Liability for inchoate crime in commonwealth law

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I. INTRODUCTION

Throughout the spectrum of inchoate crime spanning the concepts of attempt, conspiracy and solicitation or incitement, the most notorious and intractable problems have arisen in the area of attempts. A court in Zimbabwe, echoing the despondency characteristic of current academic writing, has made the comment: 'There is, perhaps, a no more unsatisfactory branch of our criminal law than the law relating to attempt, and there is not the slightest prospect that with the passage of time it will become less unsatisfactory.' Sporadic suggestions by Commonwealth courts that the complexity and incoherence of the common law should be rectified at least in part by legislative intervention, has been acted upon in England and New Zealand. The major currents of judicial authority in the Commonwealth, overlaid by statutory innovations in several jurisdictions, warrant a fresh appraisal of the conceptual framework of the law and the avenues of development for the future.

II. THE MENTAL ELEMENT

While blameworthy intention alone is insufficient to constitute a criminal attempt, a striking feature of the conception of a criminal attempt is that, unlike in most other contexts, the focus is on mens rea to which the actus reus is merely ancillary. In the setting of liability for the inchoate offence, a Canadian court has observed that 'The criminality of misconduct lies mainly in the intention of the accused'. The mental element has been identified consistently as 'fundamental' and 'of primary importance'.

6. R v Cline [1956] OR 539 at 549, per Laidlaw JA (CA of Ont); R v Keoh [1963] 1 CCC 230 (CA of Sask).
8. See the first case cited at n 6 supra.
10. See the first case cited at n 6, supra, of H. Wechsler, W. K. Jones and H. L. Kern 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute' (1961) 61 Columbia Law Review 571 at 573 where a view is expressed of attempt as 'essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose.'
In statutory formulations of the component elements of criminal attempt throughout the Commonwealth, intention to commit an offence represents the mens rea required.\textsuperscript{11} South African courts,\textsuperscript{12} stipulating "an overt act or acts directed towards the carrying out of the intention"\textsuperscript{13} have insisted on a "formulated intention"\textsuperscript{14} as the essential requirement. Some form of intention to bring about the effect which amounts to the complete offence has been required by the courts of Canada\textsuperscript{15} and New Zealand.\textsuperscript{16} Where there is difficulty in drawing an unequivocal inference regarding the requisite intent\textsuperscript{17} because of an unresolved doubt as to the firmness of purpose entertained by the accused,\textsuperscript{18} a conviction of attempt to commit a crime cannot be sustained.

The question whether the mens rea of an attempt is equivalent to that of the complete crime has given rise to acute controversy in the context of offences, the mental element of which does not necessarily call for intentional, in the sense of purposive, conduct. The mental constituent of criminal attempt requires investigation in the area of crimes which postulate, as the mens rea applicable, states of mind such as recklessness and negligence and offences which are classified as involving strict responsibility.

(a) States of mind not approximating to intention

The central problem is whether a person, who embarks on a course of conduct, envisaging an event as a probable consequence of his conduct and being indifferent whether the event is caused or not, although the occurrence of the event does not represent the purpose of his conduct, can be convicted of attempt if the event is not in fact brought about.

The principle embedded in the common law of England is that, even where the complete offence contains a mental element consisting of culpable inadvertence to circumstances or recklessness as to the occurrence of consequences, or where the complete offence entails strict responsibility, the mental component of liability for a criminal attempt necessarily involves direct intent. Thus, although intent to cause grievous bodily harm\textsuperscript{19} or the assumption of a risk of death or grievous bodily harm satisfies the mental element of murder,\textsuperscript{20} the established view in the English common law is that, to sustain a conviction for

\begin{itemize}
  \item \textsuperscript{11} Criminal Code Act of Queensland 1899, s 4; Criminal Code Amendment Act of Western Australia 1913, s 4; Criminal Code Act of Tasmania 1924, s 2(1); Criminal Code of Canada 1953-1954, s 24(1); Criminal Attempts Act of England and Wales 1961, s 1(1).
  \item \textsuperscript{12} South African law, based on Roman-Dutch antecedents, is included in the discussion because of its comparative interest.
  \item \textsuperscript{13} \textit{State v Garrett} (1882) ORC 18.
  \item \textsuperscript{14} \textit{State v du Plessis} (1981) 3 SA 382 at 398, \textit{per Corbett} JA (AD).
  \item \textsuperscript{15} \textit{R v Olhausen} (1970) 11 GRNS 394 at 396, \textit{per Clement} JA (SC, AD of Alberta).
  \item \textsuperscript{16} \textit{Police v Wylie} (1976) 2 NZLR 167 at 169, \textit{per Woodhouse} J (CA of NZ).
  \item \textsuperscript{17} \textit{R v Sorrell and Bandett} (1978) 41 CCC (2d) 9 at 16 (CA of Ont).
  \item \textsuperscript{18} \textit{R v Matte} (1973) 11 CCC (2d) 427 at 433, \textit{per Branca} JA (CA of BC).
  \item \textsuperscript{19} \textit{R v Cunningham} (1981) 2 All ER 883.
  \item \textsuperscript{20} \textit{Hyam v DPP} [1975] AC 55.
\end{itemize}
attempted murder, intent to kill is indispensable. The concept of an 'intended consequence' or of 'purposeful conduct' is integral to the foundations of liability for the inchoate offence in English law. Indeed, the suggestion that degrees of culpability falling short of direct intent may suffice for liability for attempt has been discarded as 'astounding'.

However, a significantly different point of departure has been adopted in other Commonwealth jurisdictions. In Canada, where 'intent to commit an offence' is an ingredient of liability for an attempt, the prevailing view is that conviction for attempted murder does not necessarily require intent to murder but is adequately supported by intent to commit an act which falls within the scope of the definition of murder. The Supreme Court of Canada has held that an accused person who intends to cause bodily harm knowing that death would in all probability result and is reckless whether death is caused or not, is guilty of attempted murder. The approach, that intention to cause bodily harm which the accused knew was likely to cause death and was indifferent as to the ensuing of that consequence supports a conviction for attempted murder, typifies the dominant judicial trend in Canada. On the other hand, the view that attempt is essentially a crime of purpose, which finds expression in the rule that attempt is inapplicable to murder in its unintentional forms, is entrenched in the law of New Zealand and Victoria, while the matter is unresolved in Queensland.

Clearly, the word 'attempt' in ordinary parlance contains a purposive connotation. But this should not preclude a wider scope for the inchoate offence if cogent policy factors warrant the extension. The decided cases as well as contemporary academic writing underscore the inadequacy, within the framework of the law of attempt, of a mental requisite founded exclusively on direct intent. Although reference to 'malicious intent' is a feature of early formulations of the basis of liability for criminal attempt in English law, a leading English writer concedes that a conviction for attempting to commit an intentional violation of a law prohibiting negligence is possible. The Court of

23. D. Stuart op cit n 1 supra.
25. See n 11, supra.
28. See, however, for the contrary view, R v Menard (1960) 130 CCC 242 (CA of Quebec); Toussignant v R (1960) 130 CCC 285 (CA of Quebec).
33. R v Segal (1784) Cald 397.
34. G. L. Williams op cit 29, supra, p 619.
Liability for inchoate crime

Appeal of Ontario has recognised explicitly that "The trend in modern criminal law is towards the expansion of the concept of mens rea to include recklessness as well as intention".  

This approach is reflected consistently in the case law of Nova Scotia, 36 Manitoba 37 and Quebec. 38 In circumstances where liability for the complete offence can be established on the footing of a mental element not approximating to direct intent, it is evident that insistence on full mens rea as a precondition of liability for attempt brings about the anomalous result that the degree of blameworthiness typifying responsibility for the inchoate offence is greater than that required for conviction of the complete crime. This result is plainly at variance with the acknowledged policy of the law that the complete offence calls for more drastic suppression than a preliminary movement towards commission of the offence. The courts of Canada have been decisively influenced by this consideration in departing from the attitude of the English common law which confines the mens rea of attempt within a strikingly narrow compass.

The preponderant view in Canada bears comparison with the predilections of South African courts. The effect of South African law is that the mental requisite envisaged for an attempt is indistinguishable from that postulated for the complete crime. 40 The Appellate Division of South Africa, pointing out that in order to support a conviction for attempted murder there need not be a purpose to kill proved as an actual fact, 41 has regarded as sufficient 'an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death.' 42 The broader dimensions of the mental constituent of criminal attempts in South African law, as compared with English law, are indicated by the acceptance of 'legal intention' and 'actual intention' as alternative bases of liability for the incipient offence. 43 In view of the similar antecedents of the two systems, the law of Scotland 44 presents a close parallel with that of South Africa. 45

The strict principle infusing the English common law is sustained by a rationale connected with minimal infringement of individual freedoms. A cardinal element in the texture of the common law derives from the vitality of concepts like voluntariness and mens rea as a counterpoise to utilitarian objectives of penal sanctions. 46

57. R v Ross [1976] 25 CCC (2d) 545 at 549, per Hall JA (CA of Man).
59. R v Ritchie, n 35, supra, at 423, per Schroeder JA (CA of Ont).
60. R v Hlatshwayo [1933] TPD 441 at 444; State v Kazi 1963 (4) SA 742 at 749 (W); State v Tshange 1964 (4) SA 327 at 331 (C).
61. R v Huddisch 1953 (2) SA 561 at 567, per Schreiner JA (AD).
62. Ibid; cf R v Botha 1959 (1) SA 547 at 551–552 (O); R v Peterlongo; 1959 (2) SA 125 at 128–129 (FC).
identification of a specific intent to effect the particular criminal consequence as the essential mental component of liability for a criminal attempt, tentatively countenanced by a strand of recent South African judicial opinion, has been supported on the ground that 'one cannot blunder into attempt'. In accordance with this view the premise, which underlines the analysis of the mens rea of criminal attempts in terms of object or purpose, that there must have been at the time of interruption an intention to commit the completed crime, has been thought to involve crucial safeguards for the liberty of the individual.

Nevertheless, the adoption of this principle as an inflexible postulate of the law has generated persistent misgivings in the Commonwealth. A powerful source of dissatisfaction with the central assumption of the English common law is the difficulty of distinguishing convincingly between direct intention and qualified or legal intention, subsuming recklessness, from the standpoint of the social relevance and validity of punishment, so as to impose sanctions in the former case but not in the latter. It has been persuasively asserted that 'No calculation of the efficacy of deterrence or reforming measures, and nothing that would ordinarily be called retribution, seems to justify this distinction'.

(b) Conceptual refinements

Awareness of the indefensibly restricted ambit of actual intention as the invariable mental constituent of a criminal attempt has prompted fresh approaches to the problem. A suggestion which has gained currency is that, while purpose to bring about the consequence which constitutes the actus reus is necessary, recklessness as to circumstances surrounding the consequence supplies adequate mens rea in respect of a criminal attempt. This approach entails the refinement of a contrast between the central feature of the actus reus and the elements relevant to the concomitant circumstances, coupled with the pragmatically crucial difference that direct intention is a requisite in the former area but not in the latter.

The straightforward dichotomy between consequences and circumstances, which this suggestion presupposes, is modified by the more intricate approach that intention is essential in relation to the penalised consequences and the circumstances pivotal to their occurrence, but that the mental element with regard to ancillary circumstances need merely reflect the mental element required for the

47. State v Ntshali 1981 (4) SA 477 at 482, per Kumbleben J (NPD).
50. State v du Plessis 1981 (3) SA 382 at 398, per Corbett JA (AD).
52. R. M. Perkins op cit n 24, supra, p 498.
53. See n 43, supra.
54. H. L. A. Hart op cit n 45, supra, p 127.
55. C. Howard op cit n 2, supra, pp 290–291.
complete crime. The latter hypothesis is not predicated on the requirement of intention sità-dieis consequences, in direct contrast with the admission of recklessness, negligence or even strict liability (in circumstances where these elements suffice for conviction of the complete offence) in respect of circumstances pertinent to the commission of the actus reus, but relies on a further distinction between types of circumstances, dependent on the degree of their bearing on the central element of the actus reus. This involves a less radical departure from the foundations of the common law because of the implication that the essentiality of intention is not limited to consequences but extends to part of the spectrum of circumstances.

Gradations and nuances in relation to circumstances may form the basis of a conceptual device of value, but it is difficult to support the proposed distinction between present and future circumstances. An Australian writer purports to distinguish in principle between a case where the accused inflicts serious injuries with intent to cause grievous bodily harm, accompanied by foresight that death is probable, and a case where the accused who has mislaid his umbrella appropriates one which is identical with his own but which he knows may well belong to someone else. His view that a charge of attempted murder is not maintainable in the former situation, although a charge of attempted theft may well be successful in the latter, rests on the ground that 'The accused's perception of the possibility of causing death relates to a future fact, whereas the identity of the umbrella is a present fact'. The tenuous and insubstantial character of this distinction is demonstrated by the exception which this writer is constrained to admit in regard to 'future facts where the foreseen occurrence is on a reasonable view so likely as to be accounted certain'.

While there are, naturally, differences of emphasis and degree within this variety of approaches, they contain in common the feature that, in regard to elements which are not integral to rudimentary aspects of the actus reus, direct intent is not necessarily required. Expansion of the mens rea of criminal attempts in these peripheral respects subserves a beneficial object of policy, in that it enables the policy governing the substantive crime, with regard to incidental attributes of the actus reus, to be given expression in relation to an attempt to commit that crime.

(c) Competing approaches assessed

The desirability of this degree of coalescence between the policy rationale applicable to the completed crime and that appropriate to the

57. C. Howard op cit n 2, supra, p 292.
60. Ibid.
inchoate offence represents the substance of the criticism directed against traditional common law doctrine. An American writer, highlighting the need for this affinity as part of a cohesive policy framework of the law, comments that ‘If mens rea is not material in the completed offence, it is presumably not material in the relevant criminal attempt’. The effect of this formulation is substantially similar to the conception of liability for criminal attempts incorporated in the Asian codified systems modelled on the Penal Code of India. The definition of an attempt embedded in a proposed amendment of Indian law spells out in express terms, as the mens rea of an attempt, the intention or knowledge required for the consummated offence. The statutory definition of murder applicable in India and reproduced verbatim in the criminal codes in force in Singapore, Malaysia and Sri Lanka envelops, as an alternative to the intention to kill, anticipation of a high degree of probability that death would ensue, and there is no doubt in the South Asian jurisdictions that harm inflicted with intention to cause grievous hurt but with contemplation of the requisite degree of likelihood that death might result, would amply support a conviction for attempted murder. Consequently, the codified South Asian systems are fundamentally incompatible in this respect with the common law of England but bear some resemblance to contemporary Canadian law.

The American Model Penal Code requires, as an ingredient of liability for a criminal attempt, ‘the kind of culpability’ postulated in respect of the complete offence. This approach, like that permeating the Asian systems, is founded on equivalence of the mens rea of the incipient and consummated offences and has met with a hostile academic response in England and in Australia. The point is, strictly, res integra in Australia; English judicial authority, too, is exceedingly meagre but veers towards the conclusion that an attempt to commit an offence of strict liability does not, per se, warrant classification as involving strict liability.

Despite the emphatic rejection of an extended purview of the mental constituent of liability for criminal attempts in England and New Zealand, and the tentative disapproval of this development expressed in Australia, the wider approach is reinforced by compelling

63. Indian Penal Code (Amendment) Bill 1972, s 120C.
64. Indian Penal Code 1860, s 300.
65. Straits Settlements Penal Code 1871, s 300.
66. Ibid.
68. See the Indian Penal Code, s 307, which specifically refers to intention or knowledge in the context of the offence of attempted murder; cf the Penal Code of Sri Lanka, s 300.
69. American Model Penal Code 1960, s 5 01(1).
70. G. L. Williams op cit n 29, supra, p 619-620.
71. C. Howard, op cit n 2, supra, p 290.
72. Ibid.
74. Sec n 21, supra.
75. See n 30, supra.
76. See n 71, supra.
considerations of policy. Notwithstanding the widespread modern assessment of the doctrine of strict liability as theoretically unsound and empirically of doubtful value,\textsuperscript{77} there is cogency in the assertion that 'If crimes of negligence and strict liability are necessary and valid instruments of policy, then there is no reason for not applying this same policy in the case of attempts',\textsuperscript{78} for an entirely fortuitous event may account for the difference between failure and accomplishement of a consequence prohibited by a law embodying a standard of criminal negligence or enjoining strict responsibility.

The established view in English law appears to be that a crime of negligence can be attempted only in circumstances where an intentional contravention of a law penalising negligence is demonstrable, while a crime involving strict liability would seem to be incapable of being attempted at all.\textsuperscript{79} However, the basis of this view may be assailed persuasively. If a pharmacist to whom gross negligence is imputable in preparing a prescription may properly be convicted of involuntary manslaughter in the event of the patient's death, there is a logical inconsistency in declining to countenance a verdict of attempted manslaughter where the patient's death is averted by fortuitous circumstances. The 'misplaced fear of liability based on negligence'\textsuperscript{80} which has tacitly moulded basic assumptions of the common law, has been discarded by the framers of the South Asian codes. Similarly, the argument that strict liability should not be applied to criminal attempts because there is 'no justification for extending a doctrine that has dubious justification in the first place'\textsuperscript{81} is implausible in view of vigorous judicial initiative in most Commonwealth jurisdictions in extending the frontiers of strict liability in penumbral areas of modern regulatory law.

(d) Constructive doctrines in the setting of homicide

The balance of authority in the English common law looks askance at the application of principles regulating liability for attempts in the context of unintentional forms of homicide.\textsuperscript{82} South African law, by contrast, has encountered no difficulty in convicting of attempted culpable homicide an accused whose negligence is of such an order that he would have been held guilty of culpable homicide, had the victim’s death been caused.\textsuperscript{83} This represents the antithesis of the attitude that 'In those offences which can be committed in the absence of any intent (in the sense of


\textsuperscript{78} J. C. Smith 'Two Problems in Criminal Attempts Re-Examined' n 56, supra.

\textsuperscript{79} G. L. Williams op cit n 29, supra, at 620.

\textsuperscript{80} D. Stuart op cit n 51, supra, p 662.

\textsuperscript{81} A. W. Mewett and M. Manning Canadian Criminal Law (1978) p 145.

\textsuperscript{82} See n 29, supra.

\textsuperscript{83} State v Garrett [1882] ORC 18; cf, for the law of Scotland, G. H. Gordon The Criminal Law of Scotland (1967) p 234.
purposeful conduct) at all, it does not seem possible to convict a person for an attempt to commit that offence. The point of departure typifying South African law recognises the anomaly attendant on failure to impose deterrent penal sanctions on aggravated forms of negligent conduct, potentially fatal to the victim who, by chance, is left permanently crippled instead of being killed. The significantly reduced aversion to constructive theories of penal responsibility in areas where the interest of the community is seen to be particularly vulnerable, has weakened to some extent the base of orthodox common law doctrine.

(e) Statutory innovations

While the focus on intent in a sense connoting desire and purpose as the irreducible mens rea of criminal attempts has provoked a sustained conflict of opinion, writers who express disenchantment with the common law concede that its structural framework precludes expansion of the scope of the mental element. An attempt to commit an indictable offence, whether deriving from common law or constituted by statute, is itself a misdemeanour at common law. Accordingly, in England until 1981, unlike in Canada and in the Australian and South Asian code jurisdictions, where attempt has the complexion of a statutory offence, liability for a criminal attempt was determined entirely by principles of the common law. Since these principles generally identified intention as the requisite mens rea and acquiesced in no extension other than the recognition of recklessness in some contexts as an alternative to intention, it was clear that statutory offences predicated on negligence and strict liability could involve no parallel distension of the purview of liability for attempts. Attempt, like abetment, continued necessarily to be circumscribed by common law requirements which remained substantially unaffected by statutory innovations regulating the completed crime.

(f) Law reform

The enactment of the Criminal Attempts Act 1981, in England and Wales, is important because of the opportunity it provided to repudiate this fetter and to evaluate conflicting approaches and proposals for reform in the light of contemporary social policy. A clear break with the common law is signified by the provision in the statute that 'The offence of attempt at common law is hereby abolished for all purposes not relating to acts done before the commencement of this Act.' A few

84. A. W. Mewett and M. Manning op cit n 81, supra, p 143.
85. R v Kadungaro 1980 (2) SA 581 at 582, per Beadle AJ.
87. R v Roderick (1837) 7 C & P 795.
88. See n 11, supra.
89. Ibid.
90. See n 64–67, supra.
91. Johnson v Yardie [1950] 1 KB 544; Ackroyds Air Travel Ltd v DPP [1950] 1 All ER 933.
92. Section 6 (1).
years before the enactment of the statute the House of Lords entertained doubts about the limited range of the mental element envisaged by the common law and suggested that 'intention', for purposes of the criminal law, should encompass not only the decision to bring about a result but the means adopted towards this end and the inseparable consequences of the end as well as the means. 93

This reasoning, which aims at enlarging the ambit of intention by expunging the causal factor linked with desire or purpose as an intrinsic attribute of intention, is impliedly adopted by the Working Paper on Inchoate Offences published in 1973 by the Law Commission of England. 94 One of the major proposals embodied in this Working Paper was that the mens rea of an attempt to commit a substantive offence should be supplied by the intention to bring about any circumstances specified in the definition of the offence, 95 combined with either knowledge of any circumstances referred to in the definition or recklessness as to the existence of these circumstances. 96

It is to be regretted that, in its final Report, 97 published in 1980, the Law Commission jettisoned this proposal which would have brought English law substantially in line with the effect of decided cases in Canada, 98 and fell back on the concept of intention evolved by the common law. An authoritative exposition of the common law requires, as the mental element of attempt, 'proof of specific intent, a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which, it is alleged, the accused attempted to commit'. 99 The fuller phraseology adverting to 'intent to bring about each of the constituent elements of the offence attempted' 100 is abbreviated in the statutory requirement of 'intend to commit the relevant offence' 101 which accords legislative force to the final recommendations of the Law Commission. The requirement of an 'actual intent to commit the offence attempted' 102 is defended by the Law Commission on the footing of (a) the simplicity and universality of operation of the selected criterion, 103 and (b) the lack of adequate justification to bring within the parameters of criminality the behaviour of an accused person who neither intends to do, nor succeeds in accomplishing, the proscribed act. 104

A recent assessment of the Law Commission's recommendations

95. Para 89.
96. Ibid.
97. Law Com No 102, Criminal Law: Attempts, and Impossibility in Relation to Attempts, Consipring and Incitement.
98. See the cases cited at nn 25 and 26, supra.
104. Op cit, para 2.16.
involves a positive appraisal of its conclusions in regard to the mental element. However, contrary to the suggestion that these proposals are 'clear and satisfactory', it is submitted that the Law Commission has let slip the opportunity to forge a more realistic and coherent body of legal principle. Where modern social conditions have required relegation of pristine common law principle and the constitution of regulatory and other offences of negligence or strict liability, the underlying policy factors are directly relevant to attempts to commit these offences. In terms of principle, then, equiparation of the mental element of the inchoate and consummated offences has much to commend it. This bold approach is a characteristic of the formulations adopted in the American Model Penal Code and in the criminal law of India. The Law Commission's thinking, reflected in their Working Paper, although contemplating a qualified departure from the premises of the common law, resisted so radical a transformation of the law. But the proposals contained in the Working Paper did at least enable the accommodation of recklessness as a sufficient basis of liability for criminal attempts in restricted areas and so made possible the comparable treatment of states of mind which are not distinguishable from the point of view of moral culpability or the incidence of a social hazard inherent in the accused's conduct. Even this limited improvement is excluded by the retention of the common law principle, with no material modification, in the Law Commission's final Report which, unfortunately, is likely to have the oblique result of discouraging in the foreseeable future the intermittent efforts which had previously been made to ameliorate the law within the constraints imposed by the common law tradition.

The position regarding liability for an attempt in circumstances where the accused had foresight of a particular consequence as virtually certain or at least as highly probable, admits of some degree of doubt. The adequacy of foresight of probability or certainty of the result effected has given rise to a lively conflict of opinion among English writers. Although the final Report of the Law Commission refrained from incorporating a special definition of intention in relation to criminal attempts, a leading English authority in his evidence to the Special Standing Committee proposed an amendment which explicitly provided that a person intends to commit an offence where he intends, knows, believes, hopes or has no substantial doubt that a given result will occur or that a given fact is or will be present or absent, as the case may be. This bears comparison with the recommendation by the

106. At p 771.
107. See n 69, supra.
108. See n 68, supra.
109. See n 94, supra.
Liability for inchoate crime

Law Commission itself, in a Report which specifically addressed the mental element in crime, that intention should subsume the state of mind of an accused who had no substantial doubt that a certain consequence would result from his conduct. The deletion of equivalent provision from the Criminal Attempts Act 1981 makes the law equivocal. But ex-facto the definition of criminal attempts which is now applicable in England, it is practicable to include anticipation of certainty or virtual certainty, if not great likelihood, within the sphere of intention; for an accused who resorts to a course of conduct with clear foresight of the virtual inevitability of a result can quite properly be said to have resolved deliberately to produce that result. Failure to effect this extension, favoured by ethical and social considerations alike, represents a reproach to the law.

A final point relevant to the mens rea of criminal attempts concerns advertere to circumstances which constitute elements of the definition of the offence. The Criminal Attempts Act makes no express reference to the matter, but the Report of the Law Commission suggests that intent to commit a given offence requires proof of 'knowledge of the factual circumstances expressly or implicitly required by the definition of the substantive offence'. This is illustrated by the ruling of a South African court that a motorist who did not know and had no reason to believe either that the driver of an approaching vehicle was exceeding the speed limit or that the latter intended to do so, could not be convicted of an attempt to defeat the ends of justice if he warned the driver of a speed trap. Allusion to relevant circumstances is inseparable from the requisite mens rea, but salient objectives of the law are vitiates by the construction of knowledge, in this context, as coeval with confirmed or verified belief. Policy requires that knowledge should be regarded as established by proof of 'unjustifiable disregard of a perceived possibility'. In keeping with this view the courts of South Africa have been content with proof of constructive knowledge, on the part of a person accused of attempting an offence, of all the essential or material facts which constitute the offence. The standard of knowledge in this branch of criminal law should include, in principle, reasonable inference and reprehensible abstention from inquiry.

III. THE ACTUS REUS OF ATTEMPTS

A beleaguered area of the law governing criminal attempts relates to demarcation of the point at which the accused's conduct is considered to have progressed sufficiently to satisfy the actus reus of an attempt. The foundations of liability for an inchoate crime envisage the imposition of sanctions in certain cases where a crime has been contemplated but not

113. See the Report of the Law Commission, n 97, supra, para 2.15.
114. State v Perera 1978 (3) SA 523 (TJD); but see State v Naidoo 1977 (2) SA 123 (NPD).
115. C. Howard op cit n 2, supra, p 289.
in fact committed, but the policy of the law upholds the principle of not seeking to penalise the mere intention to commit a crime. The common law which recognised liability for an attempt to conspire to commit a substantive offence\(^{117}\) was changed by statute in England\(^{118}\) in consequence of a recommendation by the Law Commission\(^{119}\) which was founded on the premise that the imputation of liability in these circumstances amounts to punishing a guilty intention alone. Of the inchoate offences, attempt has the advantage of permitting the earliest intervention to prevent the commission of a crime,\(^{120}\) but English\(^{121}\) and Commonwealth\(^{122}\) courts have been consistently astute to resist erosion of the principle cogitationis post nomen potitur. On the other hand, too narrow a delineation of the ambit of criminal attempt detracts from the value of the concept by reducing to negligible proportions the middle ground between the consummated offence and an attempt cognisable by the criminal law. The resolution of this dilemma is the object of a multiplicity of theoretical approaches, chief of which are the proximity and unequivocality doctrines developed in the decided cases and in current academic writing.

Pivotal to the policy objectives shaping the law is the distinction between attempt and preparation. A Canadian court has formulated the distinction as involving ‘acts done with intent to commit the offence which are merely preparatory in character and those done with intent to commit the offence which are so connected with the offence to be committed as to constitute an attempt to commit that offence’.\(^{123}\) The frontier between ‘the preparation antecedent to an offence and the actual attempt’\(^{124}\) is integral to the structure of the law.

(a) The criterion of proximity

(1) An overview of judicial and legislative trends

Proximity of the delinquent conduct with the consequence identifiable as the actus reus is the dominant test applicable to criminal attempts:

‘Acts remotely leading to the commission of an offence are not to be considered as attempts to commit it, but acts immediately connected with it are’.\(^{125}\) The criterion of proximity requires that the accused’s acts should constitute in law ‘a beginning of the execution or of the

117. R v de Kromme (1892) 17 Cox CC 492 at 494; cf, for Canadian law, R v Kaniszyn (1949) 95 CCC 261 (Quebec Ct of KB). See also G. L. Williams Textbook of Criminal Law (1978) p 351.
118. Criminal Attempts Act 1881, s 5(7).
119. See the Working Paper of the Law Commission, n 94, supra, para 44.
120. Ibid.
122. R v Dangay (1979) 51 CCC (2d) 86 at 86, per Dublin JA (CA of Ont).
123. Kelley v Hart (1934) 61 CCC 364 at 370, per McGillivray JA (SC, AD of Alberta).
124. R v Cheeseman (1862) 9 Cox CC 100 at 145, per Blackburn J.
125. R v Engleton (1855) 169 ER 826 at 835, per Parke B; cf R v Cope (1921) 16 Cr App R 77 at 83; R v Words (1930) 22 Cr App R 41 at 45; R v Blasham (1943) 29 Cr App R 37 at 39; R v Muskel (1953) 37 Cr App R 214.
commission of the contemplated offence. Versions of the proximity rule are incorporated in the statutory requisites of liability for criminal attempts in New Zealand\(^{127}\) and Nigeria\(^{128}\) and in a proposal by the Law Commission of India.\(^{129}\)

Several distinct formulations of the proximity rule, applied to criminal attempts, straddle Commonwealth law.

At one end of the spectrum of suggested approaches is the view that, once the guilty intent is entertained, any act which amounts to 'a step towards the commission of the specific crime'\(^{130}\) suffices to establish the actus reus of attempt. This assumption underlies the comment by a Canadian court that, to attract liability for a criminal attempt, 'one must intend to commit the completed offence and have done some act towards its accomplishment'.\(^{131}\) A comparable approach is reflected in a strand of Australian\(^{132}\) and South African\(^{133}\) authority. However, it is apparent from the standpoint of policy that the 'first stage theory', postulating merely some initiative by the accused in moving towards the perpetration of the intended crime, expands unacceptably the dimensions of liability for criminal attempts. The intrinsic significance and causal effectiveness of the accused's act require assessment in relation to the objective towards which his behaviour was directed. The need for a qualifying element is underscored by the requirement of 'a real and practical step',\(^{134}\) suggested by the Court of Appeal of New Zealand. The limiting factor, it is submitted, is not usefully expressed by the variant on the 'first stage theory', signified by the 'wrongful act' premise\(^{135}\) which posits that the act committed by the accused in contemplation of the intended crime should itself constitute an offence. The criminal quality of the incipient act cannot, in principle, supply a reliable index to its proximity to the offence attempted.

The other extreme is represented by the view that liability for an attempt is warranted only in circumstances where the accused had committed the last act which he had to perform to bring about the desired consequence.\(^{136}\) While the commission of the last act generally\(^{137}\) suffices for the imposition of liability for an

\(^{126}\) R v Young (1949) 94 CCC 117 at 126, per Fontaine J Sess (Montreal Ct of Sess of the Peace).

\(^{127}\) Crimes Act 1961, s 72(3).

\(^{128}\) Penal Code 1959, s 4; cf R v Ilaya Ogomogu (1944) 10 WACA 220.

\(^{129}\) Indian Penal Code (Amendment) Bill 1972, s 120 C(b).

\(^{130}\) R v Williams, ex p The Minister for Justice and A-D [1965] Qd R 86 at 99, per Stave J (CCA of Qld).

\(^{131}\) R v Olbauer (1970) 11 CRNS 334 at 336, per Clement JA (SC, AD of Alberta).

\(^{132}\) See the case cited at n 130, supra.


\(^{134}\) Potia v Wylie [1976] 2 NZLR 157 at 170, per Woodhouse J (CA of NZ).


\(^{136}\) R v Ransford (1874) 13 Cox CC 9; R v Vrenas [1881] 1 QB 360; R v White [1910] 2 KB 154.

\(^{137}\) See, however, DDP v Stanehouse [1977] 2 All ER 909 at 933, per Lord Edmund Davies; of the 'possible intervention' theory according to which a locus ponentiae is available to the accused even after commission of the last act.
attempt, a formulation of principle requiring the performance of the last act, although tentatively supported by Indian authority, is inconsistent with the consensus of judicial opinion in the Commonwealth. The unsuitability of the theory in contexts involving a series of deliberate acts, such as systematic poisoning, detracts from its practical value. Despite the frequent invocation of the theory in circumstances where no further act remains to be performed by the accused, it is hardly surprising that the criterion based on commission of the last act has been rejected specifically in the Australian code jurisdictions of Queensland and Western Australia and in the South African case law. The accused, to be guilty of attempt, must have proceeded a sufficient distance along the intended path, but the prosecution is not bound to establish that ‘all that the defendant could do to complete the offence, he did’. The prevailing view in Commonwealth law is that ‘to constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient, and the final step is not necessarily required’. In keeping with this premise the perpetration theory, the broad contours of which have gained acceptance, delineates the commencement of liability for an inchoate offence by reference to the frontier between acts of preparation and acts of execution. In Canada a distinction has been drawn between merely preparatory acts and acts which, besides manifesting intent, are ‘inseparably connected with the commission of the crime’. The requirement is that an act sustaining liability for a criminal attempt must be a ‘preliminary and necessary step towards the commission of the crime’. Preparation has been conceived of as involving the devising or setting up of the means necessary to commit an offence, while attempt connotes some direct action towards its commission after the preparations are complete. This basic dichotomy finds expression in the statute law of New Zealand which requires that an act held to amount to an attempt should be ‘immediately or proximately connected with the intended

138. R v Kennedy (1973) 11 CCC (2d) 263 (CA of Ont); R v Richards (1974) 2 CCC (2d) 568 (County Ct, Jud Dist of Halton, Ont); R v Whalen (1977) 34 CCC (2d) 557 (Prov Ct of BC).
140. Re Munstintham Reddy AIR 1955 Andhra 118 at 122.
141. Maus v Philippus v Donohoe (1915) 20 CLR 580 (HCA); but see Berwin v Donohoe (1913) 21 CLR 1 (HCA).
143. Criminal Code Amendment Act of Western Australia 1913, s 4.
144. R v Nihove 1921 AD 485 at 501; R v Van Zyl 1942 TPD 291; R v B 1958 (1) SA 199 at 203 (AD).
146. R v Barker [1924] NZLR 865 at 874, per Salmond J (CA of NZ).
148. R v Duffy (1931) 57 CCC 185 at 188, per Giosholm CJ (SC of Nov Sc).
150. Ibid.
Liability for inchoate crime

A similar approach is typified by the comment of a South African court that 'When a question of preparation versus attempt arises, one has to ask oneself whether the accused had already commenced the consummation of the act constituting the offence or had only taken steps leading up to the stage of commencing to carry it out.'

The essential feature of the test predicated on 'commencement of consummation' is that the accused should be shown not merely to have committed an overt act or acts directed towards the accomplishment of his intention but to have 'embarked upon a series of acts which had progressed beyond the preparatory stage and which, if not interrupted, would have led to the commission of the crime'.

This point of departure is broadly in line with French and Dutch law. An element of value in the reasoning contained in modern South African judgments is the persevering effort to ensure that the dividing line between preparation and execution is not drawn in an arbitrary manner. The commitment of South African judges to diminishing the role of coincidental circumstances is reflected in their assertion that demarcation of the boundary between preparation and attempt should not depend entirely on the time at which an event occurs, and that 'The court should lean towards giving a wide interpretation to the phrase 'commencement of the consummation' by including in such consummation all the last series of acts which would constitute a continuous operation.'

Considerations of time and place call for assessment in the light of other factors such as the probabilities inherent in a particular factual situation and the extent to which control over events is retained effectively by the accused. The significantly expanded criterion of proximity characteristic of South African law is exemplified by the observation of the Appellate Division: 'Provided that his acts have reached the stage wherefrom it can be inferred that his mind was made up to carry out his evil purpose, (the accused) deserves to be punished, because from a moral point of view the possibility of harm in them are the same, whether such interruption takes place soon thereafter or later.'

Disillusionment with the doctrine of proximity, as a practical test determining the limits of criminal attempts, is attributable largely to

151. Crimes Act 1961 (NZ), s 72(3).
152. R v B 1938 (1) SA 199 at 220, per Schreiner JA (AD) approved in State v du Plessis 1981 (3) SA 382 at 396, per Corbett JA (AD).
153. R v Sharpe 1903 TS 868, following Commonwealth v Hicks (1889) 19 Am St Rep 892.
154. See the second case cited at n 132, supra. For the distinction between preparation and attempt, as applied in South Africa and in Zimbabwe, see further State v Francis 1981 (1) SA 230 (AD of Zimbabwe); State v Molela 1982 (1) SA 844 (AD of SA).
156. Dutch Criminal Code, art 45.
157. R v Schuimbie 1945 AD 541 at 547, per Watermeyer CJ; cf State v Agmat 1965 (2) SA 874 (C).
158. R v Nkoro 1921 AD 485 at 501.
159. R v Hlatwayi 1933 TPD 441 at 445.
160. See the first case cited at n 157, supra.
the strictness with which the test has typically been applied in the Commonwealth. In sharp contrast with a strand of early authority favouring an extended conception of liability for criminal attempts, subsequent English and Commonwealth precedents have often appeared indefensible from the standpoint of policy. Thus, a jeweller who, having insured his stock against theft, concealed some of it in his premises, tied himself up and called for help was held by an English court not to have progressed beyond the preparatory stage and it would seem that, in similar circumstances, even communication by the accused with his insurers, inquiring about the feasibility of a claim, does not suffice to make him liable for an attempt. It has been held in England that an accused who trailed a lorry for more than a hundred miles awaiting an opportunity to steal it, had committed only an act of preparation. The effect of other English decisions is that tapping a person’s pocket to ascertain what it contains is not attempted theft and that breaking a window in order to commit larceny is not attempted larceny. In Queensland and Victoria, respectively, the view has been expressed that splashing the floor and walls of a house with petrol and drawing a loaded revolver from one’s pocket do not warrant imposition of liability for an attempt. In line with the attitude adopted in these decisions it has been held in Papua-New Guinea that an accused who was carrying a loaded shotgun and was disarmed by the police in the vicinity of the home of an intended victim was still engaged in acts of preparation. A more realistic view, it is refreshing to note, emerges from some Canadian authorities. The excessive stringency of the test of proximity shaped by the common law has manifestly reduced its practical value.

A compelling criticism of the degree of strictness pervading the application of the proximity rule in the common law is that it results in a dilemma for law enforcement officers who are confronted with an invidious choice between intervention at a stage when the acts of the accused are likely to be considered not to approximate to an attempt, and passive resignation in the face of an ostensible criminal design.

This unsatisfactory condition of the case law has led to the suggestion that more lavish recourse should be had to the principle of the common law that an act which does not constitute a criminal attempt may yet be an indictable act of preparation.\(^{175}\) Despite the availability of reliable antecedents,\(^ {176}\) this proposal which has the effect of obliterating the distinction between preparation and attempt has had little impact on the development of the common law. Consequently, other avenues for rationalising and improving the law have had to be found.

An innovation of considerable importance directed towards this objective is the ‘substantial step’ approach, the conceptual framework of which is foreshadowed by the provisions of the American Model Penal Code\(^ {177}\) and the Australian Territories Draft Code.\(^ {178}\) The Law Commission of England, in an exploratory paper,\(^ {179}\) adopted the ‘substantial step’ criterion as a means of widening the scope of liability far beyond the confines envisaged by the decided cases. The essence of this approach is that the distance which the accused had travelled towards the attainment of his aim leaves no room for doubt as to the constancy\(^ {180}\) or firmness\(^ {181}\) of purpose which he had entertained in his criminal enterprise. Allusion to the question whether the accused was ‘on the job’\(^ {182}\) furnishes an approximately comparable test.

However, the English Law Commission subsequently entertained reservations about the wide sweep of the proposed test and, indeed, was inclined to doubt the utility of a definitive formula. The legislation currently in force in England and Wales simply identifies as the \textit{actus reus} of an attempt ‘an act which is more than merely preparatory to the commission of (an) offence’.\(^ {183}\) The assessment by the English law reform agency that ‘The proximity test was not working well’\(^ {184}\) accounts for the abrogation of the common law offence of attempt in England and its replacement by a statutory offence. Notwithstanding the suggestion that no fundamental transformation of the common law was intended,\(^ {185}\) it is evident that the courts are no longer fettered by unacceptably narrow formulations of principle embedded in the precedents of the past. But ‘the relatively simple definition based on the proximity approach’,\(^ {186}\) favoured by the Law Commission, lacks specificity in so far as it is content to spell out the inadequacy of a preparatory act.

The statutory formulation articulating the basic premise of the law

176. See, however, \textit{Gardner v Alder} [1952] 2 QB 743 at 751 where the statutory offence of preparation was criticised as ‘vague and unsatisfactory’.
177. American Model Penal Code 1960, s 5.01.
178. Section 53.
179. See n 94, supra.
180. G. L. Williams \textit{op cit n} 29, supra, pp 631 ad fin.
181. \textit{Ibid}.
182. \textit{R v Osborne} (1920) 84 JP 63.
184. Law Com No 102, para 2.39.
186. Law Com No 102, para 2.45.
that 'something more than mere preparation or planning is essential',\(^{187}\) is strongly reminiscent of pronouncements by English judges excluding 'merely preparatory'\(^{188}\) acts from the ambit of criminal attempts. However, the statutory phraseology, representing to that extent continuity with the common law subject to accommodation of a markedly increased degree of flexibility, is vulnerable from several points of view. Its salient drawback is the lack of guidelines set out with sufficient clarity and precision to guard against the risk of inconsistent jury verdicts deriving from widely discrepant interpretations of the law. Delimitation of the scope of criminal liability for attempts is, at bottom, a question of policy. The approach compatible with modern policy requirements, it is submitted, is to regard purposive conduct by the accused as an index to his criminal intention which attracts penal sanctions, provided that an overt act by the accused demonstrating such intention can be proved. Indeed, the suggestion has been made that the purpose of the common law governing inchoate crime is to punish intention alone, an overt act signifying merely an evidentiary requirement relevant to proof of intention.\(^{189}\) This is too extreme a view, but the shift of emphasis from the retributive to the reformatory aspect of criminal punishment, manifested in particular by extensive powers of probation, certainly justifies enlargement of the sphere of liability. A realistic evaluation is facilitated by acceptance of the principle that the degree of proximity required in respect of the \textit{actus reus} depends on the settled character of the accused's intention established by the totality of the evidence in the case.

\((2)\) \textit{Some particular points}

(i) Some approaches to the definition of the \textit{actus reus} of criminal attempts involve reference to a series of acts. A well-known formulation which has had a decisive impact on the codes of African jurisdictions like the Transkei,\(^{190}\) conceives of an attempt as 'an act . . . forming part of a series of acts which would constitute the actual commission (of an offence) if it were not interrupted'.\(^{191}\) This conception has been incorporated almost verbatim in the Australian common law jurisdiction of Victoria\(^{192}\) and in the code jurisdiction of Tasmania.\(^{193}\) Despite its entrenchment in some English\(^{194}\) and Commonwealth\(^{195}\) precedents, the value of this test is curtailed by the inapplicability of its postulates in circumstances entailing a single act which fails to achieve the desired end.

189. J. Austin \textit{Lectures on Jurisprudence or the Philosophy of Positive Law} (3rd edn, 1869) p 441.
190. See the Transkeian Penal Code 1886, s 82.
191. J. F. Stephen \textit{A Digest of the Criminal Law} (1877) art 47.
195. See the case cited at n 192, \textit{supra}.
(ii) In a case where several persons armed themselves and set out in a car to carry out the common purpose of robbing a bank, but on arriving within a short distance of the bank, reversed direction because they saw the police near the bank, a dissenting judgment in the Supreme Court of Canada exonerated the accused persons from liability on the ground that "To constitute an attempt there must be a closer relation between the victim and the author of the crime than was present in this case. But this element, although relevant in conjunction with other factors, is inconclusive in itself."

(iii) Commonwealth authority suggests that, although the antepenultimate act is not invariably sufficient, the penultimate act may not be required for imposition of liability for a criminal attempt. Varying degrees of strictness in the application of the test of proximity are a striking feature of the decided cases. The refinement implicit in disentangling the successive stages of the accused's conduct impacts to the law a scholastic and unreal quality in situations where the sequence of events encompasses a continuous operation which is indivisible without palpable artificiality.

(iv) The use of illustrations to reinforce the recognition of liability in peripheral areas where the criteria spelt out in the abstract admit of ambiguity, is an aspect of the provisions contained in the American Model Penal Code and the Australian Territories Draft Code. In particular, this technique assists in extending the range of liability in contexts where the conclusions reached in the decided cases are not satisfying from the point of view of policy. It is unfortunate, therefore, that the Law Commission of England discarded the supportive role of this technique on the insubstantial ground that the courts 'have little or no experience of the use of legislative illustrations in the criminal law'.

(v) The question whether the accused's act is too remote to be regarded as an attempt is treated as a question of law in legislative provisions in force in New Zealand, Canada and Tasmania. The division of functions between judge and jury is predicated on the assumption that it is for the judge to decide whether on any reasonable view of the evidence an act might be found proved which would be sufficiently proximate in law and, if so, for the jury to decide if the act in question is in fact proved. In England there is judicial authority suggesting that, even where the facts are such that no reasonable jury could fail to find that the accused's acts are sufficiently proximate, the

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197. At 105, per Taschereau J.
198. See the case cited at n 192, supra.
200. See n 177, supra.
201. See n 178, supra.
202. Law Com No 102, para 2.33.
203. Crimes Act 1961 (NZ), s 72(2).
204. Canadian Criminal Code, s 24(2).
205. Tasmanian Criminal Code Act, s 2(4).
 question must still be left to the jury. Contemporary legislation in England contemplates that the decision whether the accused’s act is capable as a matter of law of being considered an attempt falls within the scope of judicial responsibility. 

(vi) This branch of the law illustrates the limited value of general formulae isolated from a specific statutory or factual context. The Court of Appeal of Ontario, candidly acknowledging the absence of a single test to distinguish preparation from attempt, has stressed the utility of an empirical approach. The Supreme Court of Victoria has asserted that an immutable criterion is “incapable of being defined.” The Australian codified systems, as well as the Roman-Dutch law as applied in South Africa, incorporate substantial elements of this approach. The statutory innovations effected in England signify a marked departure from conceptual premises. The indispensability of a “value-judgment of a practical nature” and the impossibility of formulating an all-embracing test represent recurring themes in the Commonwealth authorities. The reluctance of the courts of Zimbabwe to circumscribe the law of criminal attempts in times of acute tension associated with conditions of guerrilla warfare underpins the paramountcy of broad policy considerations. The Commonwealth experience supports the remark by an American commentator that “There is an irreducible element of experience in law that cannot be persuasively dissolved in logical analysis, and which penal theory must somehow take into account.”

(b) The test of unequivocality

The primary impetus of the unequivocality theory stems from the uncertainty of the established tests governing the distinction between preparation and execution. The basic premise of the unequivocality doctrine has been formulated as follows: “It is as though a cinematograph film, which had so far depicted merely the accused person’s acts without stating what was his intention had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question, then the accused has done what amounts to an “attempt” to attain that end. If there is more than one reasonably possible answer, then clearly the accused has not yet done enough.” This postulate has been modified subsequently


301. R v Orogen [1889] 15 VLR 340 at 342, per Hignbotham CJ.

302. See the Tasmanian Criminal Code Act, s 2(3).

303. R v Katz 1959 (3) SA 408 at 421, per de Villiers AJ (C).

304. State v Francis 1981 (1) SA 230 at 235 (AD of Zimbabwe).

305. State v Kudangira 1976 (3) SA 563 at 565 (AD of Zimbabwe).

306. State v Mhundura 1977 (3) SA 1009 (AD of Zimbabwe).


to require merely that 'the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime he was charged with attempting'.

The criterion of unequivocalness permeates judicial pronouncements in most Commonwealth jurisdictions. A New Zealand court has observed: 'That a man's unfulfilled criminal purposes should be punishable, they must be manifested not by his words merely, or by acts which are in themselves of innocent or ambiguous significance, but by overt acts which are sufficient in themselves to declare and proclaim the guilty purpose with which they were done'. In a strand of Australian judicial opinion it has been considered essential that the act could not reasonably be regarded as having 'any other purpose than the commission of the specific crime'. Canadian courts have required 'proof of an overt act manifesting intent' and incompatible with any other plausible explanation. A comparable approach has commended itself to the Court of Appeal of England.

The policy rationale sustaining the unequivocalness test has been set out by a New Zealand court: 'The reason for holding a man innocent who does an act with intent to commit a crime is the danger involved in the admission of evidence upon which he may be punished for acts which in themselves and in appearance are perfectly innocent'. In keeping with the approach that 'There must be proof of some overt act or acts which definitely signify that an accused person had in fact started out to commit an offence', the conclusion has been reached that confessions of intent are necessarily irrelevant except for the purpose of ascertaining the nature of the intended crime. This principle, acted upon by the Court of Appeal of New Zealand, leaves intact the qualification that contemporaneous incriminating statements by the accused, which constitute part of the res gestae, are admissible.

Despite the adoption of the unequivocalness doctrine in an authoritative exposition of English law, the implications of this test have

220. R v Barker [1924] NZLR 865 at 875, per Salmond J (CA of NZ).
223. R v Browne (1947) 88 CCC 242 (CA of Ont).
224. Davie v Lee (1967) 51 Cr App R 303 at 306, per Lord Parker CJ.
226. See n 220, supra.
230. R v Honor [1918] NZLR 510 (CA of NZ); R v Bateman [1959] NZLR 487 at 491, per North J (CA of NZ); cf, for South African law, State v Macdonald 1980 (2) SA 939 (AD).
231. Archibald's Criminal Pleading, Evidence and Practice (34th edn, 1959) s 4104.
evoked serious misgivings throughout the Commonwealth. Contrary to the balance of authority in that jurisdiction, a New Zealand judge has commented on the potential of the unequivocality approach to diminish public confidence in the administration of criminal justice by securing the exculpation of those whose guilt is palpable. Several trends discernible in the decided cases have the object of mitigating this potential. Firstly, it has been considered unnecessary for the identical act to demonstrate both proximity and unequivocality, for “it is the whole of the conduct of the accused, up to and including the last overt act, which requires to be considered.” Secondly, the requisite degree of unequivocality has received an elastic interpretation, especially in sexual cases where the courts are mindful of the adverse consequences attendant on a strict application of the unequivocality doctrine. Thirdly, judicial predilections in England, Alberta and Ontario have not been uncompromisingly hostile to the reception of confessions and similar fact evidence in circumstances where the intention of the accused, præmii impressionis, admits of doubt.

The central fallacy vitiating this theory is the assumption that the criterion of unequivocality, instead of being relevant exclusively to proof of intention, supplies a yardstick of proximity. The unsatisfactory results of the test are evident in cases where the act imputable to the accused, although sufficiently proximate to the ultimate offence, is not intrinsically unequivocal in its purport. In these contexts there is no objection to the reception of evidence altiunde to establish the intention entertained by the accused. Conversely, ‘there may be cases where one overt act demonstrates beyond all question the criminal intent, but yet of itself is not sufficiently proximate to constitute an attempt’. In these cases, contrary to the ostensible result of the unequivocality theory, there can be no liability for a criminal attempt.

The unduly circumscribed scope of responsibility for criminal attempts, in accordance with the tenets of the unequivocality theory, arises from the application of that test ‘not merely as a means of determining whether or not an act is sufficiently proximate but as a separate and additional test to determine whether an act (sufficiently proximate) may constitute an attempt’. This logical anomaly, which has contributed in large measure to disapproval of the test, is accentuated in some Commonwealth jurisdictions by incompatibility of the unequivocality principle with established elements of the law. The rule entrenched in Australian law, for example, that guilt may be

232. *R v Moore*, 229 supra, at 999, per Reed ACJ (CA of NZ).
235. See for example, *R v Mitchell* [1934] 1 WLR 438; *R v Closs* [1936] OR 539 (CA of Ont).
Liability for inchoate crime

proved solely by an uncorroborated confession,\textsuperscript{241} weakens greatly the basis of the unequivocality theory. Prevailing dissatisfaction with this theory, epitomised by its characterisation as 'a dangerous principle'\textsuperscript{242} by the Appellate Division of South Africa, by its emphatic repudiation in Ontario\textsuperscript{243} and by the legislative abrogation of the test in New Zealand,\textsuperscript{244} throws into sharp relief the adoption of elements of this approach in England\textsuperscript{245} and Zimbabwe.\textsuperscript{246}

(c) Voluntary desistance

The attitude of the English common law, that voluntary abandonment makes no difference to liability after the stage of attempt has been reached,\textsuperscript{247} continues unchanged under the Criminal Attempts Act 1981.\textsuperscript{248} This is in line with Canadian law: 'Once the essential element of intent is established, together with overt acts towards the commission of the intended crime, the reason why the offence was not committed becomes immaterial.'\textsuperscript{249} These systems, like those of Switzerland and South Africa,\textsuperscript{250} and the Roman-Dutch common law,\textsuperscript{251} regard voluntary desistance, after the preparatory stage is completed, as relevant not to the incidence of liability but only to mitigation of punishment. This principle is part of several codified Australian systems - those of Tasmania,\textsuperscript{252} Queensland\textsuperscript{253} and Western Australia.\textsuperscript{254} Criminal responsibility, in the setting of these systems, is affected only if exercise by the accused of a locus poenitentiae can be construed as evidence of lack of a 'firmly formulated intention.'\textsuperscript{255}

The exclusion of voluntary desistance as a factor bearing upon liability for inchoate crime has been defended from several points of view. An Australian court, applying principles of the common law, has

\textsuperscript{241} McKee v R (1935) 54 CLR 1 (HCA); R v Edwards [1956] QWN 16 (SC of Qld).
\textsuperscript{242} R v Van Ayl (1942) TPD 291 at 298, per Schreiner J.
\textsuperscript{243} R v Cline, n 6 supra.
\textsuperscript{244} Crimes Act 1961 (NZ), s 72(3).
\textsuperscript{245} Davis v Lee (1967) 51 Cr App R 303 at 306, per Lord Parker CJ.
\textsuperscript{248} Law Com No 102, paras 2.131-2.133.
\textsuperscript{249} R v Kosh [1965] 1 CCC 230 at 235, per Collison GJS (CA of Sask).
\textsuperscript{250} Schweizerisches Strafgesetzbuch, art 22.
\textsuperscript{251} R v Hallasmy [1938] TPD 441; R v Agrami [1963] (2) SA 874 (C).
\textsuperscript{252} Van Leeuwen Gesetze Formen 1.5.1.5; Huber Heidendorf Rechtsgeschichte 6.1.4.
\textsuperscript{253} Tasmanian Criminal Code Act, s 2(2).
\textsuperscript{254} Queensland Criminal Code Act, s 4.
\textsuperscript{255} Western Australia Criminal Code Amendment Act, s 4.
\textsuperscript{256} State v de Fossis 1981 (3) SA 382 at 398, per Corbett JA (AD). The concept of 'conditional intention', which received a fillip from the misleading statement that 'It cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal' [R v Hurson (1977) 67 Cr App R 131 at 132, per Lord Scarman], has no useful role in the law of criminal attempts where the central requirement is that relating to a formed intention: DPP v Nock and Alford (1978) 67 Cr App R 116; R v Walkington [1979] 1 WLR 1169; Attorney-General's Reference (Nos 1 and 2 of 1979) [1980] QB 180; R v Bayley and Easterbrook [1980] Crim L Rev 503.
been deflected from this inquiry by 'the necessity, in almost every case of an unsuccessful attempt to commit a crime, of determining whether the accused desisted from sudden alarm, from a sense of wrongdoing, from failure of resolution or from any other cause'. However, the moral justification of punishment for incipient crime is dependent on a complete examination of these circumstances. But a practical objection to the 'probable desistance' criterion is that it introduces an element of conjecture and speculation into the law by requiring the court to consider whether the accused's conduct had reached a stage in the sequence of events at which a change of mind is unlikely. This element of surmise is extended by the suggestion that the probability of desistance, in the circumstances of the case, should be determined by objective and hypothetical criteria.

The argument that a general defence based on voluntary abandonment of the criminal enterprise would exonerate an accused person who desists because he encounters more resistance than he expected or thought he was being discovered, lacks conviction. Once it is accepted that 'the condition of impunity is that (the accused) knows that he could have achieved his goal by continuing', desistance induced by external factors is excluded from the ambit of exonerations. Thus, Malaysian law conceives of a criminal attempt as 'an intentional preparatory action which failed in its object through circumstances independent of the person who seeks its accomplishment'.

The compelling argument in support of an exculpatory principle founded on voluntary desistance is that exemption from liability is defensible from the standpoint of individual justice as well as the prevention of crime. Apart from the rather unconvincing argument that the expectation of release from liability provides the delinquent with a motive to resile from his criminal design, it is plain that no considerations of deterrence, rehabilitation or retribution enjoins the subjection to penal sanctions of a person who resolves to abandon his criminal plan while a choice of options is available to him. Consequently, latitude earned by genuine repentance, upheld by 'the beneficence of the law in extending the hand of forgiveness', is supportable. Of comparative interest is the entrenchment of an exculpatory, as opposed to a merely extenuating, principle in modern Continental legal systems including those of France, the Federal Republic of Germany and Malta.

265. Strafgesetzbuch, art 46 (1).
266. Maltese Code, s 42(1) (b).
(d) Liability for omissions

Contemporary English law, which confines liability for attempts to 'acts', presents a contrast with Canadian and New Zealand law which extends liability to omissions. The Draft Code of the Criminal Code Commissioners and the American Model Penal Code bear comparison with the point of departure adopted by the statute law of Canada and New Zealand. Although the Court of Appeal of England has referred to 'an act of omission' the structural framework of English law suggests the exclusion of liability for omissions - an approach which has been justified on the basis that 'The legislature should be required to use clear language where it desires to penalise an omission not amounting to the complete crime'. Nevertheless, there is no adequate reason in principle why an intentional omission which fails to achieve the end aimed at should not suffice for the imposition of liability for a criminal attempt. To this extent, the comparatively restricted scope of the English statutory provision is exposed to criticism in terms of policy.

IV. IMPOSSIBILITY OF FULFILLMENT OF THE CRIMINAL OBJECTIVE

(a) Physical impossibility of performance

(1) A survey of Commonwealth law

The question whether impossibility of commission of the intended crime in the particular circumstances of the case exonerates the accused from liability for an attempt has given rise to exceptional difficulty throughout the development of the law.

The English common law has oscillated uneasily between conflicting points of view. During the last century there was unequivocal judicial support for the view that no liability could be imposed for an attempt to steal from any empty pocket, but the contrary view has been preferred in subsequent decisions. The subjective approach is reinforced by decisions countenancing liability for attempt in circumstances where the accused, by false pretences in a begging letter, requested money from another who paid the money although he was not deceived, where the

268. Canadian Criminal Code, s 24(1).
269. Crimes Act 1961 (NZ), s 72(1).
271. American Model Penal Code 1960, s 5.01(1).
273. G. L. Williams op cit n 29, supra, p 621.
275. R v M'Pherson (1857) Dears & B 197; R v Collins (1864) 9 Cox CC 497.
276. See, for example, R v Ring, Atkins and Jackson (1892) 61 LJMC 116.
277. R v Hesseler (1870) 11 Cox CC 570. But see the dicta in the House of Lords in Haughton v Smith [1974] 2 WLR 1 at 12-13 by Lord Reid, to the effect that the completed offence was not in these circumstances impossible.
accused was convicted of an attempt to commit an unnatural act with an animal the physical structure of which rendered consummation of the offence impossible, and where the accused administered to a woman who was not with child a noxious substance designed to procure a miscarriage. The subjective approach underlines the comment that ‘An intention to steal can exist even though, unknown to the accused, there is nothing to steal’. On the other hand, the objective view, sustained by the rationale that criminal responsibility for an attempt is not imputable to an accused person who is ‘not on the job’, is reflected in English decisions suggesting that, where the goods constituting the subject matter of the indictment have ceased to be stolen, the accused cannot be convicted of receiving stolen goods, no reference being made to the possibility of a conviction for attempt. Similarly, the search of an empty wallet or handbag as a preliminary to theft, the supply of a substance mistakenly believed by the accused to be a controlled drug and firing into a room which is in fact empty have been held to entail no criminal liability for an attempt.

The House of Lords, in a controversial decision which has been assailed as ‘a great slaughter in the law of attempt’ has confirmed that a completed act of handling, which is not itself criminal because it is not the handling of stolen goods, cannot be converted into a criminal act by the device of alleging that it was an attempt to handle stolen goods on the basis that at the time of the handling the accused falsely believed them still to be stolen. Although consistency in the common law has been furthered by the repudiation of precedents founded on subjective premises and by a pronouncement which removes from the pale of criminality a conspiracy to achieve an impossible result lingering reservations about the feasibility of a totally objective approach find expression in suggested constraints on the application of an objective norm in such areas as incitement, conspiracy and

278. R v Brown (1889) 24 QBD 357.
279. R v Goodchild (1846) 2 Ex C 293. This was not an attempt, stricto sensu, since the substantive offence consisted in the administration of a noxious thing with intent to procure a miscarriage; cf. for Australian law, R v Lindner [1938] SASR 412 (SC of South Austr).
286. R v Gaylor (1857) 7 Cox CC 253 at 255.
288. Haughton v Smith, n 277, supra.
290. DPP v Nutt and Alford, n 280, supra.
allied offences involving an offer to supply prohibited goods.293 Symptomatic of sensitivity to the anomalies attendant on an uncompromisingly objective criterion are the stringent construction of factual impossibility, illustrated by the decision that a burnt out clutch preventing propulsion of the vehicle did not preclude the conviction of a defendant with a blood-alcohol concentration above the prescribed limit for an attempt to drive294 and the explanation by the House of Lords that, although a pickpocket who is charged with attempting to steal from a pocket or wallet which is in fact empty could not be convicted in keeping with binding authority,295 nevertheless, where the pickpocket is charged, on identical facts, with attempting to steal generally, he could properly be convicted if a general intent to steal is imputable to him.296 The fluctuation of common law attitudes continued until, as a sequel to cogent recommendations by the Law Commission,297 a predominantly subjective approach, incompatible with exemption from liability on the ground of physical impossibility of commission of the intended offence, was incorporated in contemporary English legislation.298

The ambivalence characteristic of the decided cases in England typifies judicial precedents in most of the Commonwealth jurisdictions and in South Africa.

In Australia convictions for attempting to obtain money by false pretences in circumstances where the payer was not deceived but wished to entrap the accused,299 for attempting to drive a vehicle while the accused was under the influence of liquor even though a mechanical defect prevented the vehicle from being started,300 for attempted betting in a situation where the horse had been withdrawn from the race301 and for attempted murder, notwithstanding that the blows were ineffective to inflict death even though the accused intended to kill,302 provide examples of the application of a subjective test. By contrast, the objective standard of liability is embodied in Australian decisions which exclude responsibility for attempting to defraud the revenue in respect of the import of goods which, contrary to the accused's belief, were not subject to customs duty303 and in rulings which exculpate the accused on a charge of attempted murder if the technique resorted to by the accused to bring about his victim's death by electrocution is intrinsically innocuous.304

293. Haggard v Mason [1976] 1 All ER 337.
295. Haughan v Smith, n 289, supra.
296. DPP v Nock and Aitford, n 280 supra, at 992–993, per Lord Diplock; cf the approach of Lord Scarman at 999–1000.
297. See Law Com No 102, paras 2.53–2.100.
300. McMillan v Rones (1945) 62 WN (NSW) 126 (SC of NSW).
In New Zealand the subjective criterion had judicial support in a case of attempted abortion where the substance administered was found to be harmless. The court observed: "That this substance was inefficient for the purpose intended is immaterial, the intention of the prisoner and the doing of an act in furtherance of such intention being the material matters". Similarly, where the accused was in possession of a plastic bag containing plant material which he thought was *cannabis sativa* but which was proved on analysis to be hedge clippings, a conviction of attempting to receive a prohibited plant was upheld. On the other hand, it has been held in New Zealand that an accused cannot be convicted of attempting to receive stolen property, even though he mistakenly believed he was about to receive stolen property, if the goods had already been recovered by the police and so ceased to be stolen property.

In South Africa an earlier current of authority upholding an objective test of liability in cases involving, for instance, an empty cash box, a piece of paper erroneously assumed to be a cheque, brass mistakenly thought by the accused to be gold, a woman wrongly thought to be pregnant and harmless pills administered with the intention of procuring abortion, has been superseded by the countervailing opinion which, after some hesitation, the majority of the Appellate Division has adopted explicitly, paving the way to entrenchment of the subjective standpoint in cases of physical impossibility in modern South African law.

In several jurisdictions ambiguity has been resolved by statutory provisions which require the imposition of liability for an attempt, despite the existence of circumstances which make consummation of the offence impossible. The Criminal Code of Canada characterises as an attempt any act done for the purpose of carrying out a criminal intention, 'whether or not it was possible under the circumstances to commit the offence'. Comparable provision is contained in the criminal codes in force in Tasmania, Queensland and Western Australia, in the South Asian Commonwealth jurisdictions of

305. *R v Austin* (1905) 24 NZLR 983 (CA of NZ).
306. *A v 952*, per Cooper J.
314. *R v Parker and Allen* 1917 AD 532; *R v Chipangu* 1939 AD 296.
316. *State v Pachat* 1962 (4) SA 246, (T); *R v Shongwe* 1965 (1) SA 390 (AD of SR).
317. See n 11, supra.
318. S 34(1); cf *R v Pettibone* (1918) 2 WWR 806 (SC of Alta); cf *R v Kundus* (1976) 2 SCR 272 (SC of Canada).
321. *Criminal Code Amendment Act* 1913 (Western Australia), s 4.
India, Malaysia, Singapore and Sri Lanka and in several American jurisdictions including Illinois, Michigan, Louisiana and New York. Indeed, the South Asian codified systems incorporate illustrations, embodied in the statute, which place beyond doubt the recognition of liability in contexts which generated acute controversy in English law before the enactment of legislation.

(2) Alternative approaches evaluated

The divergent approaches deriving from the objective and subjective viewpoints may each be supported by a variety of policy factors.

The objective approach is buttressed, in the main, by arguments stressing the importance of resisting departures from the principle of legality which identifies the creation of heads of criminal liability as a matter of legislative responsibility, and cautioning that the recognition of liability for an attempt to commit a crime which is impossible in the circumstances is not only difficult to reconcile with established rules governing proximity, in so far as an act proximate to an impossible effect is conceptually anomalous, but may even be tantamount to the punishment of guilty intention alone. These arguments, largely devoid of merit, are often sought to be strengthened by a specious appeal to the connotations of an 'attempt' in everyday parlance and to demarcation of the boundary between sin and crime. The gravamen of the case for an objective test of liability for attempts in this area is the lack of a 'social menace' or of any legitimate need for 'public concern' because of the absence of an actual threat to the community. But the basic weakness of this line of argument, particularly in its application to ineffectiveness of the means employed by the accused, is that inevitable failure may well instil in the accused resolve to use more appropriate methods on a subsequent occasion.

The reasons underlying the subjective criterion carry greater

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322. Indian Penal Code 1860, s 511.
323. Straits Settlements Penal Code 1871, s 511.
324. Ibid.
325. Penal Code of Sri Lanka 1883, s 490.
328. Louisiana stat 1950, s 14.27.
330. See illustrations (a) and (b) attached to s 511 of the Penal Codes of India, Malaysia and Singapore and to s 490 of the Penal Code of Sri Lanka which contemplate, respectively, intrusion into an empty jewel box and an empty pocket.
331. Haughton v Smith, n 277, supra, at 5, per Lord Hailsham; cf at 12, per Lord Reid.
332. Ibid at 13, per Lord Reid.
334. Haughton v Smith, n 277, supra, at 15, per Lord Morris.
conviction. The ultimate justification of criminal sanctions, although the social interest is not directly vulnerable, is that the accused, thwarted as he was by circumstances independent of his will and control, is no less deserving of censure than a defendant who has succeeded in his attempt. The meting out of punishment, then, apart from serving as an expression of social disapproval, has a defensible rationale in terms of general as well as individual deterrence. Moreover, even though the objective no less than the subjective standard may lead to injustice in marginal cases—the former by compulsorily requiring the acquittal of persons who pose a potential danger to the community, and the latter by inflicting punishment on delinquents whose designs create no substantial social risk—the subjective standard may be selected convincingly as the lesser of the two evils, since extenuating factors are catered for suitably as part of a realistic sentencing policy.

The objective standpoint, containing as its central element emphasis on the incidence of a significant social hazard, would, if stretched to its logical conclusion, render punishable only the complete crime. Equally unacceptable is the subjective extreme which would render culpable every act towards putting into effect a criminal intent, however remote, so as to subject to punishment 'the would-be murderer who buys poison but then changes his mind and throws it away, (and) the witch-doctor who speaks the magic words which he believes would bodily injure or kill his adversary.' Perception of some degree of validity in both tests in discrepant contexts, highlighting in turn moral blame and social security, has supplied the impetus to evolve a hybrid approach combining features of the alternative points of view.

In the first place it has been suggested that some element of casuistry, enabling the disparate formulation of principles controlling liability during the incipient stages of different types of crime, is desirable in the texture of the law. Consistently with the approach that an empirical assessment of the nature and extent of the 'mischief' attendant on the particular crime is essential, a distinct basis of liability for inchoate crime in the setting of murder and causing grievous bodily harm has been proposed. However, in the absence of any coherent underlying principle, apart from the content of specific inchoate statutory offences, the proliferation of discrete bases of liability for attempts, relative to varying degrees of gravity of the completed offence, is bound to make the law intolerably unpredictable and invidious.

343. R v Kaze 1959 (3) SA 408 at 420, fer de Villiers AJ (C).
344. Ibid.
Secondly, gradations of factual impossibility have been suggested as a means of obviating the adoption of an inflexible standard. The contrast between absolute and relative impossibility, reflected prominently in the case law of Japan,\textsuperscript{547} forms the inarticulate premise of the suggestion by the House of Lords that, while a defendant who fires a shot at an intended adversary just out of range at the time and a defendant who administers a dose of poison insufficient to kill with intent to murder are guilty of attempts,\textsuperscript{548} no liability is imputable to a defendant who fires at a corpse thinking it is alive and intending to kill or to a defendant who gives the victim water thinking it to be poison.\textsuperscript{549} Degrees of impossibility represent a logical aberration which is best expunged from the criminal law. This conceptual device, which is relied upon by the courts of Japan to support the result that attempted abortion may be committed in respect of a non-pregnant woman,\textsuperscript{550} is avoided by other Asian systems like those of India,\textsuperscript{551} Malaysia\textsuperscript{552} and Sri Lanka\textsuperscript{553} in arriving at a similar conclusion by a more acceptable process of reasoning. Shades of factual impossibility, rejected altogether by French\textsuperscript{554} and German\textsuperscript{555} law, have had an insidious effect on the moulding of attitudes within the common law systems through the instrumentality of the 'neptitude'\textsuperscript{556} and 'adequacy of means'\textsuperscript{557} doctrines. The emphatic rejection by the South African Appellate Division\textsuperscript{558} of the postulate of 'objective risk' requiring that 'the unsuccessful effort to achieve a criminal consequence should be punished if, and only if, a reasonable man in the same circumstances as the defendant might expect the defendant's acts to result in the consummation of the crime'\textsuperscript{559} marks a refreshing trend in modern law.

A third proposal, impliedly favouring perpetuation of a line of English judicial authority,\textsuperscript{560} involves retention of an exculatory principle in cases where the accused achieved the physical result which he intended but committed no substantive offence because of the lack of an essential ingredient embodied in the definition of the offence. The influence of this approach, which would have enabled preservation of some aspects of an authoritative exposition of the common law by the

\textsuperscript{547} Fujino v Japan SC, I Petty Bench, 31 August 1950.
\textsuperscript{548} Haugthon v Smith, n 277, supra, at 7-8, per Lord Hailsham.
\textsuperscript{549} Ibid at 9, per Lord Hailsham.
\textsuperscript{550} See a judgment of 1 June 1927 by the Great Court of Judicature, I Crim Dept, 6 Dai-hen Keishu 208 at 215.
\textsuperscript{551} Agarwalla Prashodam v Emperor (1899) I LR 61 Cal 54.
\textsuperscript{552} Munah Binti Ali v Public Prosecutor (1958) 24 MLJ 159 (CA of Malaya).
\textsuperscript{553} R v Fernando (1955) 27 NLR 181 (SC of Ceylon).
\textsuperscript{554} Epoux Fleury v Ministère Public, Cour de Cassation, ch crim, 9 November 1928.
\textsuperscript{555} See a judgment of 27 February 1886, Reichsgericht I Strafsenat, 17 RGS 158 at 159.
\textsuperscript{556} Garafolo Criminology (Mod Cr Se Ser 1914), pp 312–313.
\textsuperscript{557} C. Howard op cit n 2, supra, at p 303.
\textsuperscript{558} R v Davies 1956 (3) SA 52 (AD).
\textsuperscript{559} F. B. Sayre 'Criminal Attempts' (1928) 41 Harvard L Rev 821 at 850.
\textsuperscript{560} R v Percy Dallon Ltd (1949) 33 Cr App R 102.
House of Lords, the fundamental objection to this approach is its intrinsic vagueness, in so far as all impossible attempts entail, by definition, the absence of a necessary element of the completed offence; consequently, the suggested criterion of liability is incurably nebulous. The exclusion of this refinement from current English legislation, in accordance with the thinking of the Law Commission is welcome.

Barring cases of non-existence in law of the supposed crime to be consummated the movement of contemporary law is towards the treatment of all cases of factual impossibility as comprising a homogeneous category governed by uniform principles. Thus, the accommodation of non-existence of the subject-matter of the intended offence, the absence from the subject matter of a quality essential for the commission of the substantive offence and inadequacy of the particular means employed for the perpetration of the offence under a compendious rubric, rather than the formulation of disparate approaches, is a feature of prevailing judicial attitudes. This trend is exemplified by the assimilation of insufficiency of means and impossibility of end within a common approach in the contemporary Swiss codified system.

Fourthly, the conferment of a residuary discretion on the courts in regard to nuances of impossibility has been urged as an alternative preferable to latitude available to executive officials as to the suitability of criminal proceedings in particular cases. An innovative development in Hong Kong is the forging of an approach which, throughout the spectrum of physical impossibility, identifies as the crucial element the width of the terms in which the indictment is couched. However, excessive reliance on coincidental factors detracts largely from the merit of resilience which has been claimed for this approach.

(b) Legal impossibility

It is evident that cases in which the effect aimed at by the accused, contrary to his belief, does not constitute an offence in contemplation of law warrant separate treatment from those where the consequences which the accused endeavoured to bring about, in inappropriate conditions or by inapt methods, would if caused have amounted to a substantive offence. Attribution of criminal responsibility in the former

361. Houghton v Smith, n 277, supra.
365. See the discussion in the text at notes 363-374, infra.
366. Schweizerisches Strafgesetzbuch, art 23.
368. A. Keane 'Attempting the Impossible – the Devil We Know' (1989) 13 HKLJ 39 at 60.
category of case is a clear infringement of the principle of legality.\textsuperscript{369}

Thus, an English court acquitted a boy under 14 years of age of the charge of attempting to have carnal knowledge of a girl below a specified age on the basis that he could not be convicted of "attempting to do that which the law says he was physically incapable of doing."\textsuperscript{370}

This view, clearly sound in principle, has gained acceptance in Australia\textsuperscript{371} and New Zealand.\textsuperscript{372} The removal of cases concerning legal impossibility from the purview of liability is justified not only because it is anomalous to have recourse to principles regulating attempts to supply deficiencies in the substantive criminal law\textsuperscript{373} but because the law would plainly lack coherence and consistency if an inchoate act were to attract penal sanctions even though the completed act is immune from the taint of criminality.\textsuperscript{374}

(c) Overall assessment

A striking feature of the established law is the relative importance of subjective factors in the sphere of physical impossibility, in juxtaposition with the general predominance of objective criteria in other branches of the law of criminal attempts. In most Commonwealth jurisdictions the emergence of a subjective standard in regard to attempts to commit crimes which are impossible in the circumstances is the product of judicial creativity, and in a few jurisdictions like England where the courts have recently been disposed to apply, in cases of impossibility, objective tests formulated in relation to criminal attempts generally, there has been legislative intervention asserting the primacy of the subjective approach to criminal liability in this limited area.

In marked contrast with the established pattern of Commonwealth law, the law of Japan, enshrining an objective approach to problems of impossibility, requires that "If an act was such that by its nature it was generally impossible for it to produce an effect, it is not to be punished as a criminal attempt."\textsuperscript{375} This point of departure, gravely inimical to effective law enforcement,\textsuperscript{376} is at variance with contemporary policy requirements. The better view is that the prevailing law in regard to the requisite mens rea, combined with the supportive principles regulating proximity of physical conduct, provides an adequate framework for the solution of problems pertaining to physical imposs-

\textsuperscript{370} R v Williams [1893] 1 QB 320; cf R v Crammer [1919] 1 KB 564; Walters v Lunt [1951] 2 All ER 645. See also R v Elidara [1822] 3 C & P 396; R v Philips [1839] 173 ER 695.
\textsuperscript{371} R v Moody [1897] QCR 344 (SC of Qld); but see R v Packer [1932] VLR 225 (SC of Vic).
\textsuperscript{372} R v Angus (1997) 26 NZLR 948 (SC of NZ).
\textsuperscript{373} J. S. Strahorn, "The Effect of Impossibility on Criminal Attempts" (1990) 78 U Pa L Rev 962 at 990.
\textsuperscript{375} See the Japanese Draft Penal Code 1961, art 23.
bility, no special rules being required in this specific context.\textsuperscript{377} The experience of Commonwealth systems illustrates that a patchwork quilt consisting of elaborate and partially overlapping subrules which purport to cater for categories of physical impossibility, unprofitably encumbers the law. A survey of the lines of development of Commonwealth law provides ample justification for the comment that 'The doctrine of impossibility is one of the biggest red herrings ever drawn across the path of the criminal law'.\textsuperscript{378}

V. APPROACHES TO LAW REFORM

The recurring difficulties regarding criminal attempts have served to focus the attention of law reform agencies and of academic writers on this area of the law.

A radical suggestion is that there should be no general law of attempt and that, where there are thought to be compelling social reasons for recognition of liability for an inchoate offence, responsibility for constituting the offence and for demarcating its boundaries should devolve on the legislature.\textsuperscript{379} This suggestion, which derives from a disproportionate assessment of the negative aspects of the common law tradition in this area,\textsuperscript{380} inadequately addresses the impracticability of parliamentary initiative in the form and on the scale proposed, and the beneficial contribution of the large volume of judge-made law to the prevention of crime.

The lack of clarity in regard to the distinctions among conspiracy, incitement and attempt has supplied the stimulus for a proposal regarding amalgamation of these incipient offences into the composite offence of committing an overt preparatory act.\textsuperscript{381} It would seem, however, that the advantages of the innovation are infinitesimal in comparison with its potential drawbacks. The objectives of policy relevant to these distinct heads of inchoate offences are essentially distinguishable, and the preservation of their separate identity not only makes for precision but facilitates the aim of ensuring that guilty intention alone is not penalised. The Law Commission of England rightly preferred a general law of criminal attempt to defined preliminary offences in connection with specific substantive crimes on the footing that the latter expedient is likely to be 'so generalised as to be dangerously oppressive'.\textsuperscript{382}

The assumption that the frontiers of criminal attempt are more

\textsuperscript{379} P. R. Glazebrooke 'Should We have a Law of Attempted Crime?' (1969) 85 LQR 28.
\textsuperscript{380} For an example of excessive boldness on the part of the courts in expanding the ambit of liability, see \textit{R v McShane} (1977) 66 Cr App R 97 where it was held in England that there could be an attempt to counsel or procure suicide. A more cautious attitude appears to have been adopted in Australia [\textit{Bekatwit v R} (1976) 12 ALR 333 (HCA)] and in New Zealand \textit{R v Grant} [1975] 2 NZLR 165 at 169 (SC of NZ).
\textsuperscript{381} Law Com No 102, para 2.5.
usefully demarcated in relation to the social values underlying groups of offences than in the abstract is reflected in academic writing. Thus, it has been suggested that the classification of crimes furnishes a relevant index to determination of the degree of proximity required by the law for a criminal attempt. There is no clear indication, however, that this approach, founded on the affinity of particular types of crime, will diminish materially the difficulties of definition and application of concepts which are inherent, for the most part, in the nature of criminal liability for acts which have yet to reach their fruition.

VI. CONCLUSION

The retention of a general law of criminal attempt, favoured by the English Law Commission and by the American Law Institute, is supportable from a policy standpoint. Within this framework rationalisation of the law is best achieved by the construction of a healthy body of principle untrammelled by embarrassing precedents of the past. In particular, the remarkably narrow criteria of proximity which have been applied to the actus reus substantially defeat the policy objectives of the law and belie the aspiration, in this field, that 'The life blood of the law is not logic but common sense.' Fortunately, these inhibitions, so far as the distinction between preparation and attempt is concerned, have been eschewed by contemporary English legislation which offers a fresh starting point for an imaginative judicial role. It is to be regretted, however, that constraints embedded in the legacy of the common law continue to curtail in England the mental element of attempts, although new ground has been broken elsewhere in the Commonwealth, especially in Canada.

Recurring themes and largely similar avenues of development typify Commonwealth law relating to criminal attempts, but the widely varying problems posed by the character and scope of inchoate crime make inevitable discordant approaches to aspects of the subject. Thus, the objective rules based on the distinction between preparation and execution, reflecting aversion to preventive detention, coexist with subjective conceptions which the consensus of Commonwealth opinion regards as central to the solution of problems involving impossibility. The weaknesses of the existing law stem partly from inadequacy of the applicable criterion, as in the case of the mens rea of criminal attempts, and partly from lack of flexibility in the formulation of the governing principles so as to enable a satisfying result to be reached in a wide congeries of factual and statutory contexts. The latter deficiency is exemplified by the continuing resistance in most Commonwealth jurisdictions to the incorporation of illustrations which serve to clarify

[84] Hoaglan v Smith, 277, supra, at 13, per Lord Reid.
the attitude of the law in areas which are not catered for unambiguously by the cardinal principles adumbrated in statutory instruments. Throughout a great part of the relevant body of law judicial discretion is the decisive factor, but the volume of case law available in the Commonwealth provides copious material for the forging of systematic guidelines controlling the exercise of discretion.