fire, explosion and so forth, we have not finally determined, but will wait for further feedback.

## RECOMMENDATION

**7. That it should be a crime negligently to cause death or serious bodily harm to another.**

---

61. J.R.S. Prichard and A. Brudner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983), 2 *Law and Philosophy* 149. See also G.W.F. Hegel, *A Philosophy of Right*, translated by T.M. Knox (Oxford: Oxford University Press, 1952).

62. *Supra*, note 60, pp. 19-25.

## II. Should Negligence Form a General Head of Criminal Liability?

This question has already been largely answered. The answer given above is that negligence can form a head of liability, that it should do so for conduct causing death or serious bodily harm or causing risk thereof. These cases would form exceptions to the general rule requiring knowledge for culpability (see Working Paper 29, section 3 of draft legislation, pages 26 and 27).

Now is that general rule consistent with the approach of the supporting study, Appendix E of Working Paper 29, "The Role of the General Part"? In that study *mens rea* was claimed to be not just descriptive but also normative in nature. Accordingly Working Paper 29 recommended that self-defence, intoxication and automatism should require lack of fault — the defendant must not use more force than reasonable, not get drunk through his own fault, not bring his automatism on himself. Yet contrary to this reasoning, it has been suggested, Working Paper 29 recommended that liability be generally restricted to acts done with knowledge and that mistake of fact need only be genuine.[63] Is this consistent with a normative notion of *mens rea*?

The inconsistency is only partial. On the one hand there is an inconsistency between the approach to *mens rea* and mistake of fact and that to intoxication and automatism. On the other there is no inconsistency between the approach to *mens rea* taken in the Working Paper and that taken in the supporting study.

To take the second point first, the knowledge requirement in draft legislation section 3 does not contradict the claim that *mens rea* is a normative concept. The doctrine of *mens rea* means "no criminal liability without fault," not "fault entails criminal liability." Given fault on a defendant's part, his liability depends on whether his act is prohibited by the Special Part of criminal law — *mens rea* is only a necessary and not a sufficient condition of criminal liability. However, since most Special Part sections only prohibit acts done intentionally, recklessly or knowingly, the knowledge requirement in section 3 of the draft legislation serves a generalizing function to avoid repetition of "knowingly" and so forth in each offence-creating section.

Likewise there is no inconsistency as to mistake of fact. Where knowledge is required, it is excluded by mistake of fact, no matter how unreasonable. Only exceptionally, in crimes of negligence where knowledge is not required, must mistake of fact be not only genuine but also reasonable. This is the position adopted both by traditional common law and by Working Paper 29.

63. B. Baker, "*Mens Rea*, Negligence and Criminal Law Reform" (unpublished paper prepared for the Law Reform Commission of Canada, April 1984).

To return to the first point, there remains an inconsistency between the provisions on knowledge and mistake of fact and those on intoxication and automatism. The former make negligence irrelevant to liability and mistake of fact. The latter make it relevant to automatism and intoxication.[64]

Consistency is a cherished goal in any rational code of criminal law.[65] Either the position on knowledge and mistake of fact or that on intoxication and automatism should be abandoned. The argument above regarding Special Part prohibitions, negligence offences and the generalizing nature of section 3 of the draft legislation militates against abandoning the position on knowledge and mistake of fact. What about that taken on intoxication and automatism?

Both these defences, it was recommended in Working Paper 29, should be excluded by the defendant's negligence. On intoxication alternative subsection 6(2) of the draft legislation in effect provides that everyone excused (by reason of intoxication) will, unless he proves the intoxication was due to fraud, compulsion or reasonable mistake, be convicted of the new offence of criminal intoxication, for doing what would, but for his intoxication, have been an offence, and shall receive the same penalty as for the offence charged.

On automatism, Working Paper 29 provides in draft legislation section 7 that a defendant committing an offence may be excused for unconscious conduct attributable to temporary and *unforeseeable* disturbance of the mind. Accordingly, a defendant to a theft charge in the rare case where he was too drunk to realize the property was not his, could be convicted of criminal intoxication if the intoxication was due to some *unreasonable* mistake — for example, he did not know ten pints of beer have that effect. A similar defendant claiming automatism could be convicted of theft if the automatism was due to some disturbance of mind that was *foreseeable*.

This original solution clearly raises problems, for these provisions would treat defendants lacking intent, recklessness or knowledge as though they had such intent, recklessness or knowledge. In the first example (intoxication) it would convict him, in the very rare case where his intoxication negates *mens rea*, of criminal intoxication for doing what, but for his intoxication, would have been the crime of theft, for (runs the argument of this approach) if he had been sober he would have known the property was not his and would have therefore stolen it. But how can we know that if he had been sober and known the property was not his, he would have nevertheless taken it *with intent to steal*? How can we know he would have taken it at all?

Likewise, in the second example (automatism) there could still be a conviction of stealing if the automatism was the defendant's own fault. But for his automatism (runs the argument) he would have taken the property consciously and voluntarily. Again,

64. For further discussion see Eric Colvin, "Codification and Reform of the Intoxication Defence" (1983-84), 26 *Crim. L.Q.* 43.

65. See also D. Galloway, "Why the Criminal Law Is Irrational" (1985), 35 *U.T.L.J.* 25.

how can we know that if he had been capable of acting consciously and voluntarily, he would have taken the property *with intent to steal*? How can we know he would have taken it at all?

Yet how can the criminal law not punish harm caused through self-induced intoxication or automatism? To let oneself get into such a state and then cause harm is clearly blameworthy and negligent. So why not punish it as such and not on the specious grounds involved in the above intoxication and automatism provisions? Why not convict such people, when the intoxication or automatism is their own fault, of negligent killing, negligent injury, and so on?

This second solution poses two problems. First, it would require convicting of negligent *killing* and so forth, when the negligence in fact related not to the killing and so on but rather to the getting drunk or the falling into a state of automatism. Second, there could be no conviction where negligence was not a head of liability; in particular there could be no conviction in cases of vandalism and arson, whereas we are informed by those working in the field that these are the bulk of the serious crimes in fact committed by those in a state of intoxication. Of course this second problem could be solved by making negligence a head of liability for arson and vandalism, but this we argued earlier would go against tradition, run contrary to the need for restraint and so, we think, unduly widen the ambit of the criminal law.

A third solution might be as follows. Avoid all suggestion of deeming and of imputing fictitious intent or knowledge; at the same time avoid artificial application of negligence and of widening the definitions of arson and vandalism, but instead fasten on the thing that is really blameworthy and go back to a modified version of the criminal intoxication crime. Let the law provide that it is a crime for anyone to be in a state of intoxication or automatism through his own fault and in such a state to cause injury to persons or damage to property.

This third solution also faces problems. First, while allowing convictions in property damage cases, it would not extend to non-damage cases such as theft and fraud. Second, it would mean that one who drunkenly kills another without *mens rea* would, contrary perhaps to ordinary intuitions, be convicted not of manslaughter but of criminal intoxication.

In those circumstances, we put forward all three alternatives. The first is to retain the rules set out in Working Paper 29. The second is to extend negligence to damaging property and to make blameworthy automatism and intoxication no defence to crimes of negligence. The third is to provide for a criminal intoxication and automatism crime consisting in causing harm through blameworthy intoxication or automatism.

## RECOMMENDATION

**8.** *Alternative (1):* **That the rules on automatism and intoxication remain as set out in Working Paper 29.**

*Alternative (2):* **That both intoxication negativing intent or knowledge, and automatism negativing intentionality be complete defences, unless they arose through the accused's own fault or negligence and the offence charged is one of negligence.**

*Alternative (3):* **That the rules on intoxication and automatism be modified to provide that: subject to the provision on criminal intoxication or automatism, intoxication and automatism are complete defences; and, it is an offence of criminal intoxication or criminal automatism, as the case may be, to cause injury to the person or damage to property in a state of intoxication or automatism for which one is to blame.**

Other defences can be defeated by negligence but these present no problem. While mistake of law is generally no defence, exceptions are set out in draft section 10 of Working Paper 29. One relates to reasonable ignorance of law owing to non-publication; there, the exception to the rule requiring citizens to know the criminal law is a concession made on the ground of fairness and so is properly restricted to those who take reasonable care and are not to blame for their mistake or ignorance.

Likewise with such defences as duress, self-defence and defence of property. All these, according to Working Paper 29, should only avail those whose response to the situation in question was reasonable. One who defends himself by using more force than that regarded as reasonable by the law, should not be acquitted simply because of his mistake. Either he makes a simple mistake of law and so has no excuse, or else he is trying to be wiser than the law — something the law cannot allow. (Of course excessive force owing to mistake of fact relating to the circumstances is different; as with any other mistake of fact it need only be genuine.)

## III. What Degree of Negligence Should Be Required for an Offence of Negligence and How Should This Be Defined?

This question is at the same time the easiest and the hardest of the three. The easiest, because there is general consensus, among lawyers at least, that the degree of negligence attracting criminal liability must be greater than that attracting merely civil liability.[66] The hardest, because it has proved impossible to define or specify, without ending up in circularity, the exact nature of this degree.

In the case-law three different levels of fault emerge: recklessness, gross or criminal negligence, and mere civil negligence. Recklessness, in law if not in lay language, is usually taken to refer to the conscious taking of a serious and unjustifiable risk — the offender foresees the harm but still he takes the risk. Mere civil negligence means

66. J.C. Smith and Brian Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983), pp. 83-4; G. Côté-Harper and A. Manganas, *Droit pénal canadien* (Cowansville: Yvon Blais, 1984), pp. 268-70; J. Fortin and L. Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982), pp. 115-6.

failing to take due care, the care that would be taken in the circumstances by the reasonable person — either the defendant sees the risk and takes it but the risk is not so serious or unjustifiable as to make him reckless, or he does not see the risk but should have been aware of it. Between the two stands gross or criminal negligence — though short of recklessness, it falls further below the standard of reasonable care than does ordinary negligence.

How should this kind of negligence be defined? How else except by words such as "gross," which simply mean "a lot more" than ordinary negligence but do not tell us how much more? Or by words such as "criminal" which are clearly circular and merely mean "enough to be a crime" but do not tell us how much is enough?

The problem is that we cannot quantify the unquantifiable. True, criminal negligence should involve a greater fall below the standard of care than civil negligence, as words such as "gross," "serious" and "criminal" signify. But the shortfall cannot be calibrated since it is in fact a metaphor. A precise measure is no more possible of criminal negligence than of reasonable care, reasonable force and other legal terms involving judgment calls. All that can be done is to use a term such as "gross" to show that ordinary negligence is not enough.

Accordingly, a judge would then direct a jury in a homicide trial as follows:

> Assuming you are satisfied beyond reasonable doubt that the defendant caused the victim's death, you then have to ask yourselves whether he did so intentionally, recklessly or with gross negligence.
>
> Did he do it intentionally — was his aim, for whatever reason or ultimate purpose, to kill the victim? If so — if you are satisfied beyond reasonable doubt that he did — then you must find him guilty of murder.
>
> Suppose you are not satisfied that he did it intentionally. Then, did he do it recklessly — did he kill the victim through exposing him to an obvious unjustifiable risk of death? Did he know that his conduct was substantially likely to cause the victim's death and that there was no social justification for that conduct? The sort of justification you will have in mind is that applying to a surgeon carrying out a risky operation. He knows, and the patient knows, that there is a serious risk of death but he takes it in the interest of improving the patient's condition. This is allowed by law. If you are satisfied that he acted recklessly in the sense that he had no such justification, you must find him guilty of manslaughter.
>
> Suppose you are not satisfied that he acted recklessly. Then did he do it through taking less care than he should have taken — less care than a reasonable person in his shoes would have taken? But second — because mere lack of care is not enough for criminal law — was his lack of care so serious that it is no longer simply a matter between the two parties for compensation through the civil law but rather a matter of public concern calling for stigma and punishment through criminal law? If so, you must find him guilty of negligent homicide.

You may ask how to tell gross from ordinary negligence. There is no precise way of measuring degrees of negligence. But we can all recognize the difference between being a bit careless and being very careless. You have to use your judgment and say whether in your view the defendant could be said to have been *very* careless. It is a judgment call.

Finally, if you are not satisfied that he was grossly negligent, you must acquit. If you think he was not even careless at all or was at most a bit careless, that is, ordinarily negligent — then you must find him not guilty.

## RECOMMENDATION

**9. That negligence in criminal law should be defined simply as gross negligence or as substantial failure to take reasonable care.**

# CHAPTER THREE

## Endangerment

The question raised in this part of the present Working Paper is the following. Should there be general criminal liability for endangering others? Suppose D recklessly imperils V but: does not injure him so as to commit the crime of causing bodily harm; does not intend to injure him so as to commit some crime of attempt; and does not commit some specific offence such as dangerous driving, careless use of firearms or endangering the safety of an aircraft. Suppose he is merely an extremely reckless cyclist, skater or skier hurtling along with wanton disregard for others who miraculously escape injury. Under present law he has no criminal liability. But should he? Should there be a general crime of reckless endangerment?

Strictly speaking, this question falls outside the ambit of a Paper on the General Part. Clearly the imposition of any general liability would result from an offence-creating section, finding its natural place within the Special Part. Such a section might most naturally be located under the Special Part chapter of "Offences against the Person," as is the case under the *Model Penal Code*[67] and under the various state codes modelled on it.

On the other hand, convenience suggests the present Paper as the proper place for such discussion. For one thing, the question concerns creation of an extremely general offence analogous to inchoate offences, and these traditionally have been located in the General Part. For another, its creation raises general issues of a fundamental nature calling for discussion of basic principle, and principle belongs pre-eminently to the General Part.

Now in principle all common law liability was for causing damage. In tort there had to be an injured plaintiff. In criminal law — at least in the major crimes against the person or against property — there had to be an injured victim. Murder, manslaughter, assault, arson, theft and robbery — all these caused harm to identifiable individuals.

As Bentham pointed out, however, crimes cause two different kinds of harm. First they cause primary harm to individual victims — death, injury or loss of property. Next, they cause secondary harm to the community — fear and alarm in general.[68] Indeed for this very reason crimes have been seen as public wrongs, that is, wrongs to society in general.

67. American Law Institute, *Model Penal Code* (Philadelphia: A.L.I., 1980).

68. *Supra*, note 9, pp. 152-63.

This being so, the occurrence of primary harm is not always at common law a necessary condition for criminal liability. Indeed secondary harm alone was sufficient in three contexts: (1) inchoate and related offences; (2) public nuisance; and (3) the various specific statutory offences of endangerment.

Most obvious is the category of inchoate offences. If A attempts, incites B or conspires with C to injure V, he commits an offence even though in fact he never inflicts harm on V — the mere attempt, incitement or conspiracy suffices. The secondary harm leads criminal law to step in to prevent harm before it actually ensues. Inchoate offences along with criminal participation are discussed in Working Paper 45.

Besides inchoate offences, most systems of criminal law contain numerous preliminary offences which are complete before occurrence of the real harm aimed at by the law. Perjury is complete, as the authors of the *Model Penal Code* observe, though the trial outcome is not affected, and bribery of a public servant is proscribed even though no official action is influenced thereby.[69] Other typical examples are possessing counterfeiting instruments,[70] possessing house-breaking instruments,[71] trespassing at night[72] and so on.

The next category of "harmless" crimes is that of public nuisance. At common law a nuisance, says *Russell on Crime*,[73] is anything which "works hurt, inconvenience or damage" and a public nuisance is one which "materially affects the public and is a substantial annoyance to all the Queen's subjects."[74] It can be committed by "doing something which tends to the annoyance of the public," such as obstructing a highway, or "neglecting to do a thing which the common good requires," such as keeping a corpse unburied. Essentially, as Lord Denning put it, a public nuisance is one so widespread or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own to put a stop to it; rather, it should be the responsibility of the community at large.[75]

Stephen, however, defined the offence of "common nuisance" more narrowly. He saw it as "an *act not warranted by law or an omission to discharge a legal duty*, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects."[76] [Emphasis added] To Stephen, unlike Russell, it was not enough for the act or omission to tend to the inconvenience of the public; it also had to be itself "not warranted by law."

---

69. *Supra*, note 67, p. 199.
70. *Criminal Code*, R.S.C. 1970, c. C-34, s. 416.
71. *Criminal Code*, R.S.C. 1970, c. C-34, s. 309(1).
72. *Criminal Code*, R.S.C. 1970, c. C-34, s. 173.
73. J.W. Cecil Turner, *Russell on Crime*, 12th ed. (London: Stevens, 1964), vol. 2, p. 1387.
74. *Ibid.*
75. *Attorney General* v. *P.Y.A. Quarries, Ltd.*, [1957] 1 All E.R. 894, p. 902.
76. Stephen, *supra*, note 7, p. 108.

Following Stephen, our *Criminal Code* includes this requirement in its definition of common nuisance. *Criminal Code* subsection 176(2) provides that:

> ... every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
>
> (*a*) endangers the lives, safety, health, property or comfort of the public, or
>
> (*b*) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

Also, by subsection 176(1) it is an offence to commit a common nuisance and thereby endanger the lives, safety or health of the public.

Whatever the definition — be it Russell's, Stephen's or our *Criminal Code*'s — the gist of common nuisance is its secondary harm, that is, its effect on the public. Injury to specific individuals is neither necessary nor sufficient. It is the danger or substantial annoyance to society in general that is the kernel of the crime.

The third and final category is that of specific statutory offences of endangerment. Of these there is in Canada, as in most similar jurisdictions, a goodly number. Convenience would subdivide them into those concerning dangerous activities, those relating to dangerous things and those dealing with dangerous weapons.

Most of our "dangerous activity" offences relate to transport. Of these the most conspicuous are driving offences — driving with criminal negligence,[77] driving dangerously,[78] impaired driving[79] and driving with over 80 milligrams of alcohol in the bloodstream.[80] Other examples are dangerous operation of vessels, and so forth (section 240), navigating with over 80 milligrams of alcohol in the bloodstream (section 240.2), taking an unseaworthy ship to sea (section 243), interfering with marine signals (section 395), interfering with transportation facilities (section 232) and endangering the safety of an aircraft in flight (section 76.2). In all of these the gravamen is not the harm caused — there may be none — but rather the harm risked.

"Dangerous thing" offences most obviously concern explosives. An example is the offence of failing to use reasonable care, when in possession or control of an explosive substance to prevent bodily harm, death or damage to property (sections 77 and 78). Similar to this is the offence of possessing in a public place "an offensive volatile substance that is likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property, ..." (paragraph 174(*a*)). Noteworthy also in this connection is subsection 387(2) which raises the penalty for mischief (fourteen years for public property and five for private property) to life imprisonment where its commission "causes actual danger to life."

77. *Criminal Code*, R.S.C. 1970, c. C-34, s. 233(1).
78. *Criminal Code*, R.S.C. 1970, c. C-34, s. 233(4).
79. *Criminal Code*, R.S.C. 1970, c. C-34, s. 234(1).
80. *Criminal Code*, R.S.C. 1970, c. C-34, s. 236(1).

Finally, there are the "dangerous weapons" offences. Our present *Code* in sections 82 through 106 contains a virtual mini-code relating to firearms and other offensive weapons. In addition, subsection 76.3(1) makes it an offence to take an offensive weapon on board an aircraft.

Clearly then, our criminal law already takes note of endangerment. It does so, as we have seen, through the medium of inchoate offences, through the crime of common nuisance and through the specific prohibitions of certain dangerous actions. But this is to do so in a fashion that is random, *ad hoc* and lacking principle. So, should our law now take a further step and formulate a general principle outlawing reckless endangerment?

To take this step, as Smith points out,[81] would involve no great novelty. In 1846 and also two years later, the English Criminal Law Commissioners recommended the creation of two general endangerment offences. One was the offence of maliciously putting the life of another in danger,[82] the other that of negligently causing danger to the life of another.[83] In fact, however, no such offences found their way into the criminal law of England.

Recent years, though, have seen significant developments. In 1970 the Law Commission in its Report, *Offences of Damage to Property*,[84] recommended introducing an offence of damaging property "with the intention of endangering the life of another or with recklessness in this regard" on the ground that otherwise "a considerable gap is left, especially when the offender is reckless as to endangering personal safety and yet no injury is caused."[85] This recommendation was enacted in the *Criminal Damage Act 1971*.[86] This is a notable expansion of previous English law although the new endangerment offence is piggybacked on an offence of criminal damage or mischief, unlike that proposed in 1845.

Much more in line with the 1845 proposal is an American development, namely the endangerment provision in the *Model Penal Code*.[87] Section 211.2 provides that an offence of reckless endangerment is committed by anyone who "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." The section further provides that "recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded."

---

81. K.J.M. Smith, "Liability for Endangerment: English *Ad Hoc* Pragmatism and American Innovation," [1983] *Crim. Law Rev.* 127, p. 129.

82. Criminal Law Commissioners, *Second Report* (London: HMSO, 1846), Chap. 1, s. 7, art. 4.

83. *Id.*, Chap. 1, s. 7, art. 5.

84. English Law Commission, *Offences of Damage to Property* [Report No. 29] (London: Professional Books, 1970).

85. *Id.*, para. 25, pp. 10-1.

86. *Criminal Damage Act 1971* (U.K.), c. 48.

87. *Supra*, note 67.

The *Model Penal Code* proposal has been included in most state codes and in the proposed new federal code. As Smith points out, however, there is considerable variation between the different states as to the requisite degree of risk, the need for actual or merely potential danger, grading and punishment, and prosecutional policy.[88] Despite these variations the United States shows widespread recognition of the need for general criminal law proscription of endangerment — a proscription which could be applied to firing a loaded gun into a crowd, poisoning a well used for drinking water, opening a bridge about to be crossed by a line of cars, to firearm and automobile cases, and even in one unusual case, to a strike by firemen.

Similar recognition is to be found in several non-common law jurisdictions. *The Swedish Penal Code*,[89] for instance, creates in section 9 an offence of "creating danger to another." *The Penal Code of the Polish People's Republic*[90] imposes liability for exposing a human being to an immediate danger of loss of life, serious bodily injury or serious impairment of health. Particularly interesting is *The Austrian Penal Act*,[91] which after proscribing in section 334 acts and omissions likely to cause and in fact causing injury, and after creating in Chapters IX and X numerous specific offences of endangering health and corporeal safety, continues in section 431 by stating that "it is not possible to enumerate the petty misdemeanors which may impair safety" and by providing therefore that "every act or omission referred to in s. 335 shall be punished as a petty misdemeanor ... even if it did not actually cause an injury."

The idea of a general offence of endangerment, then, is not new. It was proposed more than a hundred years ago in England. It was included in most United States codes within the last twenty years. It has been incorporated into several European codes. Meanwhile, as we have seen, endangering has been dealt with in piecemeal and sporadic fashion by our own criminal law.

Now should a new Criminal Code go further? Should it contain, as in those mentioned above, a general crime of endangerment? Should such a general crime replace, or supplement, the more specific provisions presently existing? And what should be the physical and mental elements of such a crime?

## I. A General Crime of Endangerment

First, should there be a general crime of reckless endangerment? One obvious objection to including such a crime within our Code relates to the reach of criminal law. It is that such inclusion would unduly extend the ambit of the criminal law beyond

88. Smith, *supra*, note 81, p. 132.

89. *The Swedish Penal Code* (1965), as amended to January 1972.

90. *The Penal Code of the Polish People's Republic* (1970), art. 160.

91. *The Austrian Penal Act* (1852 and 1945), as amended to 1965.

what really warrants its concern, namely, real harmfulness. It would entail that many an act of reckless (and possibly merely negligent) endangering, which would not even incur civil liability, would now attract criminal liability, although the latter is commonly seen as far more serious than the former.

To this, however, there may be a fairly easy answer. First, reckless endangerment is penalized at present when it results in death or injury but not when it does not. However, where is the logic or justification for this when the result is usually quite fortuitous from the endangerer's standpoint? Why should the latter benefit in the one case from the victim's lucky escape and suffer in the other from his misfortune? Secondly, the fact that tort liability is predicated on actual harm says nothing about the relative seriousness of criminal and civil liability. It merely results from the fact that tort law serves to provide compensation for actual harm and that those who escape harm have usually nothing for which to be compensated.

Another objection relates to certainty. Where V is injured by D's conduct it can fairly readily be inferred that that conduct endangered V — the fact of its causing injury is good evidence that it created risk of injury. But absent actual injury, the risk or likelihood of injury is much more speculative and uncertain. Meanwhile, in the interests of certainty the criminal law should surely be confined to cases of clearly harmful conduct.

This objection too admits of a ready answer. Occurrence of actual harm is a pointer but no more than a pointer to the existence of risk. An act in no way viewed as risky can quite fortuitously cause damage and one that is clearly wanton and dangerous can miraculously produce no harm. Yet it may be argued that any rational code of criminal law should withhold liability from the former but could reasonably impose it on the latter.

A third objection has to do with values. Elsewhere it has been argued by this Commission that the function of the criminal law is to denounce attacks on basic values.[92] Homicide and other crimes of violence, being frontal attacks on the basic values of life, safety and bodily integrity, are obviously fit subjects for inclusion in the criminal calendar. By contrast abstract recklessness — behaviour which in fact creates no actual harm, but merely a risk of harm often to the agent himself — should not be seen as a direct attack on basic values but rather as a defect or want of prudence, and should therefore find no place in the *Criminal Code*.

Here again an answer can be advanced similar to that given to the second objection. An attempt on V's life by D is an attack on basic values whether the attempt succeeds or not — the actual completion of the crime in terms of actual ensuing harm is quite irrelevant to D's own culpability, dangerousness and threat to fundamental values. Hence the inclusion in our law of inchoate alongside completed crimes. Likewise, an act on D's part showing wanton disregard for V's safety must be equally a violation of basic values whether V escapes injury or not — again surely completion in terms of actual

92. *Supra*, note 60, p. 16.

harm is irrelevant to D's own culpability, dangerousness and threat to fundamental values. Hence the Supreme Court of Canada's attraction, shown in *Lajoie*,[93] to the supplementation of murder under subparagraph 212(*a*)(ii) (death by a defendant who "means to cause ... bodily harm that he knows is likely to cause ... death, ...") by an inchoate murder offence (where the death is not in fact caused, but the defendant means to cause bodily harm and so forth) — a supplementation unfortunately purchased at the cost of straining the meaning of the word "attempt."

Apart from these counter-arguments to the above objections, more positive reasons can be given for recognition of a general offence of reckless endangerment. First, it would mean that our criminal law, like that of many other jurisdictions, would, in the words of the authors of the *Model Penal Code*, afford "a comprehensive provision against dangerous conduct," and "carry forward the substance of a multitude of particularistic [sections] punishing one or another instance of risk creation," and would "give systematic statement to the *ad hoc* provisions of prior law."[94] Second, it would replace pragmatism by principle. Third, it would facilitate early intervention by authority and hence facilitate prevention of actual harm occurring. Finally, in line with what was argued earlier, mere wanton disregard of others' safety is surely in itself deserving of denunciation, sanction and stigma as a serious infringement of a basic value. For these reasons an offence of reckless endangerment appears to us a necessary item for inclusion in a new code of criminal law.

**RECOMMENDATION**

**10. That the new Criminal Code include a general offence of endangerment within the "Offences against the Person" chapter.**

## II. Replacement or Supplement?

Next, should the new general offence of endangerment serve as a replacement or as a supplement to common nuisance and to the various specific offences of endangering? Logic and rationality would suggest the former, that is, that the new general offence should now replace the present law: logic, because this would prevent overlap, redundancy and possibly inconsistency; rationality, because it would substitute principle for *ad hoc* provisions.

Pragmatism, however, would caution the opposite and suggest that the new general offence should serve more as a supplement to the existing law. For one thing, common nuisance may need retention in a revised and more extended form to cover not only danger but also substantial inconvenience to the public. After all, the most conspicuous

93. *Lajoie* v. *The Queen* (1973), 10 C.C.C. (2d) 313 (S.C.C.).

94. *Supra*, note 67, p. 198.

type of public nuisance at common law was obstruction of the highway — conduct which may not involve any actual or potential danger. This question will be discussed in a later Paper on the topic of Nuisance. Meanwhile, we would not wish to delete this offence from the criminal calendar.

For another thing, a general offence of endangerment could not at present easily replace the different specific crimes concerning explosives, firearms, driving and so on. One reason is that, as we see it, the public perceives such hazards as needing more special treatment than would be afforded by a general endangering offence. Another is that some of these, firearms and driving especially, require and indeed enjoy a comprehensive regulatory scheme covering far more than the mere matter of endangerment. A third reason is that such hazards call for consideration by the use of technical and scientific expertise rather than mere commonsensical appraisal of risk. Accordingly, while in due course we plan to examine these areas of law individually with a view to their possible improvement, we feel that it would be inadvisable to replace them by one general endangering offence.

In our view a general offence of endangerment would serve two functions. First, it would usefully articulate the general principle underlying all the more specific endangering offences. Second, it would serve as a residuary offence to cover conduct clearly meriting denunciation for its wantonness but yet falling outside any of the more specific offences. Under our new Code, as in many of the others to which we have referred, the general offence would not replace but rather supplement the more particular offences.

**RECOMMENDATION**

**11. That the offence of endangerment should not replace but should supplement common nuisance and the other endangering offences.**

## III. Physical and Mental Elements

How far should a general offence of endangering extend? Dangerous behaviour can put at risk another person's life, safety, property and comfort. Indeed, the *Criminal Code* definition — though not the offence — of common nuisance speaks in paragraph 176(2)(*a*) in terms of endangering the "lives, safety, health, *property or comfort* of the public, ...." [Emphasis added] Similarly, the duty of care imposed by section 77 on those possessing or controlling explosive substances is "to use reasonable care to prevent bodily harm or death to persons or *damage to property* by that explosive substance." [Emphasis added] To take one more example, it is a crime contrary to paragraph 174(*a*) to possess in a public place "an offensive volatile substance that is likely to *alarm, inconvenience, discommode or cause discomfort to any person* or to *cause damage to property*, ...." [Emphasis added]

All the above examples involve special factors. The first, common nuisance, has a public dimension — it refers to the lives and so forth "of the public." The second has to do with a special hazard involving particular risks. The third relates to a similar specific hazard fraught with extra danger. In all such cases, then, it seems reasonable to extend the ambit of the law to cover risk to convenience, comfort and property — those persons involved with the public, with explosives and with volatile substances must take extra care.

The same surely cannot be said of conduct in general. Much that we ordinarily do may entail some measure of risk to others — to their lives, safety, comfort, convenience and property. But risk cannot be totally avoided without stifling all initiative and enterprise. Clearly, a balance has to be struck between risk and enterprise.

In our view, absent special factors such as those discussed above, the right balance as regards the object at risk is the following. Conduct endangering the convenience, comfort and property of individuals should continue to be left to the civil law as more appropriate for injunction and compensation between the parties concerned. Conduct endangering the convenience, comfort and property of the public should continue to be dealt with under the special offence of common nuisance. But conduct endangering the life and safety of the individual, because of the high value set thereon, should properly form the subject of the general offence. Whether there should be a separate offence of endangering the environment will be determined by the Protection of Life Project. Accordingly, we would propose that our new Code, like those others mentioned above, should confine the general endangering offence to conduct causing risk of death or serious bodily harm.

Conduct of course can consist of acts, omissions or conditions. Clearly, acts endangering safety would fall under the offence. Equally clearly, conditions would so rarely endanger safety that they would be best dealt with, if at all, by specific endangering offences. But what about omissions?

Omissions can attract liability in three ways: if they are in fact spurious (pseudo-nonfeasance), if they are specifically prohibited or if they cause result-crimes. Spurious omissions are in fact acts and would fall under the offence. Specifically prohibited omissions would be criminal in their own right and therefore irrelevant to the general offence. Omissions causing result-crimes — commission by omission — are less clear.

What is a result-crime? Clearly it is one resulting in harm or damage, but what about one resulting in risk or danger? In our view, tradition regards result-crimes as comprising only those where actual injury or damage is effected, and policy would suggest the same in the general interest of restraint in the use of criminal law. Meanwhile it should be noted that the various specific endangering offences, depending on the specific provisions defining them, may still, as with dangerous driving, be committed by an omission. But the general offence of endangering should not qualify as one that can be committed by omission.

Finally, what should be the mental element of the general offence of endangerment? Elsewhere we have argued that commission of a criminal offence should generally require intention, knowledge or recklessness.[95] Exceptionally, as argued earlier in this Paper,[96] where death or serious bodily harm results, we recommend that criminal or gross negligence (as explained above) should suffice.

Applying those arguments to the specific question, we take the following view. First, liability for recklessness would clearly be in order — a person knowingly exposing others to a substantial risk of death or serious injury clearly merits the attention of the criminal law. Second, because of the harm risked, liability for gross negligence would also be appropriate — if death and serious injury suffice for criminalizing gross negligence, then so does the risk of death and serious injury.

## RECOMMENDATIONS

**12. That the general offence of endangerment should be restricted to acts causing risk of death or serious bodily harm.**

**13. That the requisite culpability for the general offence of endangerment should be gross negligence.**

95. *Supra*, note 13, pp. 22-34.

96. Recommendations 7 and 9, pp. 24 and 30.

# Summary of Recommendations

**1. That in general there be no criminal liability for not acting.**

**2. That a person who creates or is in control of a danger should have a duty to take reasonable steps to prevent harm to others therefrom.**

**3. That the General Part specify that all people have a duty to take reasonable steps to provide necessaries of life to their spouses, to their children and to other family members living in the same household with them.**

**4. (1) That the General Part specify that all people have a duty to take reasonable steps to carry out any undertaking, gratuitous or otherwise, whose nonperformance will cause serious danger to life.**

**(2) That there be no duty to carry out an undertaking to give medical treatment where such treatment is therapeutically useless or is contrary to the patient's wishes.**

**5. That the General Part should specify that all people have a duty to take reasonable steps to provide necessary asssistance to those with whom they share in a dangerous enterprise.**

**6. That the Special Part provide that everyone commits a crime who fails to take reasonable steps to assist another person whom he sees in instant and overwhelming danger, unless he is incapable of doing so without serious risk to himself or another or there is some other valid reason for not giving assistance.**

**7. That it should be a crime negligently to cause death or serious bodily harm to another.**

**8.** *Alternative (1):* **That the rules on automatism and intoxication remain as set out in Working Paper 29.**

*Alternative (2):* **That both intoxication negativing intent or knowledge, and automatism negativing intentionality be complete defences, unless they arose through the accused's own fault or negligence and the offence charged is one of negligence.**

*Alternative (3):* **That the rules on intoxication and automatism be modified to provide that: subject to the provision on criminal intoxication or automatism, intoxication and automatism are complete defences; and, it is an offence of criminal**

intoxication or criminal automatism, as the case may be, to cause injury to the person or damage to property in a state of intoxication or automatism for which one is to blame.

9. That negligence in criminal law should be defined simply as gross negligence or as substantial failure to take reasonable care.

10. That the new Criminal Code include a general offence of endangerment within the "Offences against the Person" chapter.

11. That the offence of endangerment should not replace but should supplement common nuisance and the other endangering offences.

12. That the general offence of endangerment should be restricted to acts causing risk of death or serious bodily harm.

13. That the requisite culpability for the general offence of endangerment should be gross negligence.