A COMMENT ON *R.* v. *MILLER*

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I. INTRODUCTION

Although the case of *R.* v. *Miller*[1] possesses singularly unique and perhaps inimitable facts, it nevertheless provides a valuable contribution to the jurisprudence concerning basic principles of criminal law. In any Canadian or English treatment of the concepts of criminal omissions, or the concurrence of *actus reus* and *mens rea*, it will undoubtedly constitute companion reading with the well known (but not always celebrated) decision in *Fagan* v. *Metropolitan Police Commissioner*.[2] This note will consider the legal analysis adopted in *Miller* and the implications of the decision for Canadian law.

II. THE FACTS

The sequence of events in *Miller* was essentially uncontroverted. The accused, who had been squatting in an abandoned house, had fallen asleep while smoking in bed. He awoke to find that the mattress upon which he was sleeping was smoldering, having been lit by his cigarette. Logic would suggest that an individual placed in such a situation would have taken some measures to prevent the fire from spreading. However, rational and responsible thought, on this night at least, played no part in affecting the accused's reaction. After having become aware of the presence of the smoldering mattress he went into the next room and fell back asleep. The fire spread and the accused was subsequently rescued from the blazing house. He was later indicted for committing criminal damage by arson.[3]

III. THE ISSUE

The instinctive reaction of a layman to this fact pattern would likely be that culpability should attach to Miller. However, there are difficult juridical questions as to whether the accused's response to the discovery of the fire should be classified in law as arson, and this hinges on whether a conviction would be consonant with criminal law doctrine. The specific doctrinal concern centres on the requirement of the temporal concurrence of the elements of a crime. It is axiomatic that a true crime contains both mental and physical components and that the Crown must prove beyond a reasonable doubt that the accused committed the *actus reus* while contemporaneously possessing the requisite *mens rea*.[4] This rule,

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1. [1983] 2 W.L.R. 559 (H.L.).
2. [1969] 1 Q.B. 439 (D.C.).
3. The charge was laid pursuant to ss. 1(1) and (3) of the Criminal Damage Act 1971, c. 48 (U.K.). The relevant portions of these provisions read as follows: "(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence . . . (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson." In Canada, *see* Criminal Code, R.S.C. 1970, c. C-34, ss. 389, 390.
4. *See Fowler* v. *Padget* (1798) 7 T.R. 509 at 514, 101 E.R. 1103 at 1106; *R.* v. *Droste* (1980) 49 C.C.C. (2d) 52 (Ont. C.A.).

which evolved along with modern notions of subjective *mens rea*, is not a technical vestige of the past. It possesses an important policy basis, serving to ensure that 'accidents' are not considered criminal merely because they are preceded by an abandoned intention to commit a crime, or (perhaps more commonly) because they are followed by approval of an act inadvertently committed. *Miller* concerns this second type of scenario: the fire was originally set when the accused was asleep and unconscious, therefore his acts were initially both involuntary and unintentional. He then awoke and became cognizant of the smoldering. At this stage he became fixed with a reckless state of mind, which in Canadian terms one might loosely describe as an advertence to the possibility or probability of future harm, coupled with an unjustifiable assumption of that harm.[5] It then became necessary to determine if there existed a concurrent *actus reus* and that was the troublesome problem in the instant case.

Where issues of concurrence arise there are at least four approaches which may be taken. First, one may ignore this requirement; as with other axioms, there are several qualifications or exceptions to the general principle that the physical and mental elements must concur in time. Obviously, it is not relevant where the offence may be classified as one of strict or absolute liability, where there is no mental element *per se*.[6] A further exception was advanced by Lord Denning in *Attorney General for Northern Ireland* v. *Gallagher*.[7] His Lordship suggested that when an individual voluntarily becomes intoxicated so as to fortify himself with the courage to commit a criminal act, there is no need for concurrence if, at the time the criminal act is committed, the *mens rea* is absent due to the intoxication. In such a case the policy of the rule, which is to prevent fortuitous occurrences from being branded culpable, is not offended. There is a dearth of authority concerning this proposition,[8] which is not entirely surprising, in view of the extreme unlikelihood that an individual can be said to have executed his pre-conceived plan, bolstered with the courage provided by his drink, and yet at the same time be considered to be too intoxicated to form the *mens rea* for the crime perpetrated.

A second approach relates to the manner in which a positive *actus reus* is defined. This tack is perhaps best illustrated by the *locus classicus* of *Fagan*.[9] In that case, it will be recalled, a motorist, whilst endeavouring

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5. *See R.* v. *Buzzanga* (1979) 49 C.C.C. (2d) 369 at 379 (Ont. C.A.).
6. *See* G. Marston, "Contemporaneity of Act and Intention in Crimes" (1970) 86 L.Q.R. 208 at 214. *But cf.* D.R. Stuart, *Canadian Criminal Law: A Treatise* (1982) at 295: "Although authority on the point is lacking it would seem that the principle should apply equally where an offence requires a form of fault less than *mens rea*. The principle is that the act and fault occur at the same time."
7. [1963] A.C. 349 (H.L.).
8. *But see Leary* v. *The Queen* [1978] 1 S.C.R. 29 at 45-46. *See also R.* v. *MacCannell* (1980) 54 C.C.C. (2d) 188 at 192 (Ont. C.A.) where Martin J.A. held the *mens rea* for the offence of driving a motor vehicle with a blood/alcohol level exceeding 80 mg. of alcohol in 100 ml. of blood (contrary to section 236 of the Code) is "supplied by the voluntary consumption of liquor." This creates an *ad hoc* exception to the concurrence rule. *MacCannell* was followed in *R.* v. *Patterson* (1982) 69 C.C.C. (2d) 274 (N.S.S.C., App. Div.).
9. *Supra* n. 2. *See also D.P.P.* v. *Ray* [1973] 3 All E.R. 131 (H.L.); *cf. R.* v. *Scott* [1967] V.R. 276; *R.* v. *Ashwell* (1885) 16 Q.B.D. 190.

to park his car at a curb, accidentally stopped his vehicle with a rear wheel resting on a police officer's foot. After having been made aware of this fact, but not before an abusive epithet had been hurled at the constable, the wheel was moved. As a result, Fagan was convicted of assault. It was held by a majority of the English Divisional Court that a guilty intention may be superimposed onto an existing act. Therefore, it was essential to the decision that the assault, through the instrumentality of the automobile, could be said to have been continuing when Fagan first realized where the wheel was reposing. James J., for the majority, concluded that:[10]

> On the facts found the action of [Fagan] may have been initially unintentional, but the time came when knowing that the wheel was on the officer's foot [Fagan] (1) remained seated in the car so that his body through the medium of the car was in contact with the officer (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating the intention of keeping the wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.

This reasoning has been challenged[11] and indeed, there is a compelling dissent in the decision in which Bridge J. (as he then was) rejected the conclusion that the activity of Fagan, after he had accidentally stopped the car on the constable's foot, could be described as a continuing assault. In response to the sophistry of the majority, he suggested that the accused had merely permitted the vehicle to remain.

Despite the difficulty in applying the "extended *actus reus*" construct to the facts in *Fagan*, a compatible approach has been adopted in other decisions. In the recent Canadian case of *R.* v. *Salvador* [12] a concurrence issue arose in relation to a charge of illegal importation of narcotics. The four accused were sailing a yacht containing a considerable amount of cannabis resin, which they had obtained in Morocco with a view to importing it into the United States. The yacht broke down and drifted into Canadian territorial waters, where the four were later arrested. The defence position was that the importation into Canada was complete when the yacht passed the threshold into Canadian territory, but the acts were involuntary and unintentional and *ex hypothesi* there was no coincidence of the mental and physical elements. The Nova Scotia Court of Appeal summarized its reasons for rejecting this contention as follows:

1. The *actus reus* of the offence is the act simpliciter of voluntarily (by which I mean an act or conduct flowing from the exercise of a free will) bringing narotics into Canada from abroad.
2. The *mens rea* of the offence is to be found in the basic intent to knowingly bring narcotics into Canada from abroad.
3. The offence depending on the circumstances, may be one that continues after the narcotics are physically brought into Canada from abroad.
4. In any case where it can be said that the offence of importation is continuing it is not necessary that the necessary *mens rea* be shown to be present at the inception of the *actus reus.* It can be superimposed upon the existing, continuing act of importation.[13]

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10. *Supra* n. 2 at 445. Lord Parker C.J. concurred.
11. *See* G. Williams, [1969] *Camb. L.J.* 16 at 17.
12. (1981) 59 C.C.C. (2d) 521 (N.S.C.A.). *See also R.* v. *Bernard* (1961) 130 C.C.C. 165 (N.B.C.A.).
13. *Supra* n. 12 at 541-42 (*per* Macdonald J.A.); *see also R.* v. *Copeland* (1978) 45 C.C.C. (2d) 223 (Ont. C.A.).

In *Thabo Meli*,[14] the four accused attacked the deceased with iron bars, and assuming he was dead, disposed of the body over a precipice. This was all part of a pre-arranged plot according to which the body was to be placed so that it would appear that death was accidental. The medical evidence revealed that death had occurred from exposure caused after the body had been abandoned. It was argued that at the time of death the accused, thinking that their victim was already dead, did not possess the necessary *mens rea* for murder, and could only be convicted of manslaughter. The Privy Council rejected this suggestion, taking the view that it was impossible to divide up what was really a single transaction.

It can be seen that *Thabo Meli* resembles *Fagan* in that the decision to convict rested on the court's willingness to conclude that the *actus reus* was extended in time, although in *Fagan* the innocent act was later coupled with the intent, whereas in *Thabo Meli* the original *mens rea* was connected with the later physical acts which led to death. The judgment is somewhat terse and it is difficult to discern the theoretical adhesive which binds the sequence of events together.[15] It may have been crucial that there was a pre-conceived plan, however the decision has been followed in one instance where this was not so.[16] Conversely, cases which involved facts closely in parallel with *Thabo Meli* have been resolved by acquittals.[17]

These concerns aside, the facts in *Thabo Meli* can assist in introducing a third means of analysing concurrence problems. Marston[18] suggests that cases such as *Thabo Meli* pose only questions of causation. The initial, intentional attack can be regarded as a factual cause of death, as it resulted in the victim remaining unconscious during the period of exposure. The enquiry then focuses only on whether there existed a sufficient intervening act to break the legal or attributive chain of causation. In *Thabo Meli* the only possible *novus actus interveniens* was the disposal of the body.

A fourth approach to concurrence is quite different from the others, at least in form. The vehicle is to treat the accused's inaction, after he becomes aware of the accidental harm, as a criminal omission. It is well established that the *actus reus* of a crime may be committed by way of an omission where there is a positive duty to act recognized by the criminal law; the existence of a legal duty is essential to the finding of liability.[19]

A useful exemplification of this principle, and indeed the only previous English decision adopting the duty/omission construct to a contemporaneity issue, is the case of *Green* v. *Cross*,[20] where the accused was

14. [1954] 1 W.L.R. 228 (P.C.). *See also R.* v. *Moore* Rev. 229 (C.C.A.); *Jackson* v. *Commonwealth* 100 K.Y. 239.

15. *See also Russell on Crime* (12th ed. J.W.C. Turner 1964) at 57.

16. *State* v. *Masilela* 1968 (2) S.A. 558. *See also R.* v. *Church* [1966] 1 Q.B. 59 (C.C.A.). *See also* C.C. Turpin "The Murdered Corpse — Thabo Meli Extended" [1969] Camb. L.J. 20.

17. *See R.* v. *Chiswibo* 1961 (2) S.A. 714; *R.* v. *Ramsay* [1967] N.Z.L.R. 1005 (C.A.) discussed in Elliott, "Australian Letter" [1968] Crim. L. Rev. 590.

18. *Supra* n. 6 at 218-19. *See also* Note, (1954) 70 L.Q.R. 146 at 147.

19. *See*, for example, *Moore* v. *The Queen* [1979] S.C.R. 195.

20. (1910) 103 L.T. 279 (D.C.).

charged with cruelty to animals. He was a farmer who had set traps on his property to catch vermin. One morning the accused discovered that a dog had been caught by one of these traps and it was only after two hours that the pooch was eventually released by two police officers whom the accused had notified. During this two hour period the accused had attended at his neighbour's house to ascertain if that neighbour was the owner of the animal and had returned to the farm to attend to chores. Only then did he contact the police. The trapping was unintentional and the case appears to have been argued on the basis that the act of trapping was complete when the dog was first caught. The question then became — does a failure to take immediate measures to open the trap constitute a criminal omission? This depended on whether there was a duty to act. The complaint against the accused was dismissed, but an appeal was allowed and a new trial ordered. Lord Coleridge J. declined to conclude that the defendant must be liable for cruelty on the facts as found, nevertheless, he regarded it as necessary that the accused take positive steps once the danger had been ascertained.[21] Lord Alverstone C.J. agreed and held that the magistrates had jurisdiction to convict on the basis of the accused's failure to act, but did not express an opinion as to guilt. Only Channell J. dissented, asserting that it would be a "perversion of language" to find that the undue delay of the accused, "if it could be considered undue",[22] could be described as a positive act of maltreatment. He did acknowledge that in some cases this might be an inappropriate conclusion, such as where the failure to perform a trifling act resulted in pain to an animal.

The issue in *Miller* then, was whether any of these analytical devices could be employed to find a coincidence of mental and physical elements.

IV. THE DECISIONS IN R. v. MILLER

After a jury trial the accused was convicted and sentenced to six months imprisonment. An appeal was taken alleging errors of law in the recorder's summation to the jury; this appeal was dismissed[23] as was a subsequent appeal to the House of Lords.[24]

In the jury summation the recorder spoke in terms of duties and omissions. A duty, the jury was instructed, arises when an individual is either accidentally or deliberately responsible for the creation of a dangerous situation.[25] It was this facet of the direction upon which the appeal was founded. In upholding the conviction, the Court of Appeal judgment is conceptually quite turbid. It purports to reject the recorder's instructions, presumably because there exists no acknowledged duty in English

21. *Id.* at 282: "as soon as he was made aware of the fact of the dog being in the trap, he from that moment, by permitting it to remain in the trap, caused it, within the meaning of the Act, to be ill-treated, abused or tortured. Whether or not he took sufficient steps to remedy that pain is a question of degree, and I cannot agree . . . that under these circumstances, he has only to look on, to do nothing."

22. *Id.* at 283.

23. *R.* v. *Miller* (1982) 75 Cr. App. R. 109.

24. *Supra* n. 1.

25. *Supra* n. 23 at 113. *See also id.* at 111-12.

law to act in such circumstances. *Green* v. *Cross* was considered at length, but was described as a case which turned very much upon its own facts. *Commonwealth* v. *Cali*,[26] an American case with facts similar to those in *Miller*, also received only cursory treatment, though it employed the duty/omission principle. May L.J., for the Court, stated that "an unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded *in toto* as an intentional act."[27] A more precise formulation of the governing principles was resisted. However, applying the broad statement to the present case, it was concluded that:[28]

> . . . the whole of the appellant's conduct in relation to the mattress from the moment he lay on it with a lighted cigarette until the time he left it smoldering and moved to the adjoining room, can and should be regarded as one act. Clearly his failure with knowledge to extinguish the incipient fire had in it a substantial element of *adoption* on his part of what he had intentionally done earlier, namely set it on fire.

These passages reveal that the reasons in the Court of Appeal contain an amalgam of three of the approaches. Taken at face value, the idea of adopting a prior act can be regarded as establishing a pure exception to the contemporaneity requirement. This is particularly true in *Miller* where the lighting of the mattress was done while the accused was unconscious; but for the adoption, this involuntary act could not constitute the *actus reus*. Of course, the Court of Appeal chose to describe the adoption by reference to the continuous act approach. Yet in substance it is tempting to conclude that the so-called adoption of the earlier act is no more than an abnegation of a *duty* which commenced on the discovery of the fire, for under the Court of Appeal's holding it is clear that the accused must perform some positive act in order not to be taken to have adopted the earlier, unintentional act.[29]

In the House of Lords the differences between the continuous act and the duty theories were regarded as relatively minor, at least in *Miller*'s case, where the application of either would lead to a conviction. The duty approach was preferred but only on the view that this was easier to explain to a jury. It was added that the term 'responsibility' was preferable to that of 'duty', the latter term being more apposite in a civil context. Of importance is Lord Diplock's articulation of the prerequisites for, and extent of, such a responsibility to act:[30]

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26. *Commonwealth* v. *Cali* (1923) 141 N.E. 510, following *Commonwealth* v. *Asherowski* (1907) 196 Mass. 348. It would appear that neither of these decisions have been considered on this point in a subsequent American opinion.

27. *Supra* n. 23 at 118. *Cf.* the articulation of a similar proposition in G.L. Williams, *Textbook of Criminal Law* (1978) at 143-44. *See also McGregor* v. *Benyon* [1957] Crim. L. Rev. 608 (D.C.), where a mother was held to have 'adopted' the taking of a handbag by her young daughter. This finding of guilt was criticised in J.C. Smith, [1957] Crim. L. Rev. 609 at 609-10. His later comments on *Miller* are consistent with the earlier concerns expressed about *McGregor*: *see* "Case and Comment", *infra* n. 29.

28. *Supra* n. 23 at 118 (emphasis added).

29. *See also* J.C. Smith, "Case and Comment" [1982] Crim. L. Rev. 526 at 528; *cf.* D.L.A. Baker, "Arson and Accidental Fire" (1982) 46 J. Crim. L. 187. The differences between the Court of Appeal's articulation and that of the recorder appear all the more superficial once it is recognized that both purport to rely on the same passage from Glanville William's *Textbook of Criminal Law*. *See supra* n. 23 at 111-12, and 118.

30. *Supra* n. 1 at 543-44.

> I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged, provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.

Although action is incumbent where an individual creates a dangerous state of affairs, the responsibility which then falls upon the accused is not to act as a guarantor against all future damage, but rather to take reasonable steps to abate the danger.[31] Lord Diplock's judgment is consonant with the majority decision in *Green* v. *Cross*, particularly with reference to the parameters of the duty to act. In *Cross* the accused may have been unduly dilatory in releasing a trapped dog. It was a question of degree as to whether he had acted in a prompt and proper manner, and one of the factors to be considered was the personal stakes involved in releasing the animal; it was not maintained that the accused should necessarily have risked attack.

V. COMMENTARY

The decision of the House of Lords in *R.* v. *Miller* has implications which transcend peculiar occurrences of arson; the Law Lords have forged a new equation with which to formulate the basis of criminality. The variables relate to the creation of a dangerous state of affairs, and the steps which are necessary to mitigate or terminate the danger. To Lord Diplock, that such an equation should result in a finding of guilt in the case at bar was manifest. There was "no rational ground for excluding from . . . criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created".[32] Still, such a broad formulation invites the concerns expressed following *Fagan*:[33] *Miller* may be applied to fact patterns which were never contemplated by the original rule.

Should *Miller* be followed in Canada? Such a question compels an examination of the form and substance of the newly created principle. The form is the creation of a common law (that is non-statutory) duty to act. There are Canadian authorities which have recognized that a common law duty can found criminal liability.[34] However, a large sphere of uncertainty exists, for there remains doubt as to whether a duty to perform the terms of a contract can give rise to criminal liability where the failure to do so injures a party not privy to the agreement.[35] No case has resolved the issue of whether the existence of the duty in tort under *Donoghue* v. *Stevenson* [36] can be relevant in a criminal context. Indeed, the inherent

31. *See also* Kirchheimer, "Criminal Omissions" (1942) 55 Harv. L. Rev. 615 at 625.
32. *Supra* n. 1 at 543.
33. *Supra* n. 11 at 17.
34. *See*, for example, *R.* v. *Popen* (1981) 60 C.C.C. (2d) 232 (Ont. C.A.).
35. *Cf. R.* v. *Pittwood* (1902) 19 T.L.R. 37; *see also* Criminal Code, R.S.C. 1970, c. C-34, s. 380.
36. [1932] A.C. 562 (H.L.). G. Marston, *supra* n. 6 at 227, doubts whether the neighbour principle could be used to found a duty recognized by the criminal law.

problem in recognizing that common law duties can be utilized by the criminal law is that there must always be first a case in which such a duty is found to exist and until that time the state of the criminal law register would seem to suggest that it is not criminal to omit to perform the conduct in question. To impose liability on an unwitting accused would then appear to run afoul of the principle of legality.

Stuart[37] has launched a minor assault on the Canadian position relating to common law duties and the principle of legality as contained in section 8 of the Criminal Code. That section provides *inter alia* that notwithstanding anything in the code or any other Act, no person shall be convicted of an offence at common law. As Stuart observes, some offences expressly provide for omissive conduct. Failing to disperse after a reading of the riot provisions[38] provides a simple example. Other offences speak of liability arising from the failure to perform a general legal duty. Thus, one may be liable under section 200 of the Code for abandoning a child where one has wilfully omitted to take charge of a child if one is under a legal duty to do so. In a further category of offences there is no express reference to any form of duty, however, it has been accepted that the *actus reus* of these offences may be performed by an omission. For example, one may be convicted of murder by deliberately refraining from providing medical assistance where there is a legal duty to do so. It is in this latter instance, where there is no express statutory reference to liability based on an omission, that Stuart suggests the legal duty must be found in some statutory source.

At present, there is no judgment supporting this view, although it does propose a reasonable solution to the identified intrusions on legality. In the absence of authority, the narrow, technical response to Stuart's polemic is that the principle of legality, framed as it is in section 8, is satisfied so long as the alleged offence is one which exists in statutory form. Where the criminal omission leads to a charge of murder, the prosecution proceeds under the provisions proscribing murder. The existence of a common law duty serves to identify one of a plethora of means by which the *actus reus* may be performed, just as there exists a thick penumbra of case law defining or refining the ambit of offences throughout the Criminal Code.

Apart from objections relating to legality, one may ask whether our criminal law should punish an omission of this nature. There presently exists a general section which bears a slight resemblance to the duty formulated in *Miller*. Section 199 of the Code states that "every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life".[39] A more narrow provision which adopts the notion that one is under a duty to act after having created a danger can be found in section 233(2). This provides that a person involved in a traffic accident may be liable if he leaves the scene of the accident without *inter alia* offering assistance to a person who has been injured.[40]

37. *Supra* n. 6 at 66-68.

38. Criminal Code, R.S.C. 1970, c. C-34, s. 69.

39. Discussed in *R.* v. *Can. Liquid Air Ltd.* (1972) 20 C.R.N.S. 208 (B.C.S.C.).

40. *See*, for example, *R.* v. *Roche* (1983) 145 D.L.R. (3d) 565 (S.C.C.).

The recognition of a duty to abate a dangerous state of affairs is entirely consistent with these offences, but it must be acknowledged that difficulties in definition are posed. For example, the triggering event for the formation of a duty is that a danger is *caused* by the accused, and presumably it must be ascertained whether a trifling link will suffice where there are several causes.[41] Of course, *Miller* contains causation problems of this nature. The accused may have caused the fire, but strictly speaking his causal participation was not the dropping of the cigarette, which was involuntary; that was not his act. It is his initial lighting of the cigarette which must be labelled a factual and legal cause before the duty to respond is activated.

The scope of the duty to respond must also be adumbrated. Here the House of Lords' judgment is instructive, for there it was patent that the duty was to take reasonable steps, objectively viewed. However, this suggests that crimes such as arson, to which this duty to abate may be relevant, stand in jeopardy of being transformed into offences of negligence where, for example, a fire is inadvertantly started. That would be at odds with the Criminal Code provisions concerning arson. These require wilful conduct[42] which, in this context, means intentional or reckless action.[43] Such a transformation would be lamentable and should be avoided by adherence to fundamental principles of subjective *mens rea* — those same principles which would obtain in an uncomplicated case of intentional arson. Remaining faithful to these notions of subjective fault would leave open to the accused the right to plead that he honestly believed he did not cause the harm, or that he did not foresee it, or that he honestly believed his actions of abatement were reasonable. Left without avail would be malefactors such as Miller, who do little, and care less.

VI. CONCLUSION

The principle that the *actus reus* and the *mens rea* of a crime must be present at the same time has had a troubled past. Part of the difficulty relates to the use of what some consider to be abstruse terminology. Almost a century ago, Stephen J. admonished the use of the Latin term '*mens rea* as being suggestive of a uniform meaning throughout the criminal law, which he considered to be not only likely to mislead but actually misleading.[44] Similar sentiments were expressed by Lord Diplock in *Sweet* v. *Parsley*.[45] Turning attention to '*actus reus*', Lord Diplock in *Miller* assailed the use of "bad Latin", preferring "to think and speak . . . about the conduct of the accused and his state of mind at the time of

41. *See*, for example, *R.* v. *Benge* (1865) 4 F. & F. 504, 176 E.R. 665.

42. *See* Criminal Code, R.S.C. 1970, c. C-34, ss. 389, 390.

43. *See* s. 386, which provides that: "Everyone who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of that event". This section applies to a charge under s. 389 or s. 390.

44. *R.* v. *Tolson* (1889) 23 Q.B.D. 168 at 185-187, quoted with approval in *R.* v. *King* (1962) 133 C.C.C. 1 at 3 (S.C.C.). *See also R.* v. *MacCannell*, *supra* n. 8 at 192.

45. [1970] A.C. 132 (H.L.) at 162-63.

that conduct."[46] Of course, Latin phraseology (even when wrongly declined) is generally employed only to provide a cognomen, not a definition. Admittedly some confusion is generated in relation to the concurrence rule unless a distinction is made between the complete description of the physical elements of a crime (frequently called the *actus reus*) as distinct from a smaller sub-set composed of the physical movements of the accused.[47] In the case of arson, the *actus reus* is not complete until property is damaged, though this may occur long after the accused has performed his part. But the concurrence principle must be satisfied at that earlier state; it would be absurd to conclude that the requisite state of mental awareness could be superimposed on a continuing *actus reus* consisting of a raging fire which is continually incinerating property. That is why the only rational way to found liability in *Miller* is to punish his subsequent *omissive* behaviour after having discovered the fire.

In summary, the mental element of a crime must exist simultaneously with the physical actions of the accused and this must transpire before the completion of the *actus reus*. In some instances (i) this requirement is ignored; (ii) an extended definition of the physical act is formulated; (iii) with result-crimes, the intentional acts may be treated as the legal cause of the prohibited result; or (iv) the failure to act may be viewed as sufficient physical participation in the crime. Only one approach need be satisfied to convict and in *Miller* it was the last which was utilized. This seems a legitimate manner in which to characterise the gravamen of Miller's conduct — it was his failure to respond to the impending or potential peril which was culpable.

46. *Supra* n. 1 at 542.

47. This was recognized in *Fagan*, *supra* n. 2 at 445, where James J. stated that a "distinction must be drawn between acts which are complete — though results may continue to flow — and those acts which are continuing".