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This is the author's version of a work that was submitted/accepted for publication in the following source:

[McGee, Andrew](#) (2011) Omissions, causation and responsibility. *Journal of Bioethical Inquiry*, 8(4), pp. 351-361.

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<http://dx.doi.org/10.1007/s11673-011-9330-2>

Omissions, causation and responsibility – a reply to McLachlan and Coggon

Abstract

In this paper I discuss a recent exchange of articles between Hugh McLachlan and John Coggon on the relationship between omissions, causation and moral responsibility. My aim is to contribute to their debate by isolating a presupposition I believe they both share, and by questioning that presupposition. The presupposition is that, at any given moment, there are countless things that I am omitting to do. This leads them both to give a distorted account of the relationship between causation and moral or (as the case may be) legal responsibility, and, in the case of Coggon, to claim that the law's conception of causation is a fiction based on policy. Once it is seen that this presupposition is faulty, we can attain a more accurate view of the logical relationship between causation and moral responsibility in the case of omissions. This is important because it will enable us, in turn, to understand why the law continues to regard omissions as different, both logically and morally, from acts, and why the law seeks to track that logical and moral difference in the legal distinction it draws between withholding life-sustaining measures and euthanasia.

Introduction

In a recent exchange of articles, Hugh McLachlan (McLachlan 2008, 2009) and John Coggon (Coggon 2008) have debated the logical and moral relevance of the distinction between acts and omissions and, in particular, the relationship between omissions and responsibility that is thought by some to distinguish conduct involving acts from conduct involving omissions. In this paper I wish to weigh into their debate, and highlight an assumption that I believe is faulty but which I believe they both share.¹ This is the assumption that, at any given moment, there are countless things that I am omitting to do. This shared assumption leads both of them to offer a distorted account of the relationship between omissions, causation and moral or (as the case may be) legal responsibility and, in the case of Coggon, to claim mistakenly that the law's conception of causation is a fiction based on policy. However, once the faultiness of their common assumption is exposed, we can abandon it and arrive at a better understanding of what it is that distinguishes omissions from acts, both from the point of view of causation and of moral, and ultimately legal, responsibility. We will then be able to understand why it is that the law continues to regard omissions as different, both logically and morally, from acts and why the law seeks to track that logical and moral difference in the distinction it draws between withholding life-sustaining measures and euthanasia. I will begin by providing a brief account of McLachlan's and Coggon's respective positions, with a view to identifying the assumptions they each share, and then turn my attention to the philosophical issues raised by their common assumption. I conclude with a sketch for the consequences of

¹ My paper will be confined to a discussion of the arguments of these two authors and, where relevant, the most recent publications on this topic. The literature in this area is vast and it is beyond the scope of this paper to discuss arguments other than the very recent arguments provided by these two authors. I have discussed the literature extensively elsewhere (McGee 2011). An exception to this is the recent book by Michael Moore (Moore 2009), whose arguments will be mentioned where they intersect with the issues discussed in this paper.

my analysis for the role and nature of the act/omission distinction in the end of life context.

1. A preliminary remark: the distinction between omissions and letting die

McLachlan's initial article is an attempt to explain the difference between killing and letting die. The killing/letting die distinction does not always map onto the act/omission² distinction. Firstly, the act/omission² distinction can apply to conduct other than killing, as well as to the latter. Secondly, if one's view is that withdrawing life-sustaining measures should be characterised as an act (because, eg, a ventilator must be switched off, and 'switching off' is an act) it is possible to let die by means of acts, at least if the case law both prior to and since *Airedale N H S Trust v Bland* [1993] AC 789 is accepted. Thirdly – although it appears this may be disputed by McLachlan – it is possible, as we shall see, to kill by means of omissions and not simply by means of acts. Notwithstanding these qualifications, the distinctions can map onto one another in the following sense: in omitting to act in a particular case when I could have acted, I stand by and let a consequence ensue – allow it to happen – which I could have prevented by acting in some way to prevent it from happening. Because there are many contexts where an omission is not killing, it can be said in these contexts to be a species of letting die. I use the terms 'act/omission' here, however, because the killing/letting die distinction seems to imply that, in every context, if I stand by and do not act when I could have done something to prevent someone from dying, I have not, strictly speaking, killed them, but have, instead, let them die. McLachlan accepts this conclusion. He concedes that letting die might be just as morally wrong as killing (McLachlan 2008: 636). But he claims that it is nonetheless distinct from killing, even if it is as morally blameworthy (McLachlan 2008: 638). This is an implication I will deny later in this paper. Omissions *can* be a form of killing, so killing is not always an act. One can kill by omission. Since 'letting die' is to be distinguished from 'killing', it follows that omissions are not always 'letting die'. Much of the disagreement in the debate on the moral relevance of omissions stems from a failure to see that omissions can constitute killing rather than letting die. For this reason, I prefer the terminology 'act/omission' rather than 'killing/letting die'. However, where I discuss McLachlan's view, it should be noted that he (wrongly) considers *all* omissions, in the end of life context, to be instances of letting die, rather than killing. In most of his uses, this will not be a problem, because we will be discussing the sense in which omissions (or, on McLachlan's terminology, letting die) can have causal consequences. The reader should, however, bear in mind the points just discussed.

² For a detailed analysis of the concepts of 'act' and 'omission', see my 'Ending the life of the act/omission dispute: causation in withholding and withdrawing life sustaining measures' (2011) *Legal Studies: Journal of the Society of Legal Scholars* DOI: 10.1111/j.1748-121X.2011.00193.x.

2. The basic positions

As we will see, the position McLachlan defends is that an omission does not have any causal consequences. It should, instead, be seen to be 'the absence of a preventative anti-cause'. We will analyse more thoroughly the meaning of this phrase, with examples, in the following section, but the idea is that an omission is simply a failure to stop something else from causing a consequence. In that sense, I can be morally responsible for my omission, but I will not have caused any consequence by it. Rather, I will merely have prevented some other cause from taking effect.

The position Coggon defends is different. Coggon believes that omissions have causal consequences just as acts do. The question, for Coggon, ought not to be about whether a stretch of conduct is an act or an omission, but about whether or not I am morally (and, as the case may be, legally) responsible for its consequences. On Coggon's view, I may not be responsible for consequences I have caused, so the question of causation is not the relevant issue. Since the act/omission distinction is relevant to the question of causation, rather than responsibility, that distinction is something of a distraction.

The position I defend in this paper is different again. I agree with Coggon that questions of responsibility can be separate issues from questions of causation. But this will not always be so. It is true in the case of acts, but it is not true in the case of omissions. In the case of omissions, except in very limited circumstances I will refer to, the question of responsibility and the question of causation are one and the same question. This is because there is a logical relationship between an omission and an expectation that I would have acted where I failed to act, and it is the omission to act, together with the expectation, that explains why the consequence ensued. We call omissions 'causative' in this explanatory sense (McGee 2011). We say that the reason the milk went sour is that I failed to put it back in the fridge. We do not say that the reason it went sour is because my next door neighbour failed to put it back in the fridge, unless there is an expectation on my next door neighbour to do so. Absent any such expectation, the responsibility to put the milk away is mine. So it is my failure to exercise that responsibility that causes the milk to go sour, that is, explains why it went sour.

We will now examine the respective positions of McLachlan and Coggon in more detail.

3. McLachlan's account of omissions and causation

The basic claim of McLachlan's paper is that there is a moral distinction between killing and letting die. I have a moral obligation, he claims, not to kill someone, but I do not have a corresponding obligation to intervene to restrain a thug whom I notice is killing someone. Indeed, we could hardly be morally obliged to restrain or even to try to restrain all thugs (McLachlan 2008: 636). Similarly, we are morally obliged to refrain from killing each and everyone. But we do not have a similar obligation to try, or continue to try, to prevent each

and everyone from dying (McLachlan 2008: 636). McLachlan tries to explain this difference by appeal to the concept of causation. He cites the work of Garrard and Wilkinson who attack the view that omissions cannot have any causal consequences (Garrard and Wilkinson 2005). Garrard and Wilkinson state that omissions are clearly causative (2005: 66). Failure to signal right when turning can cause a crash. Failure to revise for exams can cause the student to fail them.

McLachlan contests Garrard and Wilkinson's 'bald claim that omissions can cause things to happen' (2008: 636).³ The problem, he contends, is isolating just what omission is causally relevant. For instance, the Virginia Tech killings of 2007 could be said by some people to have been caused by the absence of guns on the campus (2008: 637). Had more guns been present, the murderous student might have been prevented from killing anyone. So how do we identify which omission is the cause of the conduct? Thus we cannot really say that omissions are causative. It is better, when speaking of an omission, to refer to it as a failure to prevent what otherwise may happen to you from happening to you (2008: 637). Princess Diana's failure to wear a seatbelt, for example, did not cause her death, but rather failed to prevent the accident from killing her (2008: 637). However, McLachlan acknowledges that this is not the full solution. For there could, of course, be an infinite number of such failures to prevent. For example, we might also say that what caused Diana's death was the driver's failure to be sober, which in turn might have been caused by his failure to attend an Alcoholics Anonymous meeting earlier in the week (2008: 637). Nonetheless, his recommendation to speak of omissions as the failure to take preventative measures can be applied in the following way: We identify

- (1) the cause of the crash and death; and
- (2) the absence of a preventative anti-cause.

Diana's failure to wear a seat belt, and her driver's failure to be sober or attend the Alcoholics Anonymous meeting, are part of (2). Although what falls under (2) 'might be potentially limitless' (2008: 637), (2) does not, on McLachlan's account, have the same explanatory or ontological status as (1). In this way, by according priority to (1) – the crash and deaths were caused by another car swerving in front, say – we are not landed in an explanatory vacuum by nonetheless acknowledging that the preventative anti-causes in (2) are potentially infinite (2008: 637).

Applying his analysis to the question of whether omissions can kill, McLachlan says that a failure to intervene to stop someone drowning does not mean that

³ McLachlan's view is shared by Michael Moore (2009: 444), who states boldly: "Omissions cannot be causes", on the basis that they are the *absence* of 'a particular'. Moore's analysis is arguably excessively burdened with philosophical terminology – it is worth noting here that it is no accident that case law has eschewed what it calls the 'philosophical' conception of causation – but it seems that the basis for the claim is simply that an omission to act is an absence of any action, and only actions, rather than their absence, can have causal consequences. As we shall see later in this essay, this view stems from construing causation exclusively on the model of an agent acting on something. But 'causation' is not restricted to this paradigm notion. Rather, it is also used in an *explanatory* sense, to explain why a consequence that normally would not eventuate, actually eventuated in this instance. Omissions can be causative in this explanatory sense, for reasons we shall see.

I cause that person's death. However, he thinks that this is irrelevant because I am nonetheless morally responsible, having failed to take preventative measures. (2008: 637-8)

The presupposition of McLachlan's account, then, is that omissions in any given case are potentially infinite, and so cannot operate as causes. Instead, we should regard the ones we happen to identify as failures to engage anti-causes – failures to act that might have prevented the thing that happened from happening. They supplement, as it were, our standard account in terms of acts and events that actually occurred as categorised under (1) above.

4. Coggon's criticisms of McLachlan and the shared presupposition

The criticisms of McLachlan's account by Coggon that I wish to focus on here concern his remarks about McLachlan's account of omissions and their relationship to causation. The first point Coggon makes is that the conduct McLachlan purports to describe as an omission could also be described as an act. If I get into trouble for being drunk, Coggon says, it would hardly be an excuse to say that it is my absence of sobriety that is being witnessed (Coggon 2008: 577). Coggon perhaps picks up here on a weakness of one of McLachlan's examples, which makes his response appear plausible. However, it is unclear how far he wants to press this point. Does he mean to imply that that all omissions can be redescribed in terms of acts, and vice versa, or only the example of absence of sobriety and 'the ones McLachlan uses to build up to it' (Coggon 2008: 577)? The other examples used by McLachlan are the failure to wear a seat belt and a failure to restrain a violent thug. But if these examples could also be redescribed as acts, then there does not seem to be any reason, logically, to limit the claim to these examples, and it may be that the point Coggon wants to make is more general, namely, that any omission could be redescribed as an act and that the act/omission distinction is therefore a red herring, the real issue being simply about responsibility.

Whether Coggon's claim is the more general claim about all omissions, or is merely restricted to the absence of sobriety, the failure to restrain a violent thug, and the failure to wear a seat belt, the claim that such omissions can be redescribed as acts can be contested. Suppose I describe the failure to restrain a thug as an act of refraining from restraining the thug. We can translate this into a simple negation, by saying simply that he did *not* restrain the thug. The negation ('not') nonetheless distinguishes the conduct from the act of restraining the thug, and that, of course, is the very reason we use different terms (act, omission) to refer to the different conduct. To refer to the failure to act as "an act", as Coggon seems to suggest is possible, therefore does not suffice to show that the question of whether the conduct is an act or an omission is irrelevant or of no import, the real issue being about responsibility. In short, we are concerned, when distinguishing between acts and omissions, with conduct that it is normal to describe as an omission and an act respectively, and with the role these differences play in our assessments about responsibility. But by suggesting that McLachlan's examples of omissions could be redescribed as acts, Coggon may have

under-appreciated the reasons why we characterise the conduct in question differently in each case, and the bearing that the difference in the forms of conduct can have on the issues of moral responsibility he wishes to discuss.

There might at first sight appear to be more plausibility, however, in the converse claim – that many acts can be described in terms of omissions. For example, travelling too fast can be considered to be a failure to drive at a sufficiently low speed; crashing into a vehicle can be considered a failure to apply the brake earlier, or even failure to take an alternative route. In many of these cases, however, the notion of an omission at work is not really an alternative characterisation of the conduct, but an *explanation* of why a consequence resulted from the conduct, and an *evaluation* of the conduct that led to the consequence. We say “the *reason* he crashed is that he didn’t apply the brake, when he *should* have”; or, “the reason he crashed is that he was travelling *too* fast, ie, he *failed* to travel at an appropriate speed”. Thus where an *act* can be referred to in terms of omissions without it seeming forced, this is because the omission enters into the account where the act is blameworthy. If Coggon (and with him McLachlan) has this case in mind, then, it is not merely an alternative characterisation of the conduct as an omission, but rather something more: an explanation of why the act in question took the form that it did (driving taking the form of speeding or crashing), and an evaluation of the conduct that led to the consequence (he shouldn’t have been driving so fast).

But in the cases that concern us, we want to know if there is a morally relevant difference between *two different* examples of conduct, rather than whether there is a difference between two alternative descriptions of the *same* conduct. For example, we want to know if there is a morally relevant difference between standing by and watching someone drown, and pushing their head under water to drown them – whether, and in what sense, I can be said to cause the death in the first case as I can be said to do in the second. The contrast we are interested in here is not between two different descriptions of *one and the same* conduct (whether, eg., the act of putting his head under water was caused by an absence of sobriety on my part), but rather between the two different *examples* of conduct up for discussion (standing by and watching someone drown versus deliberately holding their head underwater), and whether there can ever be any significant moral distinction between them and, if so, in precisely what sense there can be. Similarly, in the case of euthanasia and withholding life-sustaining measures, the contrast is not between a redescription of the *act of administering the injection* itself in terms of an omission – as though we were claiming that the decision to administer it is remiss or negligent and should never have been taken – but rather between the act of administering a lethal dose on the one hand, and a decision not to provide life-sustaining measures, on the other. We want to know if there is a morally relevant difference between these two cases that can be rationally tracked by the law, and that question is bypassed if we claim that, in some contexts, the act can be described as an omission – the contrast we are interested in simply is not captured by such a claim.

Coggon is on safer ground when he begins to discuss in more detail some of McLachlan's examples. For instance, when discussing in more detail Princess Diana's failure to wear a seatbelt, Coggon takes McLachlan to task for refusing to call such an omission a cause. It may be conceded, Coggon insists, that failure to wear the seat-belt is not *the* cause of the death, but, he insists, it is nonetheless a cause of the death (Coggon 2008: 578). This point is, in my view, correct, for there is an expectation that she would wear the belt, given the catastrophic consequences that might ensue from failure to wear one. Given that expectation, her failure to wear the seat-belt has *explanatory* value, and in that sense, can be regarded as a cause of her death.

However, Coggon goes on to make assertions which are more problematic. He suggests that when the courts identify something as *the* cause, they are involved in advancing a fiction, for reasons of policy. Moral analysts, by contrast, are not similarly constrained by the pragmatic requirements the courts must impose on themselves. The question for a moral analyst is about agency and associated responsibility (Coggon 2008: 578). Coggon illustrates this claim with an example. To the question 'who left the window open', 'the answer is everyone.' (Coggon 2008: 578). But the answer that everyone left the window open is not, Coggon says, the answer that is generally invited. We really want to know who should have closed it. This, for Coggon, shows that the real question 'is about responsibility, not about omissions':

We are not interested in an exhaustive list of people who have omitted to close the window but want to know: 'who has breached his responsibility to close the window?'⁴

These comments echo a statement made by Lord Mustill in the case of *Airedale N H S Trust v Bland* [1993] AC 789. Lord Mustill expressed the view that the question before their Lordships in that case was not really about causation and omissions, but simply about whether the doctors had a duty or not to continue to provide life-sustaining measures. If there was no duty, then the question of causation would not arise [1993] AC 789, 895.

There is obviously something right about Coggon's claims here. We are, of course, typically interested in the person who has some responsibility for closing the window. However, by prising the question of responsibility apart from the question of causation, he is committed to the view – expressly endorsed in his paper – that *everyone* causes that window to remain open. Taken at face value, this means that everyone in the world causes the window to be open; they are just not *morally* responsible for it. The only person to *blame* is the person whose responsibility it was to close it. Perhaps Coggon's use of the word 'everyone' is an exaggeration, but he does not offer any

⁴ (Coggon 2008: 578). This way of putting it is, however, somewhat forced. Laypersons with no legal knowledge don't talk, in their ordinary parlance, of people 'breaching their responsibility' to close the window, and the unnatural language used by Coggon here might make us a little suspicious. His appeal to such language certainly assists him in driving a wedge between what he regards as two separate questions, the question of causation, and the question of responsibility.

account of how that term might be given a limited application, except by reference to the (for Coggon) different issue about responsibility. This is a serious defect in his account. It simply isn't a plausible position to accept that everyone in the world causes the window to be open, regardless of the fact that only some people might be responsible for its being left in that state. Yet the implication that everyone in the world may be the cause of the window being open is reflected by other comments he makes. He draws a distinction between two kinds of omissions, omissions 'over which one has no power, such as the failure to save the lives of people whom it would be physically impossible to rescue'(Coggon 2008: 578) and omissions over which one does have such power. It seems as though, for Coggon, one can omit even if one has no power whether to omit or not, but it is only omissions over which one *does* have power for which one can be morally responsible.

In making this claim, Coggon adopts a common position in philosophical thinking about omissions. In a recent paper, for example, Phil Dowe points out that 'one problem with the view that omissions can be causes is...that...there are far too many of them', illustrating the point with the claim that if the gardener caused the plant's death by failing to water it, 'then I also caused its death, [and] so too did the Queen of England' (Dowe 2010, 447). Coggon seems to accept that there are indefinitely many omissions, but unlike Dowe and McLachlan, doesn't seem to see a problem with treating them as causative, probably because, as we have seen, he thinks the causation issue is a red herring, the important question being whether we are *morally* or otherwise responsible for the consequences of all these omissions.

With this last point, then, we arrive at the presupposition that I believe McLachlan and Coggon both share, namely, that there are infinitely many omissions whose consequences I have caused. Of course, for McLachlan, I only 'cause' those consequences in the sense that I do not engage in what he calls 'preventative anti-causes', whereas for Coggon my omissions are a cause, but they may be a cause for which I am not blameworthy in any way. But both of them share the view that there are indefinitely many omissions whose consequences I have caused. In fact, however, there are not indefinitely many omissions whose consequences I have caused. Where there are consequences that it is physically impossible for me to prevent, I neither act nor omit to act in respect of them. Coggon is quite mistaken in believing in the existence of omissions over which I have no power, and consequently it makes no sense to speak of 'refraining' in such cases. This means that his response to McLachlan requires some modification to correct it. I turn now to this task.

5. Omissions and causation

Coggon is right to distinguish between omissions for which I am responsible morally or in some other way, and omissions for which I am not. But in both cases, the omission concerned is an omission over which I have some power. Indeed, the very concept of an omission requires that I have some power over it. There is no such thing as omitting to do something that it is neither logically nor physically possible that I should do. Furthermore, only in a case where

there is some expectation or duty on me to have acted, can I be said to cause the consequence that ensued from my failure to act. I will now expand on these claims in a little more detail.

(a) Prerequisite conditions for conduct to count as an 'omission'

A necessary condition for conduct to count as an omission to act is that I have both the ability and opportunity to act (Hacker 2007: 107). Suppose I give a paper at a seminar in Manchester and, at the end of the seminar, the colleague sitting next to me spills some wine. My colleague might not do anything about it. He has both the ability and an opportunity to clear up the spilled wine. In addition, there may also be an expectation that he clear it up or at least assist others to clear it up – but this is an additional factor that is not relevant to whether or not he omitted to clean it up. It suffices that he have the ability and the opportunity to do so, to label his refraining from doing so an omission. By contrast, my family back in South Manchester, being nowhere near the building at the time, and evidently being unaware of the spillage, have neither the ability nor the opportunity to clear up the spilled wine. *Pace* both McLachlan and Coggon, it is not meaningful to describe whatever they are doing at the time as an omission to come and clean up the wine.

McLachlan and Coggon might concede this. They might instead insist that, technically, my family had the ability and opportunity to clear up the spilled wine and that it is just that, since the accident is trivial in nature, we do not expect them to come and clean it up. But such a view leads to absurdities. First, it is not easy to see how they could know about it. Second, on Coggon's view at least, there would have to be a similar ability and opportunity for everybody in Manchester to find out about the spillage and come to the building and do something about it. But how could they all come to, and get into, the building and do something about it? On current estimates, there are approximately 2.6 million people in the greater Manchester area. Clearly such a view would be absurd. The true position is that only those in the room with me when the spillage happens have the ability and an opportunity to do something about it.⁵ In this sense, only *their* failure to do something might be said to be an omission.

(b) The logical interconnection between expectation or duty, and causation

When the colleague sitting next to me in the seminar room at Manchester fails to clean up the wine he spills, we say he has omitted to clean it up. But in addition we might mean by this that he had some responsibility to do it or, at least, that there was some expectation that he would clean, or help clean, it

⁵ The ability and opportunity will shade out, rather than abruptly ending. Passers by the room peering in and seeing the wine technically have the ability and opportunity to do something about it. Perhaps we could still call their conduct in walking past rather than entering the room an omission to clear up the wine, notwithstanding an absence of any expectation that they should do so. But we might also construe 'ability' and 'opportunity' as themselves circumstance relative, in so far as there are people in the room with a better opportunity and whom we would normally expect to take charge of the spillage. In that respect, we probably wouldn't regard the conduct of the passers-by as an omission, still less as causative of the stain in the table resulting from a failure to clean it up immediately.

up. In such a case, he has the ability, opportunity and responsibility to clean it up (or to assist in cleaning it up). By contrast, other colleagues sitting further away in the room have both an ability and, if my colleague is doing nothing to clean up the mess, an opportunity to help, but there may not be any expectation on them to come and assist, because it might be thought that, really, the colleague who spilled it should be the one to do something about it.

Now, only where there is an expectation, in addition to an ability and an opportunity, that someone should act when they refrain from acting, do we say that they caused the consequence. It would be very odd, for instance, to say either the other colleagues in the room sitting further away from the spillage are *the* cause or that they were *a* cause of the wine starting to stain the table. Only if there is also an expectation on them to clean it up do we say that they are a cause of the staining. Consider Hart and Honoré's example of the gardener failing to tend his garden. Normally – unless there are other reasons for the gardener's failure like his frailty or incapacity to tend to his garden – there is no expectation on the neighbour to come and do the garden. The neighbour in such a case clearly has the ability and the opportunity to come in and mow the lawn and weed the garden. But they do not come in to do it, normally because we regard the owner (or tenant) as responsible for tending to it. We neither regard the neighbour's failure to tend to it as *the* cause nor as *a* cause of the garden's being overgrown. The reason for this is that 'cause' as used in the context of omissions is used in an *explanatory* sense (Hacker 2007: 86-87; McGee 2011: 7-16). The owner's failure to tend to the garden *explains* why it is overgrown, and that is what we mean by 'cause' when we say that their failure to tend to the garden has caused it to become overgrown, or that the reason the garden is overgrown is that the owner has failed to tend to it.

Does this conflate causation and responsibility? The two overlap, except in the following circumstances: I might have a responsibility to tend my garden, but my neighbour might come in and do it in any event to prevent it from becoming overgrown. My failure to tend to it does not result in its being overgrown. But I am still responsible for tending to my garden. Nonetheless, there is a logical connection between causation and responsibility just in this sense: if I fail to do what is expected of me, and nothing intervenes to prevent the consequence of my failure coming about, then I caused that consequence by failing to act, for my failure to act explains why the consequence came about.

6. Omissions and letting die

I want to conclude now by applying this analysis to the killing/letting die issue. Because 'cause' is used of omissions in an explanatory sense, causation is logically tied to questions of expectations or duty. It is for this reason that, in *Airedale N H S Trust v Bland* [1993] AC 789, the Law Lords other than Lord Mustill thought that an omission need not be causative in all cases – it is only causative if there is some expectation that the doctors would continue to provide the measures and that they were under a duty to do so, but failed to do so. But since they were under no such duty, then, from the point of view of

assessing liability, the doctors' conduct as authorised by that case would not explain Anthony Bland's death.⁶ Rather, that would be explained by his underlying condition and the court's decision that the proposed conduct would be lawful. The doctors had both the ability and the opportunity to provide the treatment, but not a duty to do so. If, however, they had a duty to do so, and failed to do so, then they would have killed Anthony, notwithstanding that they omitted to treat him any further rather than ending his life with a lethal injection. In such a case, their omission would amount to killing, not merely letting die.

Could it not be said that the doctors' lawful conduct after the *Bland* judgement authorised the withholding of further nutrition and hydration is a cause, if not *the* cause? Is not the view that there is no causal agency at all here a fiction based on policy? No. Once it is accepted

1. that conduct can only be called an omission if a person has both the ability and opportunity to act and fails to act; and
2. that such an omission can only be an explanation of the consequence if there was some expectation or duty on the person to act

then, if there is no such expectation or duty on the person to act, it cannot be said that the omission is causative, even though condition 1 is satisfied.

Coggon might respond by insisting that here I am confusing causal responsibility with moral responsibility. The correct view, Coggon might insist, is that failure to take an opportunity to intervene means that the person is *causally* responsible, but the further question of whether that person is also *morally* responsible is answered by whether there is an expectation or duty on them to have acted. By linking the causation question to the latter, so the argument would run, I have surely collapsed causal and moral responsibility into one-another. Furthermore, if causation *is* linked to responsibility, would not this point hold also in the case of acts? Could one not say that an expectation *not* to administer a drug in some cases where it is administered means that a doctor who administered them has caused death in exactly the same sense that I have identified in the case of omissions?

We have already seen that the two notions of responsibility (causal and moral) can come apart in the case of omissions where an omission to do something nevertheless fails to have the consequence that would normally ensue from my failure to do it. Nonetheless, aside from these circumstances, in the case of omissions, moral and/or legal responsibility and causation are logically connected, given that in the case of omissions 'cause' is used in an explanatory sense as explaining why something happened when there was an expectation that it would not normally have happened – for example where someone is charged with the *responsibility* for ensuring that it does not

⁶ It should be noted that a different controversy in that case – one we do not have the space to consider here – is whether withdrawal as opposed to withholding should be characterised as an omission. I have addressed this issue elsewhere (McGee 2011: 16-23). For the purposes of the present article, and the discussion between McLachlan and Coggon, it is not necessary to address this separate issue. We can confine ourselves to a discussion of withholding only, that is, to conduct that is uncontroversially classified as an omission.

happen, but it actually happens. The explanation consists in pinning blame on somebody for not having done something they were expected to do. In the case of acts, however, this analysis does not exhaust the possible application of causation because, although of course there can be an expectation on someone to refrain from acting when they act, and so the person can be morally responsible for the consequences of their act in that sense, an act can have causal consequences regardless of whether there is an expectation on a person to refrain from acting when they act, whereas an omission *only* has causal consequences if there is an expectation on the person to act (McGee 2011). In short, responsibility exhausts causation in the case of omissions, but not in the case of acts – even when we find that a person had no responsibility to refrain from acting and yet acted, the person will have caused whatever consequence ensues from that act.

Consider, for example, the following cases. A doctor administers an antibiotic to a patient, who develops an anaphylactic reaction to it, and dies.⁷ If the doctor's conduct is unreasonable – he should have foreseen the possibility of the reaction – then the doctor will be morally and legally culpable. And we may of course say he 'caused' the patient's death and mean by this that he ought to have checked for the reaction and did not. But we are then, of course, blaming him for an omission. He failed to check, and this led him to administer the antibiotic. In this case, the failure to check plus the administration of the antibiotic explain the patient's death. What if, however, there is no omission – the patient has not so far had this reaction and all reasonable checks have been carried out, but surprisingly, the patient has the reaction? The doctor is still a cause of the patient's death, but not now in the sense identified above, where he had a responsibility to check and failed to check, but only in the sense that he has administered the antibiotic and this caused a reaction in the patient. The doctor's actions cannot be questioned in any way, and he or she is thoroughly exonerated. We might even express this by saying the doctor did not cause the patient's death. But if we do, the word 'cause' here is used to mean that he is not morally or legally responsible for it. It does not mean that there is no causal agency at all. Thus even if we use the word 'cause' in this sense of a doctor's acts, its use in this sense does not exhaust the sense in which we apply causation to acts, unlike in the case of omissions. Even though we might conclude that the doctor is not responsible and so does not cause the consequence in *this* sense, there still remains a causal connection between the conduct and the consequence because the antibiotic triggers the reaction and results in the patient's death. In short, there seem to be two senses of causation that attach to acts, the sense in which, as I have claimed, it is tied to notions of expectations and responsibilities where we say that it is the agent's having acted when he or she shouldn't have done that 'brought about' a consequence (eg, administering the antibiotic when he or she should have known not to do so), and then a sense which extends beyond this, and refers simply to the impact of the action and the effect of the substance administered, regardless of any questions of responsibility on the part of the agent.

⁷ I am grateful to an anonymous reviewer for this example.

Now, suppose instead we are dealing with an omission to provide antibiotics. Again, if there is an expectation on the doctor to provide them, the doctor will be blamed for the consequences that ensue from his failure to provide them and the doctor will be culpable for his or her omission. We may therefore say the doctor 'caused' the patient's death and mean that he or she should have provided the antibiotic, but failed to do so, and that is why the patient died. But suppose there is no such expectation. A decision has been made by the medical team not to administer any further treatment, including antibiotics, so as to allow nature to take its course and let the patient die. If that decision is made in good faith and in accordance with good medical practice, and is otherwise lawful, the doctors' decision to omit treatment will not be culpable, and so would not have caused the patient's death in this sense. But, notwithstanding that there is no expectation on the doctors to act in this case, is there an equivalent residue to which causation attaches, as there is where the antibiotic is actually administered and triggers a reaction? Can we not say that there is causation, but there is simply no responsibility on the doctor to do anything? No.

Let us put the point this way, following Daniel Callahan. A lethal injection will kill both a sick person, and a healthy person. A decision not to administer life-prolonging measures, by contrast, will have no impact on a healthy person (Callahan 1992: 53). It will only impact a sick person who needs the measures. It is therefore the condition of the patient that is doing all the work. We only say that the doctor *caused* the patient's death in the case of a sick person where there is an expectation on the doctor to provide the treatment to prevent that sickness from becoming fatal. Absent that expectation, there is nothing over and above the expectation on the doctor that he or she should act to which any causal agency can attach. It follows that, unlike in the case of acts, there is no separate sense in which an omission can have causal consequences over and above the question of responsibility.

Aside from the tendency to assimilate omissions to acts, I believe our temptation to think otherwise might stem partly from the thought that we normally do expect doctors to provide life-sustaining measures to sick patients and yet, in the cases that interest us, they refrain from providing them. We can certainly imagine contexts other than ones concerning debates about responsibility and liability where we might want to say, for example, that the reason X has died is that he is terminally-ill and the doctors have decided that further life-sustaining treatment is not appropriate (McGee 2011, n 43). But such a context is patently one in which issues of responsibility and liability are not in the picture (and so the word 'cause' if used in such a context to describe the doctors' conduct would be inappropriate and misleading), yet the point of wondering whether we can at least say the doctors are a cause, so as to suggest the courts are advancing legal fiction based on policy, is precisely to question whether the courts are really ruling out possible bases of liability in order to reach what they consider to be the morally right result, and it is this suspicion that I am targeting here.

If, then, as I have claimed, to say that someone caused a consequence by omitting to do something is to pin blame on them, what follows on this

analysis for cases of disagreement? The drowning cases are often cited as ways of invoking differing intuitions. McLachlan follows James Rachels in giving the example of a case where two people are drowning in a nearby lake, discussing whether inaction in such circumstances can be said to 'cause' the death of the swimmers. Suppose we accept that omissions are causative in the explanatory sense, as I have argued. What if we disagree about these cases, with some of us thinking that the omission explains the swimmer's death while others think that it does not? Will not 'cause' then be relativised to whether or not people think there is a duty or expectation on someone to intervene to save the drowning person? In many cases where 'cause' is used in an explanatory sense, the question of blame will be clear cut. But in the drowning cases, reasonable minds will disagree about whether someone is responsible for the death, and that will often be reflected in the way that we speak – we might express our disagreement precisely by saying that A caused B's death, rather than by saying that A was morally responsible for it. Now it would be a mistake to object here by saying: 'surely whether the omission caused the consequence is one thing, and whether we *think* it did is quite another'. While these two issues can come apart in the case of acts, they cannot be prised apart in the case of omissions, because of the logical link between expectations or duties and causation in the explanatory sense. Any disagreement about whether there *is* any such expectation or duty will be reflected in discussions about whether someone caused a consequence or not. Disagreement in contested cases about whether someone had the opportunity to act and failed to act and whether, having had that opportunity, there was an expectation on them to act, will be recorded also in claims that such a person has 'caused' a consequence – in claims that their omission to act explains why that consequence ensued. What seems to me to be most implausible is McLachlan's view that I can be responsible for it even if I haven't caused it, or Coggon's view that I may have caused it, even though I am not responsible for it. It is these two claims that I have attempted to rebut in this paper.

7. Conclusion

The assumption that both McLachlan and Coggon share is that there is potentially an infinite amount of omissions of mine in any given case. For Coggon, I may be omitting to intervene to help someone even when it is not physically possible to intervene. Nonetheless, I may not be to *blame* for any omission to intervene. Similarly, for McLachlan, there are many candidates for 'preventative' anti-causes that may have lessened the impact of Diana's crash. If she had worn a seat-belt, that would have been a preventative anti-cause that may have saved her life. But then, by the same token, her driver's failure to attend an Alcoholics Anonymous meeting is also such a failure of a preventative-anti cause. Both these views have an excessively amplified conception of omissions. Many of my acts cannot be redescribed in terms of omissions without absurdity. Further, it is necessary for me to have both the ability and an opportunity to act, in order for my not acting to be an omission. Finally, it is also, in addition, necessary that there be some expectation on me to act – by reason, for example, of my being under a moral or legal duty for

me to act – for my omission to have any *explanatory* value, and so for my omission to be a cause, to be a failure in the evaluative sense. For ‘cause’ is used, of omissions, in an *explanatory* sense; to say that X caused the train to crash, where X failed to change the signal lever, is to say that his duty to lift the signal lever was vital, was expected of him in the circumstances, and in that sense his failure to do it explains why the train crashed. Responsibility and causation go hand in hand in the case of omissions, and cannot be prised apart except in the very limited circumstances discussed.

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