“In general the criminal law prohibits the doing of harm but does not impose criminal liability for an omission. However there are justifiable exceptions to this general principle.”

Assess the truth of this statement by references to situations where a failure to act may result in criminal liability

An omission is a failure to do something and does not generally attract criminal liability. This is confirmed in the case of Airedale NHS v Bland, where the House of Lords ruled that the removal of the feeding tube was an omission and thus the doctors were not criminally liable for V’s death, as they would have been if they gave him an overdose. Generally speaking the criminal law requires a positive act to be done, and punishes these to deter others from committing the same offence. However, both the common law and Parliament have developed a series of situations when they believe that amending this principle is justified.

The courts have developed a number of duty situations where liability may incur from D’s failure to act. All of them are based on the concept of a duty of care existing between D and V. This concept was illustrated in the civil law case of Donoghue v Stevenson, where C wished to sue the manufacturer of the bottle after finding a decomposed snail at the bottom, and suffering. According to Lord Atkin the existence of a duty is based on the neighbour principle. This is a broad, vague term which has allowed the criminal courts to develop a range of situations where D owes a duty. In addition, the criminal courts have made it clear that the ‘neighbour’ principle is also enough in the criminal law to establish liability. In Winters the duty owed by D to the fire-fighters who died was based on this principle. This may be justifiable as it provides consistency in the law, however, it is a deliberately vague test, and D may not realise that he is V’s neighbour and thus owe him a duty.

The courts have allowed a duty to develop based on specific relationship, as illustrated in the case of Gibbons & Proctor, where the defendants starved their daughter to death. Parents owe a clear duty of care to their children, if only because they are more vulnerable and this is a justifiable exception. The courts have confirmed the existence of the exception in the Child and Young Persons Act 1933, which codified the Gibbons duty. Specific relationship also includes husband/wife, as illustrated in the case of Smith, where D and V were married, but after a home birth the wife refused to let the husband bring a doctor. Eventually he did, but it was too late, and there was evidence that if he had sought help earlier V would have survived. Whilst it seems logical that one spouse may owe another a duty of care, after all they did willingly enter into marriage, it also illustrates one of the issues which is the courts reluctance to allow anyone to give up their duty of care. There is no doubt that D was listening to V, who was expressing her clear wish, and it feels unfair that he should be punished for it. It would appear that a duty, once started, cannot be ended easily. In addition, the specific relationship is defined very narrowly.

Voluntary assumption is where D does a number of acts which demonstrate that he has chosen to take on the care of V, and then fails to continue. This is probably one of the most controversial, as many ordinary people may not realise that their acts of kindness could bring with them legal duties. In addition, because the court is so unclear as to when and how D may end his duty to another, people could potentially be burdened with duties they thought had finished. This is illustrated in the case of Stone and Dobinson, where the defendants attempted to care for the victim, who refused their help, and the defendants couldn’t get help because they didn’t know how to use a telephone, shows how harsh the duties can be on the defendant. People are liable who should not be. The defendants did try to help Stone’s sister and did their best.
considering their low level of intellect. This case does not demonstrate a justifiable exception – it is morally unjust that they were convicted and sent to prison. However, the case of Instan is more justified. She was the only carer of her elderly aunt and by holding her liable for the aunt’s death after she stopped going, it helps to impose higher standards of care and make sure that the vulnerable are protected.

Another area that the courts have identified is that of contractual duty. This usually arises because of the job D holds and therefore the duty they owe the public. This is illustrated in the case of Pittwood, where D failed to close the level crossing, causing V to die. This is justifiable as they have been paid to perform a duty and if you fail you should be liable. However, some people think that criminal liability is too much here, and it would be better to tackle it through compensation in the civil law, rather than criminal sanctions. In Adomako D failed to notice that the breathing tube had become dislodged, causing D’s death. If this were dealt with through the civil court system, it may mean that some professions e.g. doctors have more protection for mistakes than others and this could be unfair as their failures are more likely to cause serious harm.

Duty through public office is shown in the case of Dytham where a uniformed policeman saw a man being kicked to death. The policeman took no steps to intervene and drove away quickly when the violence was over. D was convicted of wilfully, and without reasonable excuse, neglecting to perform a duty to protect the victim. Liability is justified here because they are in positions of public trust and promotes good practice. In addition, they receive special training which puts them in a greater position to help than the average person.

The courts have made it clear that this list of duty situations is not finite in the case of Khan and Khan, where two drug dealers left a woman to overdose. This allows the courts to create new duty situations when they think it is appropriate and develop the law. However, it can also lead to uncertainty for defendants who may not be under a duty until the court determines one exists. Recently the courts have identified that there may be a duty to mitigate harm, and call for help where D knows the risk. This is the case of Evans (Gemma), where D had supplied her sister with heroin and knew that she was overdosing, but did nothing because she was worried that she would get in trouble, and V died. Although this decision may be morally justified, it has potentially very broad implications for other people – a defendant who buys V drinks, and knows that they are drunk and harm themselves may now be under a duty to help, even though it was V’s autonomous decision to drink to begin with.
In addition, the courts have decided that duties exist in the criminal law, where they would have no liability in the civil law. This is shown in the case of Wacker where D attempted to bring illegal immigrants into the country in the back of his lorry. After closing the air vents, all but two died. In the civil law, he would have no liability, as a duty cannot exist in a criminal act. However, the court decided here that a duty did exist and convicted the defendant. This is morally justified as an exception as he has clearly done an act or omission which has caused the death, but seems to create a slightly ridiculous situation where one criminal may owe a duty to another when undertaking a crime as illustrated in the case of Willoughby, where D and V conspired to burn down a pub for the insurance, but V was killed during the crime.

Although the majority of omissions are common law developments, Parliament has created some specific offences which are completed through an omission, for example failure to provide a breath sample when asked under Road Traffic Act 1988. More recently, Parliament has used omissions to create the offence of familial homicide where D causes or allows the death of a child or vulnerable adult under Domestic Violence, Crime and Victims Act 2004. This is justifiable as it closes a loophole, where it wasn’t clear which parent had caused the death and each would blame the other. It also allows for the more vulnerable to be protected, and is in line with the exception on the grounds of specific relationship which already exists.

The duty scenarios have been heavily criticised by some people. There appears to be inconsistency. How can a person of low intelligence be liable, but not a person watches a child drown? All it would take to discharge the duty would be a phone call. The area is treated differently in other legal systems. For example, France has a Good Samaritan law, which means that strangers owe a duty of care, and makes it an offence not to act in some situations. This may be justifiable because it reflects our morals and encourages everyone to take care of each other. However, it may impose too high a duty on people who have no training or experience. They may make matters worse by intervening because they have a legal duty to do so.

To conclude, there are problems with the law on omissions. This has not been helped by the judges who have developed the law on a case-by-case basis without any seeming order or plan, and diverting for the civil ground rules when they see fit. Some of the exceptions are clearly justifiable on both moral and legal grounds, such as that owed by a parent to a child but there is a need to review this area systematically but on legal grounds, not moral ones. The law can only be shaped in moral grounds by Parliament and it is not for the judges to judiciary to dictate moral boundaries.

Comment:
This is a full marks A* grade essay. It has used a wide-range of cases demonstrating accurate and detailed confident knowledge of this area of the law and developed the AO2, identifying relevant points of criticism and showing good understanding of the current debates, with a logical and well informed conclusion.

Tasks:
1. Read through this essay and pick out three strengths of the essay, explaining why in the margin next to it.
2. What do you notice about the way the author has used the cases?
3. What can you learn about the structure of an essay from this example?
4. Compare it to your own. Set yourself two things to focus on in your next essay and pop them on the Post-it