Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law

Part I

By Sally Kift*

Introduction

Though many would consider that a blameless bystander who witnesses a fellow human being in peril has a moral obligation to aid that person, few societies in the common law world have enshrined that moral precept in the criminal law and imposed a legal duty to act to rescue in such circumstances. A duty of this type has been the subject of much debate in jurisdictions in the United States and Canada and "failure to rescue" offences have been included in almost every penal code in the civil law countries since World War II. Indeed, the issue recently achieved world prominence when, on the death of Princess Diana and her companions in a Paris tunnel, there were suggestions that the paparazzi might be charged, amongst other things, with the criminal failure to rescue offence.

In contrast, the whole issue of criminal liability for failure to rescue has been largely ignored in Australia and the common law legal system of which it is part. The conventional view regarding the imposition of criminal omissions liability in common law systems like Australia has been to confine strictly any liability for acts of omission (cf commission) to cases where, for example, a special relationship exists between the parties (such as between parent and child).

It is probable that in Australia we will have to wait until some particular incident galvanises public and academic scrutiny of this lamentable state of affairs in order to instigate legal change. This occurred, for example, in 1964 in New York when some 38 people witnessed a woman being attacked

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and killed outside an apartment block: none of them intervened or called the police until she was dead.[1] Writings in other jurisdictions conjure up any number of illustrative scenarios. Take for example the collection in Prosser and Keeton:

> Because of this reluctance to countenance "nonfeasance" as a basis of liability, the law has persistently refused to impose on a stranger the moral obligation of common humanity, to go to the aid of another human being who is in danger, even if the other is in danger of losing his life. Some of the decisions have been shocking in the extreme. The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the deck, smoke his cigarette, and watch the man drown. A physician is under no duty to answer the call of one who is dying and might be saved, nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death, or to prevent a neighbour's child from hammering on a dangerous explosive, or to remove a stone from the highway where it is a menace to traffic, or a train from a place where it blocks a fire engine on its way to save a house, or even to cry a warning to one who is walking into the jaws of a dangerous machine. The remedy in such cases is left to the "higher law" and the "voice of conscience", which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim.
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> Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers. Yet thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application.[2]

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1 A collection of essays arising out of circumstances of the Kitty Genovese incident have been collected in JM Ratcliffe (ed), *The Good Samaritan and the Law*, New York, Doubleday, 1966. See further MA Menlowe and A McCall Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid*, Aldershot, Dartmouth Publishing, 1993.

2 WP Keeton *et al, Prosser and Keeton on The Law of Torts* (5th ed), St Paul, West Publishing Co., 1984 J56 at 375-377.

The purpose of these articles is to explore the bases for and validity of the incongruity between the moral precept and the legal rule in these situations and to analyse whether failure to aid those in peril should attract criminal omissions liability. Specifically, Part I will identify the nature and extent of existing liability for omissions in the criminal law, particularly focussing on the circumstances in which a limited duty to rescue may arise. The various Australian, English and Canadian codification and law reform exercises will then be scrutinised for contemporary, common law contributions to the duty to rescue debate. Part I will conclude with a brief examination of comparative law provisions on rescue. Part II will then identify and explore the theoretical bases for the distinction between acts of omission and acts of commission which has fundamentally underwritten (and constrained) the imposition of modern criminal responsibility. Finally, Part II will address the crucial question whether it is possible to reinforce a duty to rescue in the criminal law in such a way as to, if not reconcile, at least fairly balance the competing interests.

At the outset, it should be observed that these issues do not sound only in the criminal law. As Ratcliffe catalogues, there are a number of possible approaches to law reform in this area.[3] If the real objective is to encourage intervention, then safeguards from consequences, compensation and/or rewards might be offered.[4] Alternatively, if the intent is to punish bad samaritans for their recalcitrant behaviour, then a legal duty entailing criminal sanctions for breach of that specific duty could be imposed. It may be that a combination of the preceding two measures is the most desirable course; an approach that encourages (and protects) intervention, but punishes inaction. Or the approach may be that the theoretical and practical objections are so great that, however unsatisfactory the current position might be, we should simply accept that this matter is simply too problematic to countenance any meddling with the status quo. It is the second of these options on which these articles will focus, though it will be necessary to touch on the other positions throughout.

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3 JM Ratcliffe, "Introduction" in Ratcliffe, n1 at xiii-xiv.

4 For example, see the model proposed in WP Miller and MA Zimmerman, "The Good Samaritan Act of 1966: A Proposal" in Ratcliffe, n1; N Morris, "Compensation and the Good Samaritan" in Ratcliffe, n1, proposing that, as a community we should minimise the financial loss to good Samaritans. Of course, immunity for aid rendered gratuitously by medical professionals at the scene of an accident (unless guilty of gross negligence) is usually the subject of specific coverage

Good and Bad Samaritans: Some Fundamental Considerations.

It would be incorrect to say that no legislative attention has been given to these issues in the Australian criminal law. In what has subsequently been described as a "path breaking" move,[5] the *Criminal Code* 1983 (NT) created the crime of callously failing to provide rescue or succour to a person urgently in need of it. After lying dormant for over a decade, s 155 *Criminal Code* 1983 (NT) was finally considered and subjected to some detailed scrutiny in the 1994 Northern Territory decision of *Salmon*.[6] Kearney J in that case described the scope of s 155 as "uncertain and broad" and opined that the reason other common law jurisdictions had failed to legislate for like offences was because such provisions were both "unnecessary and unworkable".[7]

This type of omission offence has often been referred to as a "good Samaritan" provision after the biblical story of the same name. Lord Diplock said in *R v. Miller*:[8]

> 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; and even if it ever were to do so there would be difficulties in defining what should be the limits of the offence.

With current moves towards codification of the criminal law in Australia and England, with recent revisions of outdated Codes in Queensland and Canada, and in the context of contemporary debates raging over the interrelationship between law and morals (particularly, euthanasia in recent times), it is timely to reappraise the common law world's "empty" approach

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in the true "good Samaritan Statues" in Canada and the USA, of which over 100 exist" for example, for USA, of which over 100 exist" for example, for USA see L Holland, "The Good Samaritan Law" A Reappraisal" (1967) 16*J of Pub L* 128 and R Mason, "Good Samaritan Laws - Legal Disarray" An Update" (1987) *38 Mercer L Rev* 1439' and for Canada see M McInnes, "Good Samaritan Statues: A Summary and Analysis" (1992) 26 *UBC Law Review* 239. For and Australian equivalent see *The Voluntary Aid in Emergency Act* 1973 (Qld), s 3 which provides that medical practitioners or nurses shall not be liable for acts done or omitted in the course of rendering medical care, aid or assistance to an injured person in circumstances of emergency.

5 *Salmon* (1994) 70 A Crim R 536 at 550.

6 n5; note 1 Leader-Elliontt, "Case and Comment - Salmon" (1996) 20 *Crim LJ* 102.

7 n5 at 550-551.

8 [1983] 2 AC 161 at 175.

to omissions liability[9] and its specific inattention to the generation of a bad samaritan offence.

A fundamental question in this debate is the legitimate purpose and functions of the criminal law. Indeed, the Law Reform Commission of Canada (LRCC) anticipated this threshold point when it mooted whether there should be a preamble to the revised Criminal Code.[10]

Cadoppi suggests that "protection of social or individual interests should be the only goal of criminal law": if there is no relevant legal interest to protect, then the law is not justified in interfering even if the behaviour sought to be prohibited is contrary to morality.[11] Feinberg, endorses a principle of "harm-prevention" (raising consequential issues of blameworthiness) as a legitimate purpose of criminalisation:

> ...the criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another. Acts of *harming* then are the direct objects of the criminal law...An act of harming is one which causes *harm* to people.[12]

Other commentators emphasise the declaratory role of the criminal law; that it serves as a public definition of morality and immorality, an enunciation of what ought to be done and a denunciation of what is reprehensible. As such the criminal law has the ability, at both a declaratory and punitive level, to shape the behaviour of citizens.[13] It follows that the criminal law has an educative and informative role.

If it is accepted that the criminal law has a legitimate role in denouncing/ punishing conduct which offends the moral interests of society and that it

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9 G Hughes, "Criminal Omissions" (1958) 67 *Yale Law Journal* 590 at 620.

10 Law Reform Commission of Canada (LRCC), *Recodifying Criminal Law*, (Report No 31) Ottawa, LRCC, 1987 at 7-8; the majority view was that a preamble was unnecessary.

11 A Cadoppi, "Failure to Rescue and the Continental Criminal law" in menlowe and McCall Smith, n1 at 118; this is similar to the premble the minority endorsed for the revised Canadian Code.

12 J Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others*, New York, Oxford University Press, 1984 at 31.

13 See, for example, Law Reform Commission of Canada (LRCC), *Omissions, Negligence and Endangering*, (Working Paper 46), Ottawa, LRCC, 1985 at 19, A Ashworth and E Steiner, "Criminal Omissions and Public Duties: the French Experience" (1990) 10 *Legal Studies* 153 at 162; L Waller, "Rescue and the Common Law: England and Australia" in Tarcliffe, n1 at 141.

14 A McCall Smith, "The Duty to Rescue and the Common Law" in Menlowe and McCall Smith, n1 at 87-89.

is, or should be, concerned to intervene when harm to others is in question, the present polemic must reduce itself to "Does one who fails to rescue cause harm to another?",[14] such that that person commits a criminal offence?

It is uncontroversial to say that, as individuals and as a society, we admire and applaud those who act heroically as good Samaritans: individual and societal interests are clearly satisfied by a rescuer's actions. But is it possible, or even practical, to require compliance with a *general* duty to rescue, that is not limited to situations more specially suggesting of coercible assistance, either because of the particular *character* of the peril or the particular *person* in peril, both of which may have some proximity or association to the potential rescuer? Is it true to say (as many argue), that an *imposed* duty would be ineffective: people who would rescue voluntarily will do so without requisition, while those who would never do so voluntarily are, simply, not compellable?[15] Before proceeding further therefore, as a matter of feasibility, the issue of why potential rescuers might be reluctant to intervene should be addressed.

Freedman suggests that apathy and indifference are the least likely responses to a person in peril and that the more likely sequence of response would be:

> ...first, the intense emotional shock - characterised predominantly, but not exclusively, by anxiety; second, the cognitive perception and awareness of what has happened; third, an inertial paralysis of reaction, which as a non-act becomes in fact an act, and fourth, the self-awareness of one's own shock anxiety, non-involvement which is followed by a sense of guilt and intra-psychic and social self-justification.[16]

Much work has been done on the reasons why citizens might be reluctant to aid others in distress. Many of the underlying reasons would seem obvious: the desire not to get involved is probably paramount; reluctance because people are scared - of getting hurt themselves, of their possible incompetence

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[14] A McCall Smith, "The Duty to Rescue and the Common Law" in Menlowe and McCall Smith, n1 at 87-89.

[15] CO Gregory, "The Good Samaritan and the Bad: The Anglo-American Law" in Ratcliffe, n1 at 31.

[16] LZ Freedma, "No Response to the Cry for Help" in Ratcliffe, n1 at 175 and see also 176-181. This is particularly interesting when one considers, for example, the role that the questiln of panic plays in the leaving the scene of the accident in cases such as *Crack v. Post* [1984] 2 Qd R 311 and *Salmon*.

to effect a successful rescue, or of retribution by criminals; contemporary society's pervasive obsession with privacy and "minding our own business" which manifests in an excessive cautiousness about the appropriateness of intervening in "other people's business"; reluctance because citizens do not believe that the police would take them seriously, nor that their anonymity would be preserved, nor that the police, even if summonsed, would even be effective; because people perceive they may be liable themselves if they make the situation worse.[17] In terms of criminal culpability, it is the "moral and decisional" questions to which Fingarette refers, which come after the practical and emotional dilemmas, that are the most important.[18] Notions of blameworthiness would seem to require that there be some added feature of moral offensiveness to distinguish the consequent inaction as punishable callousness.

The further, and not inconsequential, question of what might be a *positive influence* on a bystander to intervene and, particularly, whether a legislative enactment would have any impact in this area, provokes greater psychological, societal and legislative considerations. Detailed analysis of these issues is beyond the scope of these articles but recent work has shown that, of all the possible factors that might influence an individual decision to intervene, the "influence of the social and environmental context on intervention appears most significant", seemingly because variables associated with organised and premeditated commitment lose their impact in the spontaneous, situational context.[19] One aspect of the "social and environmental context" specifically identified as relevant is the extent to which citizens perceive themselves as having a responsibility for the property or safety of others.[20]

This last consideration in particular, returns us to the notion of the function and purposes of the criminal law (and probably appropriately so before embarking on a doctrinal analysis of the current law). Would the imposition of a *legal* obligation shape and reinforce the moral obligation by

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17 For example, Cadoppi, n11 at 120-121; Gregory, n15 esp at 37; H Fingarette, "Some Moral Aspects of Good Samaritanship" in Ratcliffe, n1 esp at 214.

18 Fingarette, n17 at 214.

19 RI Mawby, "Bystander Responses to the Victims of Crime: Is the Good Samaritan Alive and Well?" (1985) 10 *Victimology* 461 at 471.

20 Mayby, n19.

giving it "specific content"[21] that would guide conduct in the face of conflicting emotional impulses, maybe even to the extent that the individual would respond automatically and not consciously consider whether it is customary to rush to the aid of the person in distress?[22] Generally in this regard, the more recent studies reflect favourably on the efficacy of legislative enactment of a duty to rescue.[23]

Finally, putting the hypotheticals to one side, realistically, what situations arise for rescue? Ashworth and Steiner, in their examination of the French failure to rescue offence, have found that the reported French cases suggest some broad, relevant categories of application: uncaring motorists who fail to assist accident victims; uncaring doctors who fail to assist sick or injured people in situations where they have failed to inform themselves properly about the person's state of health before refusing to act or prescribe medication; parents who, for religious reasons, fail to call help for their sick children when there is a danger to the child's life or health; healers who fail to advise people to take expert medical advice.[24]

Similarly, Kearney J *in Salmon*[25] considered that possible applications of s 155 *Criminal Code* (NT) were cases:

> ...involving motorists and others who fail to assist victims of accidents, doctors who fail to make home visits to sick or injured persons and parents who fail to summon medical attention for their sick children.

As any review of the civil and criminal law will reveal, it is not the position that our common law legal tradition is completely inimical to the concept of a duty to rescue: the bad Samaritan *will* incur liability for a failure to act, but only in certain, clearly defined circumstances. Indeed it

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21 Fingarette, n17 at 222. See also AM Honore, "Law, Morals and Rescue" in Ratcliffe, n1 at 240.

22 Fingarette, n17 at 222. Also Honore, n21 at 240 re the layperson's sense of shock that the law's "guiding hand" has failed in this regard. See also M McInnes, "Book Review of *The Duty to Rescue: The Jurisprudence of Aid*" (1994) 28 *Uni of British Columbia Law Review* 201 at 202.

23 See for example, Cadoppi, n11 for an analysis of the legislation in Europoe and Latin America. The psychological aspects and effects of a duty to rescue are dealt with in dealt with in detail by a number of writers, including for example Freedman, n16; H Zeisel, "An International Experiment on the Effects of a Good Samaritan Law" in Ratcliffe, n1; M McInnes, "Psychological Perspectives on Rescue" The Behavioural Implications of Using the Law to Increase the Incidence of Emergency Intervention" (1992) 20 *Man LJ* 657' R Prentice, "Expanding the Duty to Rescue" (1985) 19 *Suffolk U L Rev* 15 esp at 50; Mawby, n19.

24 Ashworth and Steiner, n13, at 158-160 re Article 63(2) of the Penal Code.

25 n5 at 551.

could well be said that there is an "attitude of encouragement"[26] to rescue to be found in the civil law of torts and it is to that area that this inquiry now turns briefly.

Common Law Tortious Liability

As for the criminal law, so too in the law of torts there is no general duty to rescue: in the absence of a duty of care owed to another, failure to act will have no implications for tortious liability. As Lord Diplock said in *Dorset Yacht Co. v. Home Office*, the parable of the Good Samaritan

> ...illustrates, in the conduct of the priest and the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law.[27]

For Australia, Deane J observed in *Jaensch v. Coffey:*

> ...both priest and Levite ensured performance of any common law duty of care to the stricken traveller when, by crossing to the other side of the road, they avoided any risk of throwing dust in his wounds...[28]

Cullen has recently isolated three specific instances in which there may be a duty to act for the benefit of another on the basis of a relationship of proximity between the parties.[29]

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[26] Waller, n13 at 148; and see also McCall Smith, n14 at 73: the moral sympathies of the law are with the rescuer in a civil action. See, for example, *Videan v. British Transport Commission* [1963] 2 QB 650 at 669 per Lord Denning: "Whoever comes to the rescue, the law should see that he does not suffer for it."

[27] [1970] AC 1004 at 1060; see also Lord Reid at 1027; *Quinn v. Hill* [1957] VR 439 esp at 446; cf *Maloco v. Littlewoods Organisation Ltd* [1987] SC (HL) 37 per Lord Goff at 76. For a recent discussion of rescue doctrine in torts see WD Cullen, "The Liability of the Good Samaritan" (1995) *Juridical Review* 20, also A Linden, "Rescuers and Good Samaritans" (1971) 34 *Modern Law Review* 241.

[28] (1984) 155 CLR 549 at 578-579; see also *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 a5 477-481 per Brennan J; at 502 per Deane J.

[29] Cullen, n27 at 21; see also RP Balkin and JLR Davies, *Law of Torts*, Sydney, Butterworths, 1991 at 223-226; AM Linden, *Canadian Tort Law* (4th ed), Toronto and Vancouver, Butterworths, 1988 at 263-303; Keeton et al, n2 at 376-377; McCall Smith, n14 at 75-79; *Laws of Australia*, Sydney and Melbourne, Law Book Company, 1995, 1993 at 20.7:38; 27.2:12; 33.2:69.

1. Where there is an existing, special relationship between the parties: for example, in *Horsley v. McLaren (The Ogopogo)*,[30] Laskin J identified that relationships such as parent and child, doctor and patient, employer and employee,[31] and carrier and passenger can give rise to a duty to rescue.

   In the doctor/patient situation there may be further issues such as, for example, a positive ethical duty to aid patients which, if breached, may give rise to disciplinary proceedings. Moreover, as discussed below, the New South Wales Court of Appeal has recently held that a doctor may incur civil liability for failing to treat even a *non*-patient in an emergency.[32] Gruzman has suggested that where the defendant is a public rescue body, liability will be imposed for failure to rescue or for negligence in the carrying out of the rescue operation.[33]

2. In cases where there is a significant feature of control: for example, a duty may arise where occupiers of land know of dangers arising from the state or use of their land.

3. In situations where the rescuer has created a known risk to others, even if the original danger was generated by innocent conduct.[34]

In a dramatic development, a remarkable extension of the rescue doctrine has occurred recently in the Australian common law. Utilising what were then the well-established principles of proximity (to determine

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30 [1971] 2 Lloyd's Rep 410.

31 See *Miller v. The Royal Derwent Hospital Board of Management*, Unreported Tas Sup Ct, 29 May 1992, Zeeman J at 15.

32 For example, the ethical duty created by *Medical Practice Act* 1992 (NSW) s 36 and its definition of "unsatisfactory professional conduct" which includes the refusal or failure, without reasonable cause, to attend to a patient within a reasonable time after being requested to do so (or cause another to attend within a reasonable time) for the purpose of rendering professional medical services in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner. See also Waller, n13, at 155: a "penal provision of a very dreadful sort as far as doctors are concerned". See further Cullen, n27 at 26. Recently *Woods v. Lowns* (1995) 36 NSWLR 344 esp 358-360 (Badgery-Parker J at first instance); *Lowns v. Woods* (1996) *Aust Torts Reporter* 81-376 (NSW Court of Appeal) considering (the since repealed) s 27(1)(h) *Medical Practitioners Act* 1938 (NSW) and finding liability for a medical practitioner who negligently failed to attend and treat a non-patient in an emergency.

33 L Gruzman, "Liability for Search and Rescue Authorities for Negligence" (1991) 65 ALJ 646.

34 See, for example, *McKinnon v. Burtatowski* [1969] VR 899; cf *Stovin v Wise* [1996] AC 923.

whether a duty of care existed in a particular fact situation), a medical practitioner was found liable in negligence for failing to attend and treat a non-patient in an emergency. The proximity determinants, as enunciated in *Jaensch v. Coffey*[35] and *Sutherland Shire Council v. Heyman*[36], required that for a sufficient relationship of proximity to be found to exist between parties, there must be *physical* proximity (in the sense of space and time), *circumstantial* proximity (for example, in relationships of employer/employee or professional/client) and causal proximity "in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury suffered".[37]

In the particular circumstances of *Lowns v. Woods*,[38] it was held that each of these aspects of proximity were satisfied in the case of an 11 year old boy who had an epileptic seizure while on holiday. Dr Lowns was requested by the boy's sister (who arrived on foot at his surgery) to assist the boy, and had refused to come, saying that the ambulance (which had also been summonsed) should bring the child to him. As a result of a prolonged seizure, the child suffered severe brain damage and was rendered a quadriplegic. Despite the child not having been his patient, Dr Lowns was found to have been physically proximate (the sister arrived on foot), to have been circumstantially proximate (as measured against the ethical standard of medical practice set out in (the then applicable) s 27(1)(h) of the *Medical Practitioners Act* 1938 (NSW) and on the basis of his having been requested "in a professional context" to assist, there being reasonable impediment, no risk to himself, no disabling physical or mental condition (eg, tiredness, illness or inebriation), and no other patient, that prevented him from treating the child) and to have had causal proximity (in that he knew of the emergency situation and was aware of the appropriate treatment and consequences of its non-administration). Dr Lowns was consequently held to have breached a duty of care owed to this non-patient by failing to

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35 (1984) 155 CLR 549. See now *Hill v. Van Erp* (1997) 142 ALR 687.

36 (1985) 157 CLR 424, particularly per Deane J at 497-498. See now *Hill v. Van Erp* (1997) 142 ALR 687.

37 *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 per Deane J at 497.

38 *Woods v Lowns* (1995) 36 NSWLR 344 esp 358-360 (Badgery-Parker J at first instance); *Lowns v Woods* (1996) Aust Torts Reporter 81-376 (NSW Court of Appeal) considering s 27(1)(h) *Medical Practitioners Act* 1938 (NSW) and finding liability for a medical practitioner who negligently failed to attend and treat a non-patient in an emergency.

attend the child, and damages were ordered in the sum of $3.2 million.

Both at first instance and on appeal, the judgments in Lowns v. Woods upheld the proposition that there is no general duty to rescue at common law.[39] In the face of the acknowledged resistance to the creation of such a duty to rescue, even where death or serious injury is foreseeable,[40] it has been suggested that it is unlikely that the more general legislative provisions in the other States would support any extension of a general common law duty to rescue in similar circumstances: both the trial judge and the majority were greatly influenced by the particular wording of s 27(1)(h) of the *Medical Practitioners Act* 1938 (NSW) - which made failure to attend a "person" (cf a "patient") in such instances a matter of professional misconduct - while the judgements also placed emphasis on the request to Dr Lowns having been made "in a professional context".[41] Nevertheless, despite its limited application and even though notions of proximity have recently lost prominence as the key determinants for developing new categories of negligence (in favour of *Hill v. Van Erp's* "incremental by analogy" approach[42]), that the modern common law would take this momentous step towards requiring action, where previously inaction was legally sufficient, is encouraging in the context of the current debate.

An ancillary tortious aspect of rescue is the question of whether an independent duty is owed to the rescuer. The common law is generally supportive in this regard and any rescuer who is injured, acting on the

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39 *Woods v. Lowns* (1995) 36 NSWLR 344 esp 354, 359 (Badgery-Parker J); *Lowns v. Woods* (1996) *Aust Torts Reporter* 81-376 per Kirby P at 63,155, per Mahoney JA at 63,166, per Cole JA at 63,175.

40 Particularly, *Jaensch v. Coffey* (1984) 155 CLR 549 per Deane J at 578 and *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 per Brennan J at 477-81.

41 *Lowns v. Woods* (1996) *Aust Torts Reporter* 81-376 per Kirby P at 63,155, Cole JA at 63,176, cf Mahoney JA at 63,166 and see K Day, "Medical Negligence - the Duty to Attend Emergencies and the Standard of Care: *Lowns & Anor v. Woods & Ors*" (1996) Syd LR 386 at 392-396. Section 27, considered in *Lowns v. Woods*, has since been repealed and replaced: cf *Medical Practice Act* 1992 (NSW) s 36. For other commentaries on this decision see: L Crowley-Smith, "The Duty to Rescue Unveiled: A Need to Indemnify Good Samaritan Health Care Professionals in Australia?" (1997) 4 *Journal of Law and Medicine* 352; K Amirthalingam and T Faunce, "Patching Up Proximity': Problems with the Judicial Creation of a New Medical Duty to Rescue" (1997) *5 Torts Law Journal* 27.

42 (1997) 142 ALR 687.

43 *Wagner v. International Railway Co.* (1921) 232 NY Rep 176 at 180 per Cardozo J.

moral duty, will no longer face a plea of *volenti*. "The cry of danger is the summons to relief"[43] and the law will allow recovery against the negligent party who created the situation of danger on the basis that the harm caused is a foreseeable consequence of the original negligent conduct.[44]

So far as liability of the *rescuer* is concerned, a rescuer will be liable if s/he negligently worsens the position of the victim, or misleads the victim into the belief that the danger has been removed, or deprives the victim of the opportunity of help from other sources. It is clear however, that the civil standard of care for a rescuer will always be judged against that which could be reasonably expected in the circumstances of emergency.[45]

Criminal Law: Omissions Liability and Failure to Rescue.

The criminal law, with its traditional emphasis on positive acts of commission, has not imposed any direct liability for failure to rescue. Parallelling the civil law, however, it is possible to identify, within the specific categories of recognised omissions liability, some scope for the operation of a limited criminal duty to rescue.

In a detailed Working Paper, the LRCC[46] identified that criminal omissions liability may arise in three ways. Each of those instances will now be considered.

A fertile class of liability in the present context is that of "not acting within a wider course of acting":[47] where there has been relevant past conduct on the part of the defendant, the ensuing non-action may be categorised as either part of one continuous act or as a culpable omission. The issue is whether a person who, even inadvertently, creates a potentially harmful situation by an act should have a duty to take steps to avert or minimise the

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44 See esp *Haynes v. Harwood* [1935] 1 KB 146, the leading English case; *Ogwo v. Taylor* [1988] AC 431 rejecting the doctrine of volenti also in relation to professional rescuers such as firepersons. Cf generally *Chapman v. Hearse* (1961) 106 CLR 112. Note the useful discussion in *Russell v. McCabe* [1962] NZLR 392.

45 Cullen, n27 at 23-27; McCall Smith, n14 at 73-74. Cullen refers to the *American Restatement of Torts* (2d) para 323 and 324; in para 324 the principle seems to be that liability may be imposed for the infliction of injury but not for failure to confer a benefit.

46 LRCC, Working Paper 46, n13 esp at 8 and see generally Chapter 1.

47 LRCC, n13 at 8.

effects of that act.[48]

The situation may be exampled by the facts in *R v. Miller.*[49] The accused in that case accidentally started a fire but, on discovering what he had done, took no steps to extinguish it. He was convicted of recklessly damaging the house by fire. In the Court of Appeal the accused was held liable on the analysis of his conduct viewed as one continuing act. In the House of Lords, Lord Diplock recognised that the causing of a situation of danger gives rise to a duty to act correctively to avert harmful consequences.[50]

Similarly to the torts cases, this class of liability gives rise to criminal responsibility for failure to rescue in a case where the dangerous situation has been created by the rescuer. It is also possible that there could be a failure to rescue in this context in the scenario exampled by *R v. Taktak.*[51] In that case, though the Court ultimately did not find the appellant to have been criminally negligent, he was found to have voluntarily assumed a duty of care for a fellow drug addict in circumstances which ultimately led to the victim's death. Having no duty to do so, he intervened and, in effect, prevented rescue being affected by anyone else.

A second class of omissions liability identified by the LRCC is the "non-acts explicitly prohibited as omissions";[52] those specific offences where the proscribed conduct is defined by reference to omission or failure to do something. At common law, an example would be misprision of felony, which Waller describes as a "crime of omission to inform".[53] Statutory

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48 See A Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 *LQR* 424 at 439-440; see also McCall Smith, n14 at 60-62.

49 [1983] 2 AC 161, also the approach of G Williams in [1982] *Crim LR* 773. See further LRCC, Working Paper 46, n13 at 9.

50 [1983] 2 AC 161 at 176; see also McCall Smith, n14 at 60-62 referring to *Kroon* (1991) 52 A Crim R 15 where he says the prior dangerous conduct (driving the motor vehicle) created an obligation to act and prevent harm to others or the commission of an offence. Cf duty in 204.4 of Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Final Report, Model Criminal Code *Chapter 2: General Principles of Criminal Responsibility*, Canberra, AGPS, 1993, hereafter "Final Report" (CLOC subsequently becoming MCCOC).

51 (1988) 14 NSWLR 226 at 246, 250; though the conviction was ultimately deemed to be unsafe and unsatisfactory. See further below.

52 LRCC, Working Paper 46, n13 at 11-12.

53 Waller, n13 at 148-152. Waller draws a direct relationship between this offence and the educative purpose of the criminal law: in emergency the criminal law might well "spur to action" a bystander who witnesses a brutal attack, or at least remind them of their obligation to call the police (at 148). See, for example, s 316 *Crimes Act* 1900 (NSW).

examples abound: traffic legislation provides many instances (failing to provide breath sufficient for a breath analysis or failing to give way) and taxation legislation is replete with such offences (failure to lodge tax returns). One offence of this nature that is especially relevant to the current discussion is that of failure to stop and render assistance (if possible) at the scene of an accident.[54] This common offence seeks to both encourage Good Samaritanship and to prevent evasion of civil and criminal responsibility. Here is a situation where the legislature and the courts have found little difficulty in the imposition and interpretation of a positive duty to act. McCall Smith suggests that this is due to the specificity with which the omission is defined: ôthe person upon whom the duty to act rests is spelled out, as are the incidents of the duty, and it is therefore not open to the defendant to rely on an uncertainty argument".[55] Alternatively it may be, as Rudzinski has suggested, that the punishment is really for the act of fleeing, not for an *omission* to stop and assist.[56] It is significant that the LRCC's proposed duty to rescue provision would come within this category of omissions liability.

The third category of omissions liability arises where the failure to perform some legal duty constitutes the conduct element of the offence. This liability stands or falls on the question whether there is or there is not a legal duty to act. As has been recognised by a number of commentators and some courts, a limited duty to rescue may arise within the framework of one of those duties. For example, McCall Smith suggests:

> Provided that it occurs within the context of one of these categories, a failure to rescue may result in criminal liability. This amounts to a limited duty to rescue, imposed only in special circumstances and not on the general public, yet even so the existence of such liability still refutes the proposition that the common law completely fails to recognise a duty to rescue.[57]

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[54] See for example *Traffic Act* 1949 (Qld) s 31 and note *Crack v. Post* [1984] 2 Qd R 31; *Traffic Act* 1909 (NSW) s 8; *Maritime Services Act* 1935 (NSW) s 30G; *Road Safety Act* (Vic) s 61; *Road Traffic Act* (SA) s 43; *Road Traffic Act* 1974 (WA) s 54; *Traffic Act* (ACT) s 32; *Traffic Regulations* 1988 (NT) reg 138(1)(d). See discussion at Waller, n13 at 152-153; Gregory, n15 at 28-29; Linden (1988), n27 at 282-285; Keeton *et al,* n2 at 377.

[55] McCall Smith, n14 at 58.

[56] AW Rudzinski, "The Duty to Rescue: A Comparative Analysis" in Ratcliffe, n1 at 93.

[57] McCall Smith, n14 at 60. See also, for example, *R v. Taktak* (1988) 14 NSWLR 226; *R v. Witika* [1993] 2 NZLR 424 and J Finn, "Culpable Non-Intervention: Reconsidering the Basis for Party Liability by Omission" (1994) 18 *Criminal Law Journal* 90.

Specific to the present discussion, the criminal law recognises three categories of relationship duties:

1. *Where there is a relationship between the person in peril and the potential rescuer,* either by virtue of a relationship of family or employment, or because of an assumption of "charge" in relation to the victim.[58] A classic example of the application of this duty may be seen in the case of *R v. Russell* [59] where it was held that a father's failure to rescue his own children from drowning by his estranged wife was a criminal omission. In the Code jurisdictions, the scope of the duties are more certain given the legislative statements as to whom they are owed. Potentially, at common law the categories are still open but may include children, spouses, partners, relatives, employees and, on occasions, anyone under the same roof.

   In *Stone and Dobinson*,[60] for example, both defendants were convicted of the manslaughter of Stone's sister who was living with them. The sister became anorexic, remained in her room clearly in need of medical help and ultimately died. The two accused were liable on the basis that they failed to attempt to save her life. The Court held that Stone was liable by reason of a duty owed to the deceased as his sister who was under his roof, and that Dobinson was liable because she had willingly undertaken certain duties in respect of the sister and therefore had a continuing duty to act, probably in a sense similar to that of the

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[58] With respect to relationship duties under the Codes see *Criminal Code* (Qld) ss 286-287, *Criminal Code* (WA) ss 263-264, *Criminal Code* (Tas) ss 145 and 147, *Criminal Code* (NT) s 149 (note that the latter provision specifically provides that the person in charge, *inter alia*, is to perform reasonable action by way of rescue, which would seem to mirror the common law given the decision in *R v. Russell* [1933] VR 59.) With respect to assumption of responsibility or charge under the Codes see *Criminal Code* (Qld) s 285, *Criminal Code* (WA) s 262, *Criminal Code* (Tas) s 144, *Criminal Code* (NT) s 149. With respect to the latter duty, under the Tasmanian Code it is irrelevant how the charge of the other person arose; under the other Codes the charge may arise by imposition of law, by contractual duty or by act. For the common law position in relation to these duties see discussion in McCall Smith, n14 at 63-67, Ashworth, n48 at 440-443, and see B Fisse, *Laws of Australia: Homicide*, Sydney, Law Book Company, 1992 at [32] and [34] for a comprehensive discussion of the duties in the Australian jurisdictions. Cf MCCOC at 204.1.

[59] [1933] VLR 59 esp 81-82. See also *Kuchel v. Conley* (1971) 1 SASR 73 at 83-84; *R v. Cowan* [1955] VLR 18 at 21 where the duty owed to the woman with whom the defendant lived was founded on either an implied undertaking or on the basis of their relationship.

[60] [1977] QB 354.

defendant in *R v. Taktak*.[61] In *Taktak*, though the conviction was ultimately quashed, the NSW Court of Criminal Appeal was prepared to hold that the accused's duty to seek medical assistance for the deceased arose, not out of any prior relationship with her, but by virtue of his having assumed a duty to care for her by taking her to some premises in an attempt to assist her. By then abandoning her, he denied her the opportunity of obtaining any other aid. Had he not assumed her care and ignored her plight, he would not have been under any duty.

Cases of this sort raise issues of reliance and dependence on the part of the victim. Ashworth suggests that the relevant features are the determinants of presence and special relationship.[62] The latter, in particular, attracts support from the way in which the courts have been prepared to attribute liability for complicity in cases of omissions to act, where the party him/herself is not subject to a direct legal duty, though their co-offender is so subject. For example, in the New Zealand decision of *R v. Witika*[63] the nature and extent of party liability for omissions was scrutinised, but again in the situation where there was a relationship duty in existence: Witika and her de facto were convicted of the manslaughter of Witika's two year old daughter.

McCall Smith has said that

> The relationship cases ultimately have to be interpreted in terms of moral claims. The courts will infer a duty to rescue, it seems, where they feel that the moral claim is sufficiently strong to justify the creation of a legal obligation.[64]

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61 (1988) 14 NSWLR 226 per Yeldham J at 246, per Carruthers J at 250.

62 Ashworth, n48 at 442. See also *R v. Instan* [1893] 1 QB 450: an accused who lived with and accepted responsibility for her 73 year old aunt was found guilty of homicide by neglect; see Hughes, n9 at 621- 626.

63 (1993) 2 NZLR 424 and see generally Finn, n57. Cf *R v. Clark and Wilton* [1959] VR 645 (a guardian is under a duty to protect a child from violence by a co-guardian). Note Ashworth and Steiner, n13 at 162 discussing the English courts development of omissions liability for complicity in certain situations; see also Ashworth, n48 at 445-447 citing the cases of *DuCros v. Lambourne* [1907] 1 KB 40 and *Tuck v. Robinson* [1970] 1 WLR 741.

64 McCall Smith, n14 at 66.

2. *Where a person occupies a position or has undertaken duties which require him/her to act.*[65] This category brings together a number of different situations. The "position" or "undertaking" that requires the particular person to act may be, for example, an official one arising out of a contract of employment that requires the person to render aid. Ashworth and Silver identify positions such as lifeguards (who agree to rescue drowning swimmers as a term of employment), firepersons, police,[66] nurses, babysitters, and the like.[67] In the manslaughter case of *R v. Pitwood*,[68] for example, there was a contractual duty as a keeper of a railway crossing gate, the duty was breached and life was lost as a result.

   It has been suggested that the basis for liability in these cases lies in the accused's assumption of responsibility to "protect the interests of persons who [have] obviously relied on the performance of the accused's contractual obligation". The essence of the liability is founded in the defendant's duty and his/her capacity to prevent harm.[69]

3. *Where the potential rescuer is the owner of property connected with the peril.*[71] *Miller's Case*[71] could come under this head. In a Code jurisdiction it would almost certainly do so on the basis of failure to exercise reasonable care over a dangerous thing under the accused's control (ie, the lighted match) *if* the result caused injury to life or health rather than to damage to property. However, as Fisse has noted, the limits of the *Miller* duty in terms of rescue doctrine under the Codes have been made apparent in *R v. Phillips*,[72] a case where the victim died from drowning after having been injured by the accused and left unconscious by the shore of the ocean. The court held that the failure of the accused

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65 With respect to duties based on undertakings under the Codes see *Criminal Code* (Qld) s 290, *Criminal Code* (WA) s 262, *Criminal Code* (Tas) s 151, *Criminal Code* (NT) s 152. For the common law see discussion in McCall Smith, n14 at 67-70; Ashworth, n48 at 443-445; Fisse, n58 at [33]; J Silver, "The Duty to Rescue: A Reexamination and Proposal" (1985) 26 *William and Mary Law Review* 423 at 426.

66 Cf *Ticehurst v. Skeen* Unreported Sup Ct NSW, 5 March 1986, Wood J at 20, 22-23.

67 Ashworth, n48 at 444-445; Silver, n65 at 426.

68 (1902) 19 TLR 37.

69 See Fisse, n58 at [33]; Ashworth, n48 at 444-445; McCall Smith, n14 at 67-70.

70 With respect to duties of persons in charge of dangerous things under the Codes see *Criminal Code* (Qld) s 289, *Criminal Code* (WA) s 266, *Criminal Code* (Tas) s 150, *Criminal Code* (NT) s 151). For the common law position see McCall Smith, n14 at 70-71, Fisse, n58 at [35].

71 [1983] 2 AC 161.

72 (1971) 45 ALJR 467 per Barwick CJ at 471, Menzies J at 476, Windeyer J at 478 and see Fisse, n58 at [35].

to move the victim to a safe position out of the reach of the tide did not constitute an omission to perform a duty under the relevant Tasmanian Code provision; there was no requirement, as was found in *Miller*, to embark on corrective action in relation to a danger for which there could be found causal responsibility.

Codification, Omissions Liability, Rescue and Reform

Little has changed in the law of criminal omissions in recent times, despite the considerable effort that has gone into contemporary codification and reform exercises. It is nevertheless interesting to examine this work to ascertain what, if anything, of present relevance these review and reform bodies have had to say.

The recent Australian codification exercises have given no consideration to legislating for a duty to rescue. The scope of omissions liability was given little independent consideration by the Gibbs Committee in 1990.[73] In 1992, the Model Criminal Code Officers Committee (MCCOC as it is now known) of the Standing Committee of Attorneys-General accepted the traditional view that omissions should attract liability in only two instances: if the statute creating the offence so provides or the omission was in breach of a legal duty to act.[74] To answer allegations of vagueness as to the present common law position, the Final Report stated that the Model Code would set out the circumstances in which a legal duty to act arises (as had been earlier set out in the Discussion Draft s 204).[75] In accordance with the conventional position, it was made clear that breach of the duty of itself would not create criminal responsibility.[76]

It is useful to have regard to the duties identified by MCCOC:[77]

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[73] See Review of the Commonwealth Criminal Law, Interim Report *Principles of Criminal Responsibility and Other Matters*, Canberra, AGPS, 1990.

[74] See Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Discussion Draft, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Canberra, AGPS, 1992 at 28-31, hereafter "Discussion Draft" and MCCOC, Final Report, n50 esp at 19.

[75] See MCCOC, Discussion Draft, n74 at 28-31; MCCOC, Final Report, n50 at 19.

[76] MCCOC, Final Report, n50 at 19. Cf for other offences which impose duties not related to persons, such as filing a tax return, MCCOC, n75.

[77] The model provision was based on s 2(3)(c) of the Canadian Draft Code as recommended by LRCC, Report No 31, n10 and on the proposed ss 53-4 of the Final Report of the Queensland

Discussion Draft s 204

Everyone has the duties set out in section 204.1-204.4.

204.1 The duty to provide the necessaries of life to his or her dependent spouse, dependent child or a member of his or her household for whose welfare he or she has assumed responsibility if the spouse, child or household member is unable to provide himself or herself with those necessaries.

204.2 The duty to avoid or prevent danger to the life, safety or health of any child (whether or not related in any way to him or her) for whose welfare he or she has assumed responsibility.

204.3 The duty to avoid or prevent danger to the life, safety or health of any person if the danger is attributable to any act performed by him or her or to the possession, custody or charge by him or her of any thing, object, substance or situation.

204.4 The duty to avoid or prevent danger to the life, safety or health of any person if the danger arises as a consequence of an undertaking commenced or contemplated by him or her.

Aside from the obvious benefits of codifying the duties giving rise to omissions liability, no significant ground was broken by MCCOC in terms of omissions liability.

The English Law Commission in 1989 also had little regard to the wider question of omissions liability, preferring to restate the conventional view that "[c]riminal liability for failure to act is exceptional".[78] The Criminal Code Bill proposed by the Law Commission preserves the power of judges to determine whether or not, in given situations, the defendant had a duty to act for the benefit of the victim. No relevant extensions of omissions

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Criminal Code Review Committee, the O'Regan Review, at 192. Reference was also made to the English codification work: The Law Commission, *Criminal Law, Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill,* London, HMSO, 1989 (Law Comm. No. 177) and The Law Commission, *Criminal Law Criminal Code for England and Wales Volume 2, Commentary on Draft Criminal Code Bill,* London, HMSO, 1989 (Law Comm. No. 177), ss 16 and 17; also to the US Model Penal Code (American Law Institute, Model Penal Code, Official Draft and Explanatory Notes, American Law Institute, 1985. Complete text of the Model Penal Code as adopted by the American Law Institute (1962), s 2.01(3).

[78] See The Law Commission, Vol 2, n77 at 186.

liability were suggested.[79]

On the other hand, as would be expected given the level of debate in the jurisdiction, the Law Reform Commission of Canada gave detailed consideration to the general question of omissions liability and to the specific issue of a "rescue from danger" provision, recommending in 1985 that a special non-rescue offence be enacted.[80] Such an offence, in the words of the Commission, would

> ...generalise the specific duty already recognised 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.[81]

Comparative Rescue Statutes

Adding to the comparative material in this area, Cadoppi recently reviewed and analysed rescue legislation in Europe and Latin America.[82] This research shows that almost every country in Continental Europe, Eastern Europe and Latin America has a statute or a specific provision in its penal code stipulating a duty to rescue.[83] At least two American states, Vermont and Minnesota, also have statutes imposing a rescue duty and two further states, Massachusetts and Rhode Island, have a more limited

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79 Law Commission, n77, Vol 1 at 51, clauses 16 and 17 and Vol 2 at 186-188 and see also Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980), Cmnd. 7844, paras 252-253. The attempted categorisation of the duties in the first draft of the Code met with disapproval: see particularly, G Williams, "What Should the Code Do About Omissions?" (1987) 7 *Legal Studies* 92. For commentary (and criticism) on the final proposal see G Williams, "Criminal Omissions - The Conventional View" (1991) 107 LQR 86 at 97; Ashworth, n48 at 436-437; Ashworth and Steiner, n13 at 153.

80 LRCC, Working Paper 46, n13 at 20.

81 LRCC, n13 at 19.

82 See Cadoppi, n11; also FJM Feldbrugge, "Good and Bad Samaritans" (1966) 14 *American Journal of Comparative Law* 630 and Rudzinski, n56. Also Silver, n65 at 434-5 reviews the European statutes. Most of these sources set out some of the statutory provisions in appendices.

83 Without purporting to be exhaustive: Portugal 1867 (Civil Code only, introduced into new Criminal Code in 1982), the Netherlands 1881, Finland 1889, Italy 1889 and 1930, Norway 1902, Russia 1903-17 and 1960, Turkey 1926, Denmark 1930, Poland 1932, Germany 1935

duty to notify police (closer to common law misprision of felony) on witnessing armed robberies, murders and rapes (Mass) or rapes only (R.I.).[84] In Quebec, the *Charter of Human Rights and Freedoms*[85] s 2 imposes a general duty to rescue. McInnes suggests that, coupled with the provisions of the Canadian *Criminal Code*, this provincial legislation may give rise to penal sanctions.[86]

As one would expect, these statutory provisions vary considerably, not least in terms of the precision with which they are drafted and the scope of liability imposed: for example, determinants of liability are placed variously along a spectrum ranging from easy to difficult rescue and from no risk at all to the rescuer up to and including the risk of serious danger to health. As these provisions have increased in number, so they have also changed in character, particularly with the enactment and amendment of provisions in significant jurisdictions like France, Germany, Spain, Portugal, Belgium and Austria in the more recent decades pre and post World War Two.[87] The principal change identified by Cadoppi is to the effect that the duties to rescue are now both "wider and sanctioned with higher penalties".[88]

An important feature of most of these offences is that the crimes created are not "result crimes" or crimes of "commission by omission" in the sense that liability only ensues if the defendant's conduct has harmful consequences (such as death) for the person in peril. Rather, to use the terminology of Ashworth and Steiner, these offences are "conduct crimes", the second

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and 1953, Rumania 1938, France 1941 and 1945, Hungary 1948 and 1961, Greece 1950, Czechoslovakia 1950, Bulgaria 1951, Yugoslavia 1951, Spain 1951 and 1956, Belgium 1961, Austria 1975: see Cadoppi, n11; Feldbrugge, n82; and Rudzinski, n56. Cadoppi's research also identifies that of the Eastern European codes, prior to 1989, all except Albania, had a good samaritan statute in force; that in Latin America, with a tradition from the continental European Codes, almost every country provides for punishment of bad samaritans.

84 See Keeton *et al*, n2 at 375; Silver, n65 at 423, 426-7. In Vermont, for example, see Vt. Stat. Ann. tit. 12, (519(a) (1973) requiring one to give reasonable assistance to someone in danger of grave physical harm if there is no risk involved.

85 R.S.Q. 1977, c. C-12.

86 M McInnes, "Protecting the Good Samaritan: Defences for the Rescuer in Anglo-Canadian Criminal Law" (1994) 36 *Criminal Law Quarterly* 331 at 331; see also D Stuart, *Canadian Criminal Law* (2nd ed), Toronto, Carswell, 1987 at 81; LC Wilson, "The Defence of Others - Criminal Law and the Good Samaritan" (1988) 33 *McGill Law Journal* 756 at 809-810.

87 See Ashworth and Steiner, n13 for an examination of the French article 63(2); see Cadoppi, n11 at 100-102 particularly re the German experience.

88 Cadoppi, n11 at 109.

category of omissions liability envisaged by the LRCC: the mere non-performance of the duty/conduct is the source of the liability.[89] Consequently, the punishment for these offences is relatively lenient, though, as Feldbrugge examples, citing the Hungarian and Italian provisions, a particularly serious result might constitute an aggravating circumstance of the failure to rescue offence.[90]

Conclusion - Part I

The long standing imposition of criminal liability for failure to rescue in an profusion of European and Latin American penal statutes, stands in stark contrast to the heavily circumscribed common law tradition. At most, only tentative and limited consideration has been given to extending our system's conventional view on omission liability: the traditional liability mindset cannot conceive of the evolution of a duty of any general level of application that would require a stranger to render aid to those in distress or peril in any situation where the status relationships described above are absent. The conceptual and theoretical bases for this common law derelict on rescue will be examined in Part II, which will conclude with the practical exercise of formulating a workable rescue duty.

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[89] See Ashworth and Steiner, n13 at 157-158; LRCC, Working Paper 46, n13 at 11-12; Cadoppi, n11 at 95; Feldbrugge, n82 at 646.

[90] Feldbrugge, n82 at 646.