

Example 1: 'GBH murder'

Under English criminal law, a person can be convicted of murder when she: (i) caused the death of another person and (ii) intended to cause that person really serious bodily harm – also known as grievous bodily harm, or GBH. Murder is a common law crime, meaning it is defined by the courts, and not found in a statute passed by Parliament. The above definition of murder was confirmed in a case called *Cunningham* in 1981. The decision in *Cunningham* about what the law of murder *is* raises important questions about what the law of murder *should be*. Should people be held liable for murder only where they intended (or at least foresaw) that they might cause the death of another person? Or should some unintended and unforeseen killings be included within the definition of murder?

On the one hand, it can be argued that people should only be blamed for things they have *chosen* to bring about, or at least chosen to *risk* bringing about. This conception of blame relies on an argument about individual autonomy and control: if a *choice* is made, control is exercised, and individual autonomy is on display. Without choice, there is no such control and individual autonomy is not displayed.

This choice-based account might limit murder to cases where the defendant intended to bring about death, or at least foresaw the risk of killing another person. This is because it cannot be said that there is a *choice* to bring about death, or risk causing death, where there is ignorance of the possibility that someone might die. In cases where the defendant intended only to cause GBH, and did not intend to kill, or foresee the risk of causing death, liability for a lesser crime than murder (for instance, manslaughter) might more accurately reflect the defendant's responsibility and culpability, whilst respecting the defendant's choices and individual autonomy.

On the other hand, it can be argued that it is not simply 'bad luck' when the victim of an attack intended to cause GBH dies. Rather, it is a foreseeable result of such serious attacks (and part of the reason why such attacks are criminalised and punished severely, even where death does not result). As such, the defendant made her own (bad) luck in choosing (autonomously) to intentionally cause the victim GBH, and should be liable for murder where death results, even if she claims credibly that there was no intention to kill, or even foresight of the risk of death.

Which argument do you find more compelling, and why? Are there any other arguments for or against 'GBH murder'?

Example 2: Duties of care and true omissions

Tort, the law of private wrongs, determines when one person (the 'victim') can recover from another (the 'defendant') for harm the defendant has inflicted on the victim. When you are in a car crash and wish to sue the person who hit you for the damage to your car (or worse yet, the damage to your body), you would rely on tort law to do so – specifically the law of negligence. However, in order to recover for negligence, the defendant must owe a 'duty of care' to the victim; if the relationship between the victim and defendant is too remote, no recovery will be permitted.

Many common lawsuits in negligence do not raise a difficult question involving duty of care: an employer who exposes his employee to hazardous working conditions, a doctor who performs an operation resulting in harm to a patient, or a driver who drives carelessly striking a pedestrian would usually be held to owe a duty of care without much controversy. However, the law of negligence will usually *not* identify a duty of care where a defendant has merely failed to intervene to prevent harm from coming to a victim, unless the defendant somehow bears responsibility for the hazard in the first place. Such failures to act are called 'true omissions.' If I see you about to walk off a cliff and could easily warn you to prevent you from falling off but omit to do so, I will not be held to owe a duty of care. I may have acted *immorally* in failing to prevent you from coming to harm, but I did nothing *illegal* and a lawsuit against me in tort will fail. This principle that you cannot recover for true omissions has a number of justifications. It is argued that ascertaining when there is a pure duty to intervene is almost impossible for courts; that it would impair human freedom and distort typically 'efficient' behaviour to impose a general positive obligation to act; and that it would result in the proliferation of litigation regarding when intervention is necessary.

In recent years, several high-profile cases have queried the margins of duty of care and true omissions, particularly related to the duty of public bodies to prevent victims from coming to harm from a violent third party where the governmental body has knowledge that the violent third party might cause harm. Yet the UK Supreme Court has continued to deny that public bodies owe a duty of care to the ultimate victims in such situations, relying in large part on the classic theory of omissions, and further observing that imposing liability upon public bodies (for example, police offices) to behave in a particular way might distort their behaviour. The Court has also suggested that politics, not litigation, is the right way to handle dissatisfaction with governmental conduct.

Is it fair to generally refuse recovery to a victim when the defendant's conduct has had the form of a true omission? Should governmental bodies – whose role is to serve the public welfare – be treated differently with regards to their omissions to provide service?