

# Gross Negligence Manslaughter by Omission: the emergence of a Good Samaritan law?

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Abstract:

There has been much academic debate concerning criminal liability for omissions and the extent to which such liability should be extended. The focus here concerns a recent, unreported, conviction for gross negligence manslaughter which raises the question of how far the courts and the Crown Prosecution Service are willing to blur existing boundaries of omissions liability and the established principles of causation. By scrutinising the current legal duties to act required for such liability to arise in the context of *R v Bowditch*, it will be demonstrated that we are moving incrementally towards a Good Samaritan law but with an absence of fair warning to guide citizens. Further, it is apparent from this conviction that the restricted principles of causation that apply to actions are not as restrictive when applied to omissions. It is clearly timely for the Law Commission to act to determine appropriate boundaries so that omissions liability complies with the rule of law.

Keywords: Gross negligence manslaughter, liability for omission, Good Samaritan law, causation.

Introduction.

This article aims to examine a recent conviction<sup>1</sup> for gross negligence manslaughter which raises issues of legal and moral culpability. Although the conviction received some media coverage, at the time of writing it has not received attention in academic literature. The case highlights a difficulty with the gross negligence manslaughter offence in the context of omissions liability: where did the legal duty to act arise to substantiate a conviction? This analysis will further question the established principles of criminal omissions liability and causation, or lack thereof. The current boundaries of certain recognised duties have become

nebulous and it would appear that we are moving ever closer to a Good Samaritan law for England and Wales.

The case for critical exploration is the conviction of 21-year-old Michael Bowditch of gross negligence manslaughter at Maidstone Crown Court in January 2017. Bowditch had met the victim, seventeen-year-old Becky Morgan, at a party on 30<sup>th</sup> April 2016, before going with her to the harbour arm in Ramsgate later that night. Soon after 2am, the pair had been on the harbour arm, 'a long, arcing walkway with the harbour one side and the sea, protected by a low wall, the other.'<sup>2</sup> The defendant had consumed alcohol, cocaine and cannabis. He could not remember how Miss Morgan came to fall into the sea but had told police that they had been 'mucking about.'<sup>3</sup> Miss Morgan had asked for his help, saying that she could not swim but Bowditch had said he could not help her. He stood and watched her drown and, shortly afterwards, he was seen dancing in a bar before door staff threw him out for being too drunk.<sup>4</sup> Nearly two more hours passed before he rang the police to say he had seen someone die that night. Bowditch initially faced three allegations, each in the alternative. First, murder on the basis he pushed the victim into the sea with intent, which he denied. Second, unlawful act manslaughter on the basis that he pushed her into the sea without intent. Finally, gross negligence manslaughter in that he owed her a duty of care, given the circumstances in which she went into the water, and failed to act on it.<sup>5</sup>

Bowditch denied murdering Miss Morgan during a previous court appearance but changed his plea to guilty to gross negligence manslaughter just before his trial was due to start.<sup>6</sup> The prosecution accepted that the defendant had not pushed Miss Morgan into the sea nor had any contact with her prior to her going into the water.<sup>7</sup> Judge Jeremy Carey noted that what was not disputed is that the defendant 'very soon realised she was in the sea, and you did absolutely nothing.'<sup>8</sup> Bowditch received a five and a half year custodial sentence. The learned judge found the case to be an almost unique one, raising issues on the question of omission with regard to gross negligence manslaughter, the existence of a duty of care, causation and the effect of the intoxicants on the defendant's awareness of what was happening on the harbour arm, and his memory and behaviour afterwards.<sup>9</sup>

As is known, it is established law in England and Wales that to be guilty of gross negligence manslaughter by omission you must both owe your victim a duty of care<sup>10</sup> and also be under a legal duty to act. These two duties are entirely different,<sup>11</sup> although there have been instances of conflation.<sup>12</sup> A duty of care is the first requirement for the offence of gross negligence manslaughter, whereas the second duty, the legal duty to act, is inherent as the basis of criminal liability for omissions. What becomes apparent when examining this conviction is the difficulty in determining a legal duty in this instance. The leading authority for gross negligence manslaughter is *Adomako*, where Lord Mackay of Clashfern LC enunciated:

*The ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence.*<sup>13</sup>

Such 'ordinary' negligence principles determinative of giving rise to a duty of care stem from *Donoghue v Stevenson*,<sup>14</sup> a case establishing civil negligence for manufacturers of consumable products. In giving judgment, Lord Atkin opined that negligence liability is grounded on a public sentiments of moral wrongdoing. However:

*acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*<sup>15</sup>

At first there was some doubt as to whether the civil form of negligence, as represented by this quote, would be incorporated literally into the criminal law but this now seems to be the case.<sup>16</sup> In consequence, a duty of care for the purposes of gross negligence manslaughter can easily arise and would risk the criminalisation of many without some constraints. Whilst

such a potentially far-reaching duty can be readily justified for positive acts that have caused harm to others, as proscribing certain conduct still leaves citizens with other options, criminal liability for omissions has always had its limitations in order to respect an individual's autonomy.<sup>17</sup> Where action is mandatory in any given circumstance, there is no longer any freedom of choice.

The prosecution told the hearing that Bowditch's 'failure to take any steps' to prevent the victim's death 'forms the basis of his culpability for manslaughter.'<sup>18</sup> If this is correct his criminal responsibility would be based solely on his duty of care in accordance with the neighbour principle, cited above, as no duty to act is evident. Applying the duty of care principle to this omission case, there can be no dispute that Bowditch was under a moral duty to try to help Miss Morgan. He could have alerted others to the emergency or perhaps have thrown one of the nearby lifebuoys to her, but a moral duty does not equate to a legal duty; this distinction is discussed below. Even if he lacked the capacity to reasonably foresee the consequences of his action due to his intoxicated state, that would not prevent the duty of care arising. Any reasonable person would have appreciated the risk of death or serious injury and that is all that is required. However, a failure to act *per se* cannot give rise to the ascription of criminal liability, a duty to act must still be present. Elliot has suggested a duty of care should be sufficient, arguing that further requirements are unnecessarily restrictive, unduly favouring personal autonomy over moral and social responsibility.<sup>19</sup> Although this suggestion undoubtedly has merit and would introduce a Good Samaritan law, without some limits to its ambit it would be too great an interference in personal autonomy and could put citizens in danger. To date, current law still holds a duty to act as a prerequisite for omissions liability. Admittedly, this is restrictive when it may concern morally abhorrent inaction but this is somewhat mitigated by the recent relaxation of orthodox causation principles, discussed in more depth below.

When considering a distinction between legal guilt and moral guilt the boundaries are often unclear. Kant is one of the rare theorists to have distinguished between the two, identifying 'two distinct ways of being bound to do one's duty,' one external and the other internal.<sup>20</sup> The external, which Kant also labels 'juridical' legislation, entails the use of external coercion and incentives to motivate the citizen to behave in the required manner. Established

duties to act within the criminal law are a pertinent example of this as citizens are able to apprise themselves of the current law before acting or omitting to act, but new duties or nebulous duties would fail to achieve the set purpose. Alternatively, if a person fulfils their duty purely because it is their duty, this is internal coercion, or as he calls it ‘ethical’ legislation. In this latter example, the act would be termed as merely ‘moral’ rather than ‘legal.’<sup>21</sup> In recent years, it appears that the courts have been combining moral duties with existing categories of recognised legal duties to impose criminal responsibility in an uncertain and haphazard way in omissions cases to meet the moral exigency of the moment in an effort to do justice. This can be extrapolated from the judgments in the drug supply homicide cases,<sup>22</sup> particularly the controversial judgment in *Evans*,<sup>23</sup> considered below, and now in the present case.

It is acknowledged that the categories of legal duty that have developed for omissions liability have moral foundations. What is remarkable in Bowditch’s case is the apparent absence of a recognised legal duty to act. As there must have been a legal duty, without one there can be no conviction for failing to act to prevent harm, it is incumbent to determine what duty might be applicable in these circumstances. As is known, there are six possible duties: statutory,<sup>24</sup> public,<sup>25</sup> contractual,<sup>26</sup> a duty arising from a special relationship,<sup>27</sup> a voluntarily assumed duty,<sup>28</sup> and a duty arising from creating, or possibly contributing to, the creation of a dangerous situation/supervening fault.<sup>29</sup> The relevant duties to the limited reported facts, given that Bowditch pleaded guilty to the charge, could potentially be one of the last three listed common law duties, in the absence of a Good Samaritan law. The extent of their potential applicability to the case will now be scrutinised.

#### Special Relationship Duty:

For a duty to arise under this category, current law suggests that duties only arise between spouses<sup>30</sup> and between parents and their children under eighteen years of age.<sup>31</sup> Ashworth highlights that the parent/child relationship lacks clarity as there are conflicting authorities with regard to the existence of a duty after the child reaches the age of majority.<sup>32</sup> He identifies that the basis of this parental duty has shifted in focus from familial ties to

voluntarily assumed duties.<sup>33</sup> This proposition clearly has merit even though *Stone and Dobinson*<sup>34</sup> suggested that siblings have a duty of care to each other.<sup>35</sup> The judgment in *Stone* is difficult to interpret as it suggests three possible factors in finding a duty, one being the familial tie, but it is not clear whether any single one of these was sufficient to constitute a duty or all three were combined to create one. There are further *dicta* elsewhere where a sibling duty has been considered as a possibility<sup>36</sup> but this duty is not recognised according to the Court of Appeal in *Evans*.<sup>37</sup> Certainly, there is a statutory duty in this regard where the siblings live together, one of the parties is over 16 years and the other is a child or vulnerable person.<sup>38</sup> Bowditch and Miss Morgan were not related to each other which would appear to exclude this category altogether, unless the relationship duty were to be extended to friendship.

The existence of a duty owed by friends is now also unclear. According to *Lewin v CPS*,<sup>39</sup> there is no duty of care between friends but this is possibly because the friend in this case could not have appreciated the danger Lewin was in when he left him. Here, three friends were on holiday in Spain and, on a night out, Lewin consumed a large amount of alcohol. Leaving a club at 8am, Lewin had to be helped by his friend and others into the passenger seat of a car as he was barely conscious. His friend drove them back to their accommodation, parking the car in the shade. As Lewin was large and heavy, his friend did not think he could get him out of the car unaided and left him in the car to sleep off the effects of alcohol. Lewin was found dead in the car approximately four hours later. On appeal against the CPS' decision not to prosecute Lewin's friend for manslaughter, the court found that if a reasonable person would have foreseen that by leaving the deceased in the vehicle parked in that position he was being exposed to the risk 'not merely of injury or even of serious injury but of death'<sup>40</sup> then a duty may have arisen. However, anyone leaving Lewin and knowing that his comatose state was due to an excessive intake of alcohol would probably have envisaged that in due course he would rouse himself and make his way to bed. The idea that he might suffer significant injury, as opposed to discomfort, as a result of being overheated in the car would be unlikely to cross the mind of anyone not medically trained.<sup>41</sup>

The Court of Appeal in *Sinclair and Johnson*<sup>42</sup> have previously expressed the contrary view that a duty between friends could theoretically be found<sup>43</sup> but, as with the decision in *Stone*

above, there were other factors the Court considered relevant too. If friends can potentially owe such a duty to each other then it may be that Bowditch was under a duty to act because he had befriended Miss Morgan at a party that night. This seems improbable; it would be surprising if a friendship duty could arise on the basis of such a brief acquaintance. If such a duty could arise it would have a potentially severe impact on people socialising as a duty to assist could arise in any reasonably foreseeable life threatening situation based on the briefest acquaintance. *Evans*<sup>44</sup> may have changed this position, and if it has, it is possible that a duty could arise but under an alternative category, the creation of a dangerous situation, as will be considered.<sup>45</sup> Given that the special relationship duty appears to be inapplicable to Bowditch, another possibility is that he voluntarily assumed a duty for Miss Morgan. This category of duty will now be examined.

#### Voluntarily Assumed Duty:

The most cited example of this duty is *Stone and Dobinson*.<sup>46</sup> Stone had allowed his sister to live in a room of the house he shared with Dobinson. Dobinson had tried to wash and feed the sister, who suffered from anorexia nervosa. This case is problematic on every level, as alluded to above. The court struggled to pinpoint where the duty of care originated; it may have been because the victim was Stone's sister, or alternatively that the defendants had voluntarily assumed a duty for the sister by taking her into their home and attempting to look after her. Unfortunately, neither of the defendants were really capable of looking after their own needs as they both had low intellectual abilities. Clearly, in the current case, Bowditch had not taken the victim into his home, so how could he assume such a duty? Precedents on this duty are unclear and seem to be based on a combination of factors that cannot be pinpointed, suggesting that the courts are finding the existence of duties to impose liability where they see fit. Consternation has been expressed that the courts have used the concept of a duty in this category to connote simple acts of kindness<sup>47</sup> which greatly extends the ambit of liability for manslaughter.

In *Ruffell*<sup>48</sup> a duty arose in a matter of hours. Ruffell had briefly tried to resuscitate the victim who had taken an overdose of heroin. This suggests that a duty can arise very quickly,

but scrutiny of the judgment reveals that the court found it important that apart from the resuscitation attempt, Ruffell and the victim were friends and the deceased had stayed at the defendant's home that evening. There is no weight attached to each of the three factors making it impossible to discern any precedent for the future. The judgment in the subsequent case of *Evans*,<sup>49</sup> is even more oblique. Here the defendant and her mother had tried to look after the victim for several hours, as was the case in *Ruffell*, but the court found that no voluntary assumed duty arose. Unfortunately, the Court of Appeal did not specify why this was so. Instead, the Court based the existence of a duty around the *Miller* Principle, discussed under the next category.

As the boundaries of the voluntarily assumed duty are not clearly defined, it is impossible to determine with certainty that a duty arose in respect of Bowditch but on balance it would appear unlikely as he did not try to help Miss Morgan in any way. The only way this duty could be applied is if, by accompanying her to the harbour, he could be seen as looking after her. Given there was an age gap of just four years and the defendant was in a state of intoxication, this seems doubtful. This leaves one final category which could underpin any duty to act, the creation of a dangerous situation.

#### The Duty Arising by the Creation of a Dangerous Situation/ Contributing to a Dangerous Situation:

The remaining possibility of establishing an existing recognised duty, unless there is a conflation and extension of the categories discussed above, is by the creation of a dangerous situation following the *Miller*<sup>50</sup> principle. As is known, the basis of the *Miller* principle is that if someone accidentally creates a dangerous situation, once aware of this, they are then fixed with a common law duty to act by taking reasonable steps to prevent harm.<sup>51</sup> This principle appears to have been extended in *Evans*<sup>52</sup> to encompass those who may not have created a dangerous situation themselves but are found to have contributed to it. The Court of Appeal found that the question to be answered in this case was not whether Evans could be guilty of manslaughter because she supplied the drugs which caused her step-sister's death,<sup>53</sup> but whether '*she was under a duty to take reasonable steps for the safety of the deceased once she appreciated*' that the heroin was potentially life threatening.<sup>54</sup> The Court held:

*where a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise.*<sup>55</sup>

Clearly conscious awareness of the danger, at least in circumstances where it is life threatening, is no longer essential according to *Evans*.<sup>56</sup> It is enough that a person should have realised there was danger. This is why friends, in circumstances similar to those that arose in *Lewin v CPS*,<sup>57</sup> might now find themselves criminally liable, although it is unlikely that *Lewin* itself would be decided differently as the judge found that no reasonable person in that situation would have foreseen the danger. Finding friends liable in such a way would indeed be a draconian measure and would potentially catch those in the same position as Bowditch. What is interesting is the Court's analysis of the legal duty to act in *Evans*. Although it appears to be based solely on her supply of the heroin to the deceased and then failing to act, it is not that simple. The Court of Appeal stated that if the jury found (as they did) that Evans had been involved with supplying the heroin to the deceased, '*that fact, taken with the other undisputed facts*<sup>58</sup> would, ... give rise to a duty on the appellant to act.'<sup>59</sup> These undisputed facts appear in paragraph 12 of the judgment, namely that (1) Gemma and her mother remained with Carly, from the moment she injected the heroin until she was found dead; (2) Gemma realised that Carly appeared to be suffering from an overdose and that her condition was serious; and (3) both Gemma and her mother believed they were responsible for taking care of Carly. The weight attached to any of these undisputed facts is a mystery but it also leaves open the question of whether the conviction would have been upheld without their presence. The fact that Evans and her mother had remained with Carly throughout hints at a voluntary assumed duty yet this was found not to arise. The second undisputed fact, the recognition of a life threatening state of affairs, would be relevant to a duty of care and to a Good Samaritan law but does not give rise to a legal duty to act. The final fact that was not disputed, that both Evans and her mother felt responsible for Carly's care is simply a moral duty, it does not equate to a duty to act upon Evans in law.<sup>60</sup>

With regard to Bowditch, it was the prosecution's case that the duty of care arose given the circumstances in which Miss Morgan went into the water.<sup>61</sup> This suggests that it is this category of duty that underpins Bowditch's criminal liability. When he had first called the

police, he told them that Miss Morgan had jumped in but when he accompanied the police to the harbour he said that they had both been lying on the harbour arm when Miss Morgan stood up, was messing about and fell in. Later, in his Prepared Statement to the police, Bowditch stated that he did not know how Miss Morgan had gone into the water; he did not see it happen. He remembered being on his feet and hearing a splash. He said that he did not believe he could have pushed her in.<sup>62</sup> He was intoxicated at the time and failed to appreciate the seriousness of the situation until he started to sober up, his memory of the events was fragmented.

Following sentencing, DS Mattholie stated that ‘there is only one person who will ever really know the full details of what happened that night to cause a 17-year-old girl to lose her life. Bowditch has now admitted he did play a part in her death’<sup>63</sup> presumably by pleading guilty to the offence. In his intoxicated state, it is at least possible that Bowditch might not know exactly what happened that night. The extension of the *Miller* principle in *Evans* renders any personal incapacity irrelevant, it being sufficient that Bowditch ought to have realised it was a life threatening situation. His admission to the charge of gross negligence manslaughter may well have seemed the lesser of the evils faced. He was clearly remorseful that Miss Morgan had drowned but this does not mean that he legally owed her a duty to act, unless he created the dangerous situation or contributed to her drowning. As a minimum, to satisfy the current legal requirements, he needed to have accidentally knocked her into the water. If he did, he would have created a dangerous situation and it would be a straightforward application of the *Miller* principle to arrive at a duty to act. There is no evidence that this happened. He did not admit that he was involved in her fall. As the prosecution accepted his assertion that he had no contact with Miss Morgan prior to her fall into the sea and the investigating officers could not determine the extent, if any, of Bowditch’s part in the death, it is difficult to see why he pleaded guilty, rather than leave it to the Crown to prove their case beyond reasonable doubt.

Did Bowditch contribute to the creation of a dangerous situation? As noted above, this extension of the *Miller* principle was found in the judgment in *Evans*. *Evans* was found to have contributed to the danger by supplying the heroin that her step-sister had overdosed on and then failing to summon medical assistance. Accordingly, she had either created the

danger by the drug supply<sup>64</sup> or contributed to it by not doing anything to help once she realised the seriousness of the situation. Without her involvement in supplying the heroin, there would have been no duty to act. The other 'undisputed facts' in Evans do not seem to have an influence in the present case, although, like Evans, Bowditch felt responsible in some way. Extrapolating this, without Bowditch having a duty to act first (by knocking Miss Morgan into the water) he cannot have contributed to the dangerous situation by simply failing to act. To find a duty in these circumstances would be to impose a Good Samaritan law. Consequently, a legal duty to act would be imposed upon everyone who witnesses a life threatening situation and fails to act to minimise harm.

A Good Samaritan Law:

Could it be that we have now inadvertently moved a step closer to a new duty of proximity and a Good Samaritan Law? There has been much academic debate about the advantages and disadvantages of such a law.<sup>65</sup> Those opposed to such an extension of the law include Joel Feinberg who contended '[t]he most basic autonomy right is the right to decide how to live one's life, in particular how to make critical life decisions.'<sup>66</sup> Even John Stuart Mill believed that moral harm could not be sufficient grounds for criminalisation per se.<sup>67</sup> By way of contrast, Lord Devlin argued that the criminal law could be used against immoral behaviour that deviated from a common morality and could affect society injuriously.<sup>68</sup> This is why Elliot<sup>69</sup> has called for the duty to act to be removed. Certainly, the more serious the harm threatened, the more justified it could be to insist on acting, especially where there is no risk to the rescuer and the harm is life threatening.<sup>70</sup> If this is further extended by the existence of circumstances whereby an agent fixed with such a duty to act is the only person who can assist the victim, as was the case with Bowditch, the argument becomes more compelling. However, it would be unjust to impose a duty without requiring the defendant's appreciation that the situation is so grave.<sup>71</sup> Otherwise, those who lack the capacity to appreciate the seriousness of a given situation could find themselves criminalised where they lack any moral culpability for the consequences. This in itself would be immoral. It is not the purpose of this article to argue for or against such an extension of the current law. What is called for, however, is clarity and transparency demarking when liability will arise to give fair warning to citizens, fulfilling one of the most fundamental principles of criminal law.

What compounds the current mystique regarding establishing a legal duty to act is the more obsequious erosion of principles of causation.

Causation and omissions:

As is known, established principles of causation were thrown into disarray following the Court of Appeal's judgment in *Kennedy (No 1)*.<sup>72</sup> By way of synopsis, Kennedy supplied the victim, V, with a syringe of heroin. V self-injected the drug and died from an overdose. Kennedy's appeal against his conviction for unlawful act manslaughter<sup>73</sup> was dismissed. It was established law at that time that the free, voluntary and informed act of a third party broke the chain of causation between a drug supplier and an addict who subsequently died from an overdose of the drug supplied for this offence.<sup>74</sup> Whilst the decision in *Kennedy (No 1)*<sup>75</sup> was subsequently overruled by the House of Lords judgment in *Kennedy (No 2)*,<sup>76</sup> setting the law back upon the right track with regard to settled causation principles, their Lordships further stated that the judgment did not apply to the offence of gross negligence manslaughter.<sup>77</sup> No further guidance on this matter was forthcoming.

In consequence, although the free, voluntary and informed act of a third party forms a new intervening act that breaks the chain of causation of a defendant for one type of involuntary manslaughter, it has been held not to be the case where the manslaughter is by gross negligence, as in *Evans*. There is no theoretical rationale for such a difference but it is a method of bypassing more restrictive causation principles, ameliorating the hitherto restrictive nature of omissions liability and imposing criminal liability for morally reprehensible behaviour. In essence, it is implementing the proposal that the courts should focus purely on a duty of care<sup>78</sup> and produces a version of oblique causation. Indeed, as Ormerod highlights, the Court of Appeal's focus in *Evans* was not a question of whether Evans' supply of heroin to the victim caused her death, because such a position could not be reconciled with the principle that the victim's voluntary consumption of heroin would have been a *novus actus interveniens*.<sup>79</sup> Instead, the question was whether Evans was under a duty to take reasonable steps to help her stepsister once she realised the heroin she had supplied was causing a life threatening impact. Evans then breached her duty to the victim by failing

to summon timely medical assistance.<sup>80</sup> After all, it was not Evans who had created or contributed to the creation of a dangerous situation at the point of supply. Nobody forced her stepsister to take the heroin, let alone an overdose, it was the deceased who created the dangerous situation. However, by focussing solely on whether a breach of a duty had occurred that may have hastened death, causation was established. This approach runs a coach and horses through longstanding causation principles diluting them to the point where little protection is afforded to those who fail to act. Once a breach of a moral duty of care arises, it is sufficient that its breach might have hastened death.

With regard to Bowditch, it seems that Bowditch did not create a dangerous situation, he may merely have contributed to one created by Miss Morgan accidentally falling into the harbour. This is in contrast to Evans where there is a slight causal link as Evans “supplied” the drug that was consumed by the deceased. Bowditch’s breach of duty hastened Miss Morgan’s death, and even though this may have simply been a breach of a duty of care, it was sufficient to establish causation and he is serving a long custodial sentence. It appears that this stance has followed the proposal in the Draft Criminal Code,<sup>81</sup> highlighted by Professor Glanville Williams,<sup>82</sup> reversing the rule in *Morby*,<sup>83</sup> so that there is no longer any need to prove beyond reasonable doubt that the omission caused the death. All that must be proved is that an omission might have prevented the harm. Far from restrictive criminal liability for omissions, this makes an ommitter subject to more stringent criminal liability than someone who commits an offence by a positive act.<sup>84</sup> Further, although some jurisdictions do impose a duty to assist those in peril, a failure to assist is not treated as a homicide.<sup>85</sup>

Conclusion.

The case of Bowditch is unsettling given the difficulties identified with determining the basis of his criminal liability and the worrying dilution of causation principles, which first surfaced in *Evans*. It is a tragic case that has involved the loss of one young life and the incarceration of another. It must have been a comfort to Miss Morgan’s family that they did not have to sit through a trial but from a legal perspective this was a case that needed to be aired fully in the criminal courts. If Bowditch had no contact with Miss Morgan prior to her falling into the

sea, without a Good Samaritan law, he had no legal duty to act and should not be criminally liable. What is of utmost concern is the lack of transparency and clarity - how can the criminal law guide citizens or act as a deterrent when its boundaries are built on unstable foundations? This analysis reveals the urgent need for the Law Commission to propose reform to establish appropriate limits for common law omissions duties and principles for causation in omissions cases. This will provide much needed clarity and uphold the rule of law.

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<sup>1</sup> *R v Bowditch* (unreported) Maidstone Crown Court, 26<sup>th</sup> January 2017.

<sup>2</sup> <http://www.6pumpcourt.co.uk/news/gross-negligence-manslaughter-case-simon-taylor-prosecutes> accessed 10/04/17.

<sup>3</sup> <http://www.bbc.co.uk/news/uk-england-kent-38757650> accessed 13/02/17.

<sup>4</sup> *Ibid.*

<sup>5</sup> See <http://www.6pumpcourt.co.uk/>, above n.2.

<sup>6</sup> <http://www.kentonline.co.uk/thanet/news/man-admits-killing-teen-girl-119541> accessed 13/03/17.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> See <http://www.6pumpcourt.co.uk/>, above n. 2.

<sup>10</sup> *R v Adomako* [1995] 1 AC 171.

<sup>11</sup> C. Elliot, 'Liability for manslaughter by omissions: don't let the baby drown!' (2010) 74(2) *Journal of Criminal Law* 163.

<sup>12</sup> For example, *R v Evans* [2009] EWCA Crim 650.

<sup>13</sup> Above n. 10 at 187.

<sup>14</sup> [1932] AC 532.

<sup>15</sup> *Ibid.* at 580, per Lord Atkin.

<sup>16</sup> J. Herring and E. Palser, 'The duty of care in gross negligence manslaughter' [2007] *Criminal Law Review* 24.

<sup>17</sup> A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989)105 *Law Quarterly Review* 424.

<sup>18</sup> <http://www.kentonline.co.uk/> above n.6.

<sup>19</sup> Above n.11.

<sup>20</sup> I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (Indianapolis: Bobbs-Merrill, 1965) at xiv.

<sup>21</sup> *Ibid.* at xiv.

<sup>22</sup> *R v Kennedy (No 1)* [1999] 1 Cr App R 54; *R v Finlay* [2003] EWCA Crim 3868; *R v Ruffell* [2003] EWCA Crim 122.

<sup>23</sup> [2009] EWCA Crim 650.

<sup>24</sup> For example, S.5 Domestic Violence, Crime and Victims Act 2004 (as amended).

<sup>25</sup> *R v Dytham* [1979] QB 722.

<sup>26</sup> *R v Pittwood* (1902) 19 TLR 37.

<sup>27</sup> *R v Gibbins and Proctor* (1918) 13 Cr App R 134.

<sup>28</sup> *R v Stone and Dobinson* [1977] QB 354; *R v Hood* [2003] EWCA Crim 2772.

<sup>29</sup> *R v Miller* [1983] 2 AC 161; *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999.

<sup>30</sup> *R v Hood* [2004] 1 Cr App R (S) 431

<sup>31</sup> *R v Stone and Dobinson* [1977] QB 354.

<sup>32</sup> A. Ashworth, 'Manslaughter by omission and the rule of law' [2015] *Criminal Law Review* 563 at 565.

<sup>33</sup> *Ibid.*

<sup>34</sup> Above n. 31.

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<sup>35</sup> The judgment suggest three possible factors in finding a duty but it is not clear whether any one of them alone constituted a duty or all three combined to create the duty.

<sup>36</sup> In *R v Sinclair and Johnson* (1998) 21 Aug, CA, it was noted that Sinclair and the deceased were like brothers and this was deemed potentially relevant to the existence of a duty, combined with other factors.

<sup>37</sup> [2009] EWCA Crim 650.

<sup>38</sup> S.5 Domestic Violence, Crime and Victims Act 2004 (as amended).

<sup>39</sup> [2002] EWHC Crim 1049.

<sup>40</sup> Applying the judgment in *R v Singh (Gurphal)* [1999] *Criminal Law Review* 582.

<sup>41</sup> [2002] EWHC Crim 1049 at para. 24 per Kennedy LJ.

<sup>42</sup> Above n. 36.

<sup>43</sup> *R v Sinclair, Johnson and Smith* [1998] EWCA Crim 2590. Apart from the fact that they were such close friends that they were like brothers, Sinclair had supplied the drug knowing the victim was not an addict and stayed with him for several hours before calling for medical assistance.

<sup>44</sup> [2009] EWCA Crim 650

<sup>45</sup> A duty could now arise by contributing to the creation of a dangerous situation if you realise, or ought to realise your friend is in danger: *R v Evans* [2009] EWCA Crim 650.

<sup>46</sup> Above n. 31.

<sup>47</sup> See Ashworth, above n. 32 at 574.

<sup>48</sup> [2003] EWCA Crim 122.

<sup>49</sup> Above n. 23.

<sup>50</sup> [1983] 2 AC 161 HL, per Lord Diplock.

<sup>51</sup> *Ibid.*

<sup>52</sup> Above, n. 23. Gemma Evans was convicted for the death of her step-sister, Carly, by gross negligence manslaughter. Gemma was an intermediary in the supply of heroin that Carly overdosed on. Recognising that she had overdosed, Gemma and her mother failed to get medical assistance, trying to look after Carly themselves with fatal consequences. The mother was convicted on the basis of her parental duty to the deceased. Given that parents have a legal duty to act as primary carers for their children, unless they have relinquished that responsibility, it could be argued that Evans' responsibility to act was subjugated by the mother's presence. It would have been more appropriate to charge Gemma with the "failure to protect" offence under s.5 Domestic Violence, Crime and Victims Act 2004 (as amended), rather than manslaughter.

<sup>53</sup> As Professor Ormerod notes, this would be inappropriate following *R v Kennedy (No 2)* as Carly's free and voluntary act of self-injection would break Gemma's chain of causation in supply, D. Ormerod, 'Case comment *R v Evans (Gemma)*' [2009] *Criminal Law Review* 661.

<sup>54</sup> *R v Evans* [2009] WLR 1999 at 2003 per Lord Judge CJ.

<sup>55</sup> *Ibid.* at para.31, per Lord Judge CJ.

<sup>56</sup> *Ibid.*

<sup>57</sup> [2002] EWHC Crim 1049.

<sup>58</sup> Author's emphasis added.

<sup>59</sup> Above n. 54, at para. 35. per Lord Judge CJ.

<sup>60</sup> Although the focus here is predominantly on the duty to act, it has been recognised that there are also causation issues, G. Williams, 'Gross negligence manslaughter and duty of care in "drugs" cases: *R v Evans*' [2009] *Criminal Law Review* 631.

<sup>61</sup> See <http://www.6pumpcourt.co.uk>, above, n. 2.

<sup>62</sup> *Ibid.*

<sup>63</sup> [www.kent.police.uk/news/policing-news/0117/Ramsgate-man-jailed-for-the-manslaughter-of-Becky-Morgan](http://www.kent.police.uk/news/policing-news/0117/Ramsgate-man-jailed-for-the-manslaughter-of-Becky-Morgan)- Kent Police, accessed 10/04/2017

<sup>64</sup> This is a little simplistic as she was merely an intermediary between the supplier and the victim.

<sup>65</sup> A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424; cf. G. Williams, 'Criminal Omissions- the Conventional View' (1991)107 *Law Quarterly Review* 86.

<sup>66</sup> J. Feinberg, *Harm to Self* (Oxford University Press: New York, 1986) 54.

<sup>67</sup> J.S. Mill, *On Liberty* ( J.W. Parker & Son: London, 1859)

<sup>68</sup> P. Devlin, *The Enforcement of Morals* (Oxford University Press: Oxford, 1965) 11.

<sup>69</sup> Above n. 11.

<sup>70</sup> G. Dingwall and A. Gillespie, '*Reconsidering the Good Samaritan: A Duty to Rescue?*' (2008) 39 *Cambrian Law Review* 26.

<sup>71</sup> *Ibid.* A suggested two stage test which takes account of the state of mind of the ommitter is postulated.

<sup>72</sup> *Kennedy (No 1)* [1999] Cr App R54.

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<sup>73</sup> Ibid.

<sup>74</sup> *R v Dalby* [1982] 1 All ER 916 (CA).

<sup>75</sup> *Kennedy (No 1)*, above n. 72.

<sup>76</sup> [2007] UKHL 38.

<sup>77</sup> [2007] UKHL 38; [2008] 1 AC 269 at 274, per Lord Bingham of Cornhill.

<sup>78</sup> Above n. 11.

<sup>79</sup> Above n. 53.

<sup>80</sup> Ibid.

<sup>81</sup> Law Commission, No 177, A Criminal Code for England and Wales (London: HMSO, 1989) Cl 17(1)(b).

<sup>82</sup> G. Williams, 'Criminal Omissions- the Conventional View' (1991)107 *Law Quarterly Review* 86.

<sup>83</sup>(1882) 15 Cox. 35.

<sup>84</sup> Above n. 82 at 98.

<sup>85</sup> D. Baker, 'Omissions liability for homicide offences: reconciling *R. v Kennedy* with *R. v Evans*' (2010) 74(4) *Journal of Criminal Law* 310 at 316.