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The Pitfalls in the Law of Attempt: A New Perspective

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Abstract The law of attempt is laden with some of the most hotly debated and controversial issues in the criminal law sphere. This article provides a critical and in-depth analysis of most, if not all, of the pitfalls that have bedevilled this area of the law since time immemorial. In particular, the discussion will focus on the type of mens rea required for an attempt, how far an accused must progress toward the commission of the subject offence in order to satisfy the actus reus component of an attempt, whether certain offences are intrinsically incapable of being the subject of an attempt, and whether the various courts and legislatures have agreed upon a universally accepted, coherent, and workable doctrine concerning the status of ‘factual impossibility’ as a defence to an attempt.

1. Introduction

Among the multitude of criminal offences recognised at common law, perhaps none has engendered more uncertainty and controversy over the years than the law of attempt. This is exemplified in the fact that many of these problems remain substantially unabated, notwithstanding the continual efforts of the judiciary to formulate viable solutions through the incremental development of the common law. Although far from exhaustive of these controversial areas, the most poignant include: the type of mens rea that must be proved, how far the accused must have progressed towards the completion of the intended offence in order to satisfy the actus reus component; whether there are certain categories of offences which, as a matter of law, cannot serve as a predicate for an attempt; whether the doctrine of factual impossibility should be available as a defence to the crime of attempt; and whether one who has committed an attempt should be absolved of liability if he or she voluntarily abandons the criminal enterprise before it has reached fruition.

The discussion to follow will focus on these and other issues in the law of attempt, particularly those that have proven to be the most intractable. In addition, the discussion will explore and critically analyse the litany of unsatisfactory efforts by both the courts and legislatures to redress these problems. It is important to emphasise that although the piece does not profess to offer viable solutions to many of these problems, it does endeavour to analyse them from a somewhat different perspective that is designed not only to facilitate a better understanding of these thorny issues, but ultimately lead to reforms that are workable, sound in principle, and long overdue.

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2. Overview

There are two major areas of controversy surrounding the law of attempts. The first concerns the mens rea component of the offence; specifically, whether the mens rea needed to convict for an attempt is satisfied by proving that the accused acted with the same mens rea needed to convict for the subject (complete) offence. The second concerns the actus reus component of attempts insofar as it relates to what is often termed the ‘proximity rule’. Under this rule, the actus reus of attempt requires the accused to have taken steps that are immediately and not merely remotely connected with the commission of the subject offence. Although the legislatures and courts have formulated a logical and satisfactory answer to the mens rea controversy, they have thus far failed to formulate any clear guidelines for determining how far the accused must have progressed towards the commission of the subject offence in order to satisfy the ‘proximity rule’.

3. The mens rea for attempt at common law

The seminal English case of R v Mohan1 is the classic authority regarding the mens rea requirement of attempt. In Mohan, the accused was convicted of attempting to cause grievous bodily harm by wanton (reckless) driving. The issue before the Court of Appeal was whether the trial judge had misdirected the jury when he stated that this crime was established if the jury was satisfied that the accused acted with the same recklessness required by the complete offence.2

The Court of Appeal held that intent was ‘an essential element of the offence of attempt’,3 and went on to examine the meaning of intention. Intention was defined as a decision to bring about a certain consequence,4 and was distinguished from the motive or emotion leading to the action.5 The court opined that the direction of the trial judge could only be upheld if intention was broadly construed to include recklessness, meaning knowledge of the likely consequences of one’s actions.6 Finding no authority to justify this position,7 the court concluded that while knowledge of the likely consequences of one’s conduct does constitute evidence of intention, it does not amount to intention in itself.8 The court commented that the crime of attempt is a serious offence that is often as morally culpable as the full crime,9 but as it is one step removed from the commission of the intended offence, the courts must not ‘strain to bring within the offence of attempt conduct which

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2 Ibid. at 2.
3 Ibid. at 8.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid. at 10.
8 Ibid.
9 Ibid. at 11.
does not fall within the well-established bounds of the offence’. Accordingly, the final direction of the trial judge was found to be bad in law and the appeal was allowed.

(a) Can recklessness constitute a sufficient mens rea for an attempt at common law?

Although Mohan appeared to unequivocally reject the notion that any mens rea short of an intention to bring about all the consequences of the subject offence could suffice for an attempt, subsequent Australian decisions raised doubts as to the continued vitality of this rule. One such case was R v Evans.

In Evans, an appeal to the Supreme Court of South Australia concerned a trial judge’s direction regarding the crime of attempted rape. The trial judge directed that the mental element of attempted rape was identical to that of the completed crime of rape; namely, that the accused must have acted with knowledge that the alleged victim was not, or might not (recklessness) be consenting to the sexual penetration. It was argued that given the purposive nature of attempts, every element of the crime must be intended, even if the complete crime could be committed with a less culpable form of mens rea than intent (in this case recklessness).

In answering this question, the court could find no analogous authority to guide it. A similar question had been posed in the case of R v Zorad, which also concerned a charge of attempted rape. In Zorad, the trial judge directed the jury that the mens rea for attempted rape included ‘a determination to have intercourse whether the prospective victim was consenting or not’. It was argued that this amounted to recklessness and, in accordance with Mohan, was not comprehended within the mens rea of attempts. The trial judge, however, had clarified his statement by going on to state that the accused ‘must have had the intent to penetrate the prosecutrix without her consent’. According to Street CJ, this qualification corrected any error that might have occurred in the direction and made it unnecessary for the court to decide whether the direction would have been incorrect had it included recklessness. The court in Evans also distinguished the current case from those of Whybrow and Mohan by drawing a distinction between the accused’s state of mind as to the prohibited consequences of his or her conduct.

11 Ibid.
13 Ibid. at 263.
14 Ibid. at 266.
15 Ibid.
16 Ibid.
17 [1979] 2 NSWLR 764.
18 Ibid. at 773.
19 Ibid.
20 Ibid.
21 Ibid.
22 (1951) 35 Cr App R 141.
and the accused’s state of mind as to the existence of facts which render his or her conduct criminal. Both of those cases concerned the *mens rea* of intention with regard to bringing about one or more consequences required by the definition of the intended crime, but neither concerned the accused’s state of mind vis-à-vis the existence of facts rendering the conduct in question illegal.

The court stated that in order to satisfy the *mens rea* for attempt, the accused must intend to bring about all the consequences required by the definition of the subject offence, but the court could find no reason why this principle should extend to the existence of facts rendering an act criminal. In relation to the existence of facts which render conduct criminal, the court further reasoned that it will suffice for the accused to have acted with the same *mens rea* required by the definition of the complete crime, even if this does not go as far as intention. The court further reasoned that because lack of consent was not a consequence of the actions of a would be rapist, but a fact that would render such actions criminal should it be present, the requisite *mens rea* was identical to that of the complete crime and a direction of recklessness was appropriate.

The appeal was dismissed.

According to Evans, therefore, there are certain offences for which the same *mens rea* that will suffice to convict for the subject offence will also suffice for an attempt to commit the offence. It is noteworthy that three years prior to Evans, a three-member majority of the High Court stated in Alister v The Queen, per obiter dicta, that the *mens rea* for attempted murder was satisfied by proof that the accused acted with recklessness in regard to occasioning grievous bodily harm on the victim. As murder is the ultimate crime in which the requisite *mens rea* relates to the consequences of the accused’s conduct, the rather tenuous distinction drawn by the Full Supreme Court of South Australia in Evans is clearly at odds with the *obiter dicta* in Alister. In any event, the High Court ultimately departed from these *obiter dicta* and held that nothing short of an intention that the subject offence be committed can suffice for an attempt at common law. Stated differently, there must be an intention to bring about all the consequences (external elements) of the subject offence. As the common law rule enunciated in Evans cannot be reconciled with the High Court’s decision in Knight, it too must be seen as overruled.

The ease with which the rule enunciated in Knight is stated belies the complexities that inhere in its practical application. In particular, the

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25 Ibid.
26 Ibid. at 268.
27 Ibid.
28 See also R v Khan [1990] 2 All ER 783 (holding that recklessness in regard to the victim’s lack of consent is a sufficient *mens rea* for the offence of attempted rape).
30 Ibid. at 421–2 (per Gibbs CJ dissenting); at 431 (per Murphy J dissenting); at 446 (per Wilson and Dawson JJ); at 467 (per Brennan J).
31 Knight v R (1992) 175 CLR 495 at 501. For an example of a recent decision following Knight, see R v MJJ [2004] NSWSC 57.
complexity centres on exactly what is meant by the requirement that the accused must have intended that the subject offence would be committed? The answer will depend on whether the subject offence is properly classified as one of ‘basic’ or ‘general’ intent, ‘specific’ intent, or ‘strict liability’.

With regard to ‘basic’ or ‘general’ (hereafter referred to as ‘basic’) and ‘specific’ intent crimes, courts and legal scholars have yet to articulate a universally agreed upon explanation of the distinction between the two categories. This elusive distinction is perhaps best explained in a passage from Lord Simon’s judgment in DPP v Morgan:32

By ‘crimes of basic intent’ [crimes of general intent] I mean those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The actus reus of assault is an act which causes another person to apprehend immediate and unlawful violence. The mens rea corresponds exactly . . . On the other hand there are crimes of ulterior intent [crimes of specific intent]—‘ulterior’ because the mens rea goes beyond contemplation of the actus reus. For example, in the crime of wounding with intent to cause grievous bodily harm, the actus reus is the wounding. The prosecution must prove a corresponding mens rea (as with unlawful wounding), but the prosecution must go further: it must show that the accused foresaw that serious physical injury would probably be a consequence of his act, or would possibly be so, that being a purpose of his act.

Thus, crimes of ‘basic’ intent are those in which the mens rea(s) of the offence does not extend beyond one or more of the non-mens rea (actus reus) elements of the offence as defined by its statutory or common law definition.

Although the matter is far from settled, Lord Simon’s passage supports the proposition that murder is a crime of ‘basic’ intent. Depending on the jurisdiction involved, an intention to kill or cause grievous bodily harm or even recklessness as to causing death or grievous bodily harm can constitute a sufficient mens rea for murder.33 The non-mens rea elements of murder (or any form of homicide) are: (1) causing; (2) the death; (3) of another human being.34 It is apparent that none of the aforementioned mens reas contemplate something more than causing the death of another human being. Intention to kill or recklessness as to causing death contemplate and relate exactly to the three non-mens rea

33 In the ACT, NSW and Tasmania, the mens rea for murder will be satisfied if the accused was reckless as to killing (grievous bodily harm will not suffice), Crimes Act 1900 (ACT) s. 12(1)(b); Crimes Act 1900 (NSW) s. 18(1)(a); Criminal Code (Tas) s. 157 (1)(c). Queensland, Western Australia and the Northern Territory require an intention to kill or cause grievous bodily harm, recklessness will not suffice: Criminal Code (NT) s. 162(1)(a); Criminal Code (Qld) s. 302(1); Criminal Code (WA) s. 279(1).
elements of the crime. The other possible mens reas, intention to cause grievous bodily harm or recklessness as to causing the same, actually contemplate something less than the three non-mens rea elements of murder. It therefore follows that murder is a crime of ‘basic’ intent.

On the other hand, if one or more of the mens rea(s) of an offence go beyond and contemplate something more than one or more of the non-mens rea elements, the offence will be deemed as one of ‘specific’ intent. For example, s. 20 of the Crimes Act 1958 (Vic) provides:

A person who, without lawful excuse, makes to another person a threat to kill that other person or any other person—
(a) intending that that other person would fear the threat would be carried out; or
(b) being reckless as to whether or not that other person would fear the threat would be carried out—is guilty of an indictable offence . . .

The non-mens rea element of s. 20 is a threat to kill another person. The mens rea for the offence requires that the accused must have either intended or acted with recklessness in regard to placing the other person in fear that the threat would be carried out. Thus, each of the alternative mens reas extends beyond and contemplates something more than one or more of the non-mens rea elements.

If the subject offence is one of ‘basic’ intent, it is sufficient to prove that the accused intended that each and every one of the non-mens rea elements of the subject offence would exist at the time the offence was to take place.35 As rape is an example of a ‘basic’ intent crime, the mens rea for attempted rape is satisfied by proof that the accused intended for there to be carnal knowledge or sexual penetration of the victim without his or her consent at the time the offence was to occur. Common assault (‘battery’ type) is an additional example of a ‘basic’ intent crime. An attempted ‘battery’ type common assault requires proof, therefore, that the accused intended for there to be an unlawful application of force against the victim without his or her consent at the time the offence was to take place.

If the subject offence is one of specific intent, the prosecution must prove, in addition to the mens rea required for basic or general intent offences, that the accused acted with whatever specific intent is required by the definition of the subject offence. Burglary at common law represents an example of a specific intent crime. At common law the elements of burglary are: (1) breaking; (2) entering; (3) of the dwelling of another; (4) at night-time; (5) with the intent to commit a felony therein. What makes this a ‘specific’ intent crime is that the mens rea element ((5) above) goes beyond and contemplates something more than one or more of the non-mens rea elements ((1) through (4) above). In other words, it contemplates something more than merely breaking and entering the dwelling of another at night-time; namely, an intention to commit a felony therein.

To satisfy the mens rea for attempted burglary, therefore, the prosecution must prove that the accused intended to bring about elements (1)

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through (4) and did so with the mens rea set out in element (5)—all at the
time the subject offence was to take place. Similarly, in order to satisfy
the mens rea for an attempt to commit s. 20 of the Crimes Act 1958 (Vic),
the prosecution must prove that the accused intended to make to
another person a threat to kill that person or any other person and either
intended that the person to whom the threat was made would fear that
the threat would be carried out, or was reckless as to whether the person
to whom the threat was made would fear that the threat would be
carried out—at the time the subject offence was to occur.36

(b) Are there offences that cannot be attempted?

What if the offence is one of ‘strict’ or ‘absolute’ liability which, by
definition, does not require the prosecution to prove any type of mens
rea or negligence on the part of the accused?37 As offences of this genre
cannot be characterised as ones of basic or specific intent, the foregoing
methodology for ascertaining the mens rea requirement for an attempt is
both incongruous and unworkable.

This raises the question of whether it is possible to incur liability for an
attempt to commit an offence of this type. Although there is a paucity of
reported cases on this subject, there is no reason in logic or principle that
would preclude liability. Under the decisions of the English Court of
Appeal and High Court in Mohan and Knight respectively, an accused
does not satisfy the mens rea for an attempt unless he or she intends for
the subject offence to be committed.38 The issue, therefore, is whether
such an intention can be reconciled with the nature of a strict or
absolute liability offence. In addressing this issue, it is important to
understand that the essence of an offence of strict or absolute liability is
that the prosecution is not required to prove ‘fault’ on the part of the
accused.39 It is equally important to understand that there is nothing in
the nature of such an offence that precludes liability on one who has acted with intention, knowledge, belief, recklessness, or
negligence in relation to the proscribed consequences or the existence of
facts that render the conduct criminal. It therefore follows that there is
no inherent conflict between the mens rea for an attempt and the nature
of an offence of strict or absolute liability. It also follows, based upon the
principle enunciated in Mohan and Knight, that the mens rea for an
attempt to commit an offence of this type is satisfied by proof that the
accused intended to bring about the actus reus elements of the subject
offence.

Another difficult issue is whether an accused can be convicted of an
attempt to commit an offence that requires one or more of the actus reus
elements to have been brought about solely by way of recklessness or
negligence on the part of the accused. For example, ss 17 and 24 of the
Crimes Act 1958 (Vic) provide:

36 For recent English authority which appears consonant with this analysis, see
Attorney-General’s Reference (No. 3 of 1992) [1994] 2 All ER 121.
37 Gillies, above n. 34 at 81.
39 Gillies, above n. 34 at 82.
17. A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.

24. A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence.

Is it not the very essence of ss 17 and 24 that the accused must cause serious injury to another person solely by way of recklessness (s. 17) or negligence (s. 24)?

Putting aside the controversial notion of constructive intention, is it not a maxim that intention and all forms of negligence are mutually exclusive of one another? If so, the requisite mens rea for an attempt cannot be reconciled with offences such as ss 17 and 24. Although this particular issue was not raised before the English Court of Appeal in Mohan, the subject offence at issue was one that required the actus reus elements (bodily harm) to have been brought about solely by wanton (reckless) driving on the part of the accused. Since the conviction was quashed on other grounds, the decision is not necessarily inconsistent with the view that one cannot be convicted of an attempt to commit an offence of this type.

On the other hand, if an offence is defined in a way that permits one or more of the actus reus elements to be brought about other than by way of recklessness or negligence on the part of an accused, in principle there is no apparent conflict that precludes liability for an attempt. Simply stated, the very essence of such an offence is not that one or more of the actus reus elements can only be brought about by an accused’s recklessness or negligence. The common law offences of rape and ‘battery’ type common assault serve well to illustrate this point. Both crimes consist of an alternative mens rea requirement that an accused act intentionally or recklessly in relation to one or more of the actus reus elements. In the case of rape, an accused must act with either intention or recklessness in regard to the woman’s lack of consent. In the case of ‘battery’ type common assault, an accused must act with either intention or recklessness in regard to making physical contact with another person. Thus, it is possible to attempt either of these crimes.

Finally, both categories of manslaughter at common law raise troublesome issues insofar as the law of attempts is concerned. With regard to involuntary manslaughter, by definition the accused does not intend to kill. It is apparent, therefore, that there can be no attempt to commit involuntary manslaughter because the requisite mens rea for an attempt requires nothing less than intent to bring about all of the actus reus elements of the subject crime which, in this case, would include the death of another human being. Thus, as in the examples of ss 17 and 24 above, the requisite mens rea for attempt and the very essence of the subject offence are such that they cannot be reconciled. If the accused

41 Gillies, above n. 34 at 647; Andrews v DPP [1937] AC 576 at 581.
intended to kill, the appropriate charge would be attempted murder, assuming the absence of some lawful justification or excuse.

If the intention to kill was induced by sufficient provocation on the part of V to reduce the conviction to voluntary manslaughter if V had died, there is a split of authority as to whether it is proper to charge the accused with attempted voluntary manslaughter or, if the charge is attempted murder, to direct the jury that it can convict on the lesser charge of attempted voluntary manslaughter.

In commenting on this split of authority, it is apparent that considerations of *stare decisis* alone are not an adequate justification for refusing to allow provocation to be raised as a defence to attempted murder. This is exemplified in the fact that the Code jurisdictions of Queensland, Western Australia, and the Northern Territory have eschewed common law precedent and extended the defence of provocation to crimes other than murder. On the opposite side, it may be argued that if an accused attempts to kill under circumstances that would allow the defence of provocation to defeat a charge of murder had the attempt been successful, the doctrine of legal impossibility would preclude a conviction for attempted murder. The argument follows that in order to prevent the accused from escaping criminal liability altogether, the better course is to recognise the offence of attempted voluntary manslaughter. The fatal flaw in this argument is that the doctrine of legal impossibility applies only in instances where the accused’s intended objective, even if fully implemented, would not have amounted to criminal misconduct. In the scenario postulated, the accused’s intended objective would have amounted to criminal misconduct, albeit not the crime of murder. Thus, reliance on the doctrine of legal impossibility is misplaced. In the final analysis, if the reasonable concession to human frailty rationale is an adequate justification for permitting the defence of provocation to reduce what would otherwise be murder to the lesser offence of voluntary manslaughter, there is no reason the defence should not apply as well to reduce attempted murder to the lesser offence of attempted voluntary manslaughter.

(c) The mens rea for attempt under the various statutory provisions throughout Australia

Most, if not all, of the states and territories have now codified the Australian common law position. In the Code jurisdictions of Western

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44 Criminal Code (Qld) ss 268, 269; Criminal Code (WA) ss 245, 246; Criminal Code (NT) s. 34(1).
Australia, Tasmania, and the Northern Territory, the relevant statutory provisions expressly require that the accused must intend to commit the subject offence.45

In Queensland, the statutory crime of attempt provides that ‘[a]ny person who attempts to commit any indictable offence is guilty of an indictable offence . . .’.46 The wording of the statutory attempt provisions in the common law jurisdictions of the ACT, New South Wales, and South Australia is virtually identical to that of Queensland, the only difference being that one can only be convicted of an attempt to commit an *indictable* offence in Queensland.47 In the event of statutory ambiguity in the common law jurisdictions, there is a presumption that common law principles apply in the absence of a clear legislative intention to the contrary.48 Although there is no such presumption in the event of statutory ambiguity in a Code jurisdiction such as Queensland,49 the common law is highly persuasive. In Victoria, s. 321N(2) provides:

For a person to be guilty of attempting to commit an offence, the person must—

(a) intend that the offence the subject of the attempt be committed; and

(b) intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place

Subsection (a) appears to adopt the common law position. But if that is so, what is the effect of subs. (b)? Does it add to or in any way qualify the common law position? In the view of this author, the answer must be that it does not. The court in *Evans* held that a *mens rea* can relate to either the prohibited consequence or consequences of one’s volitional act(s) or omission(s) as defined by the common law or statutory definition of an offence—or it can relate instead to the existence of facts which, according to the common law or statutory definition of an offence, render one’s conduct criminal.50 Where the requisite *mens rea* is one of *intention*, it typically falls within the former category. Where the *mens reas* of recklessness is concerned, it can just as easily fall within either category. The *mens reas* of knowledge and belief, on the other hand, typically fall within the latter category. And while there are certainly differences among the *mens reas* of intention, knowledge, and belief,51 there is very little difference between intention and knowledge

45 Criminal Code (WA) s. 4; Criminal Code (Tas) s 2(1); Criminal Code (NT) s. 4(1).
46 Criminal Code (Qld) s. 535.
47 Crimes Act 1900 (ACT) s 347; Crimes Act 1900 (NSW) s 344A; Criminal Law Consolidated Act 1935 (SA) s. 270A.
48 Gillies, above n. 34 at 8.
49 Ibid. at 9–10.
51 For insightful discussion of these *mens rea* generally, see Gillies, above n. 34 at 46–79.
or belief, aside from the fact that *intention* typically relates to consequences and *knowledge* or *belief* typically relate to the existence of facts that render the conduct criminal. There is very little difference between knowledge and belief; that is, belief is a state of mind that is one step removed from knowledge in that it allows for some doubt, albeit minor, as to the existence of the facts which render the conduct criminal.

When an offence is defined in such a way as to require that an accused act (or omit to act) with knowledge or belief as to the existence of certain facts, does it represent a departure from the common law to require that same knowledge or belief vis-à-vis the existence of those facts in order to satisfy the *mens rea* component of an attempt to commit the offence? For example, the statutory crime of rape under subs. 38(2)(a) of the Crimes Act 1958 (Vic) provides that ‘[a] person commits rape if . . . he or she intentionally sexually penetrates another person without that person’s consent while being aware that the person is not consenting or might not be consenting’. Consonant with the above analysis, the *mens rea* of intention relates to the consequence of sexually penetrating another person—while the alternative *mens reas* of awareness (knowledge) or recklessness relate to the existence of the fact that renders the conduct criminal: the absence of consent on the part of the victim. As rape under s. 38(2)(a) is a crime of basic intent, at common law the *mens rea* for an attempted rape under this provision would require that an accused intend to penetrate another person sexually without their consent at whatever time the offence is to occur. That an accused must intend for these circumstances to exist serves to underscore the reality that any person intending to commit a crime can never be absolutely certain that his or her criminal scheme will reach fruition. The wording of subs. (b) of s. 321N(2) reflects this reality by requiring that an accused ‘*intend* or *believe* that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place’ (emphasis added). In the context of subs. (b), therefore, there is little or no difference between the words ‘*intend*’ and ‘*believe*’. Moreover, subs. (b) is consonant with the notion that intention and belief typically relate to *proscribed consequences* and *the existence of facts rendering the conduct criminal* respectively. In substance, therefore, subss (a) and (b) are merely a codification of the current Australian common law position.

4. The *actus reus* for attempt at common law

As noted in the ‘Overview’ above, a major area of controversy surrounding the crime of attempt concerns the precise nature of its *actus reus* component. Under what is often termed the ‘proximity rule’, the *actus reus* of an attempt requires that the conduct of the accused must have progressed to the point where it is immediately and not merely preparatory to or remotely connected with the commission of the subject offence. As the cases that follow illustrate, the courts and legislatures have thus far failed in their efforts to formulate a satisfactory test for resolving this issue.
(a) The ‘last act’ test

The proximity rule was first and most famously enunciated in the case of R v Eagleton.\textsuperscript{52} In Eagleton the accused contracted with the government to supply bread to indigent persons, and would be paid based upon the number of loaves supplied. The accused then defrauded the government by selling underweight loaves, and money was credited to his account. Before the money could be withdrawn, the government charged him with attempting to obtain money under false pretences. Parke B enunciated a test for the \textit{actus reus} of attempt when he opined that ‘[a]cts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are’.\textsuperscript{53} Parke B further opined that the test is satisfied (as in this case) when the accused has performed the last act dependent upon himself leading to the completion of the intended crime.\textsuperscript{54} This extension of the proximity rule has been referred to as the ‘last act’ test.\textsuperscript{55}

For a number of reasons, the ‘last act’ test has failed to withstand the test of time. The first is that Parke B did not explain whether the performance of the last act dependent upon the accused toward the commission of the offence is an absolute prerequisite to satisfying the \textit{actus reus} component of an attempt, or merely a sufficient condition precedent thereto. If Parke B intended the former, then the test is laden with the potential for untoward results in cases that, unlike Eagleton, do not require action or inaction on the part of someone other than the accused in order to consummate the subject offence. One such consequence is that satisfaction of the ‘last act’ test would often result in the actual commission of the complete offence, thereby obviating the need to prosecute on the charge of attempt. Another potential untoward consequence is that an accused who fails to perform the ‘last act’ due to personal ineptitude or factual impossibility (discussed below) will totally escape criminal liability for his or her conduct. If, for example, a person purchases a firearm, loads it with ammunition, sneaks into someone’s home and lies in wait with every intention of shooting them to death, should that person escape liability for attempted murder solely because the firearm jammed when he or she pulled the trigger? Finally, in cases that involve a plan to consummate the subject offence in increments, as by slowly poisoning someone to death, it would flout the very underpinnings of the law of inchoate offences if an accused were to escape liability for attempted murder until the ultimate lethal dose has been administered.

It is logical to assume, therefore, that Parke B intended the ‘last act’ test as a merely a sufficient condition precedent in establishing the \textit{actus reus} for an attempt, and only in cases such as Eagleton in which the action or inaction of someone other than the accused is necessary to complete

\textsuperscript{52} (1855) Dears CC 376; 169 ER 776, 826.
\textsuperscript{53} Ibid. at 835.
\textsuperscript{54} Ibid. at 836.
\textsuperscript{55} See, e.g., above n. 34 at 685.
the subject offence. Be that as it may, even in these instances the courts and legislatures have resoundingly rejected the ‘last act’ test.56

In *Director of Public Prosecutions v Stonehouse*,57 the appellant was a British politician who took out several life insurance policies, faked his death, and subsequently attempted to begin a new life in Australia under an assumed name. At the time he was apprehended and extradited to Britain, his wife had not submitted any claims on the life insurance policies. The appellant appealed from his conviction for attempting to obtain property by deception on the ground that, *inter alia*, the appellant’s actions had not progressed far enough towards the commission of the offence to fulfil the *actus reus* requirement of an attempt.58

Counsel for the appellant accepted that the accused had made his final contribution to the commission of the crime,59 but nonetheless contended that he had not gone beyond the preparatory stage of the offence.60 The case of *R v Robinson*61 was heavily relied upon in this submission. In *Robinson*, the accused had staged an apparent burglary and robbery of his store in order to collect on an insurance policy. It was held by the court that as a fraudulent insurance claim had never been communicated to the insurance company, the offence did not go beyond the preparatory stage.62 The court in *Robinson*, therefore, founded its judgment on the proximity rule of Parke B in *Eagleton*.63

The court in *Stonehouse* did not question the validity of Parke B’s test, but did question whether it had been correctly applied in *Robinson*.64 After discussing the *Eagleton* test in more detail,65 the court went on to examine the viability of the ‘last act’ test.66 Lord Edmund Davies, with whom Lords Salmon and Keith concurred, rejected the proposition that a person who performed the last act dependent on himself for commission of an offence should necessarily be guilty of an attempt, as their last act could nonetheless fail to go beyond the preparatory stage.67 The court held that in this particular case, the appellant’s act of faking his death was sufficiently proximate to the crime of obtaining property by deception and, for that reason, upheld the conviction.68

*Stonehouse* was decided at a time when attempt was a common law offence in the UK. Twelve years later in *R v Jones*,69 the English Court of

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56 See, e.g., Crimes Act 1958 (Vic) s. 321N(1); Criminal Code (NT) s. 4; Criminal Code (Qld) s. 4; Criminal Code (WA) s. 4; see also Gillies, above n. 34 at 685; B. Fisse, *Howard’s Criminal Law*, 5th edn (Law Book Co: 1990) 393–4.
58 Ibid. at 64.
59 Ibid. at 84.
60 Ibid.
61 [1915] 2 KB 342.
62 Ibid. at 349.
63 Ibid. at 348.
64 [1978] AC 55 at 85.
65 Ibid. at 85–6.
66 Ibid. at 86.
67 Ibid.
68 For an example of more recent English authority denouncing the ‘last act’ test, see *Attorney-General’s Reference (No. 1 of 1992)* [1993] 2 All ER 190.
69 (1990) 91 Cr App R 351.
Appeal grappled with the proper construction to be accorded ss. 1(1) and 4(3) of the Criminal Attempts Act 1981, which provide:

1. (1) If, with intent to commit a criminal offence . . . a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence . . .

4. (3) Where, in a proceeding against a person for an offence under section 1 above, there is sufficient evidence in law to support a finding that he did an act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact.

The facts of Jones are very similar to the above example of the person who, armed with a loaded firearm, sneaks into another’s home with the intention of lying in wait and murdering the occupant, only to fail because the gun unexpectedly jammed when the trigger was pulled. In Jones, the appellant purchased a firearm, ammunition, and disguise and then proceeded to sneak into the victim’s car with the intention of shooting him to death. Fortunately for the victim, a struggle ensued and the appellant was disarmed and arrested before he was able to remove the safety catch and pull the trigger. The appellant was convicted of attempted murder and appealed on the ground that the trial judge had failed to direct the jury that s. 1(1) should be construed as a codification of the ‘last act’ test enunciated in Eagleton. Specifically, the appellant contended that three unperformed acts dependent upon the appellant were necessary for the subject offence to be consummated: removing the safety catch; placing his finger on the trigger; and pulling the trigger. In rejecting this argument, the Court of Appeal held that the requirements of s. 1(1) are satisfied when the preparatory phase ends and the accused begins to embark upon the commission of the subject offence. The court stressed that the accused need not reach the point where it is impossible to retreat from the commission of the subject offence in order to satisfy the actus reus component of an attempt.

(b) The ‘if not interrupted’ test
According to this test, the actus reus of an attempt is satisfied if an accused’s act(s) or omission(s) form part of a series of acts (or omissions) which, if not interrupted, would result in the commission of the subject offence. This test has been expressly adopted by statute in Tasmania (with qualifications) and has found support in a number of reported decisions. This test is also fraught with problems, the most poignant being that its adoption would have the effect of decriminalising attempts that fall within the doctrine of ‘factual impossibility’ (discussed below),

70 (1990) 91 Cr App R 351 at 351.
71 Ibid.
72 Ibid. at 355.
73 Ibid.
74 Criminal Code 1924 (Tas) s. 2(1), (3) and (4); R v Grogan (1889) 15 VLR 340 at 342; R v Page [1933] VLR 351 at 354; R v Bormelli [1962] SASR 214 at 218; R v Collingridge (1976) 16 SASR 117 at 119ff, 139, 140; R v McPherson (1857) 169 ER 975; R v Collins (1864) 9 Cox CC 497 at 499; R v Linnecor [1906] 2 KB 99; Davey v Lee [1968] 1 QB 366 at 370.
which has now been expressly repudiated as a defence in most jurisdictions, including Tasmania.\textsuperscript{75} In the absence of some very innovative statutory construction, it is difficult to understand how Tasmania can expressly adopt the ‘if not interrupted’ test and, at the same time, expressly reject the defence of factual impossibility. Although this issue has yet to be authoritatively decided, two justices of the High Court have construed the Tasmanian statute as abolishing the defence of factual impossibility.\textsuperscript{76}

(c) The unequivocal test
This test originated in the following passage from the judgment of Lord Salmond in \textit{R v Barker:}\textsuperscript{77}

\begin{quote}
[A]n act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which \textit{res ipsa loquitur} [the thing speaks for itself] applies . . . 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 are done.

This suggests that an accused’s act(s) or omission(s) will be insufficient to satisfy the \textit{actus reus} of an attempt unless they are explicable only on the basis that they manifest an intention to commit the subject offence. Thus, there cannot be an attempt if there is a plausible explanation of the relevant act(s) or omission(s) that is inconsistent with such an intention. This test has thus far received scant support in Australia.\textsuperscript{78} Although the ‘unequivocal test’ is open to the criticism that it poses an unreasonably high burden on the prosecution, the obvious counter argument is that it is entirely appropriate in light of the prosecution’s heavy burden of proof in criminal cases.

Unfortunately, there are other serious shortcomings that militate strongly against the adoption of this test. Suppose, for example, that there is uncontroverted evidence that after an accused procured a firearm, ammunition, and a disguise, he then told several of his closest friends that he planned to murder his spouse’s paramour at a time of his choosing. It is arguable, if not probable, that the ‘equivocal test’ would be satisfied under such circumstances. Yet there is little, if any, doubt that these circumstances disclose a classical example of conduct that is merely preparatory to and not immediately connected with the commission of the subject offence. The test, therefore, is laden with the potential

\textsuperscript{75} Criminal Code 1924 (Tas) s. 2(2).
\textsuperscript{76} \textit{McGhee v R} (1995) 130 ALR 142 at 160 (\textit{per} Toohey and Gaudron JJ); see also \textit{Haas v The Queen} [1964] Tas R 1 at 28 (\textit{per} Neasey J).
\textsuperscript{77} [1924] NZLR 865 at 874.
\textsuperscript{78} See \textit{R v Williams} [1965] Qd 86 at 100 (\textit{per} Stable J); \textit{O’Connor v Killian} (1984) 38 SASR 327. But see \textit{Nicholson} (1994) 76 A Crim R 187 at 190–2 (\textit{per} Underwood J); at 199 (\textit{per} Wright J), a case in which the Tasmanian Court of Appeal refused to adopt the test.
for contravening the cardinal tenet that liability for an attempt cannot be predicated on acts or omissions that do not progress beyond the preparation phase of a criminal scheme. Moreover, the test serves to further cloud rather than clarify the troublesome distinction between conduct that is immediately and not remotely connected with or merely preparatory to the commission of the intended crime.

(d) The statutory test in Victoria

Section 321N(1) of the Crimes Act 1958 (Vic) provides:

A person is not guilty of attempting to commit an offence unless the conduct of the person is—

(a) more than merely preparatory to the commission of the offence; and
(b) immediately and not remotely connected with the commission of the offence.

In practical terms, this approach is similar, if not identical, to the ‘proximity’ limb of the test enunciated by Parke B in *Eagleton*, absent the ‘last act’ qualification. It is also very similar to the approaches adopted by the House of Lords and the English Court of Appeal in *Stonehouse* and *Jones* respectively. All of these tests share a common thread that acts or omissions that amount to nothing more than preparation will not suffice. They also have in common, however one chooses to express it, that the act(s) or omission(s) of the accused must have progressed to the point that the commission of the subject offence is imminent.

In the final analysis, there has never been, nor is there likely to be, a formulation that can be applied with total fairness and consistency in determining whether the *actus reus* for an attempt has been satisfied. The tests set forth in *Eagleton* (minus the ‘last act’ qualification), *Stonehouse*, *Jones*, and substantially codified in s. 321N(1) of the Crimes Act 1958 (Vic), are probably the most satisfactory formulations of the *actus reus* of an attempt to date. Though laden with uncertainty and the potential for inconsistent results that create both the reality and perception of unfairness, it can at least be said that they are not tainted with the obvious flaws that inhere in the ‘last act’, ‘if not interrupted’, and ‘equivocal’ tests. This seemingly intractable difficulty in the law of attempts is perhaps best summed up by a rather crass but effective comment of Justice Potter Stewart in *Jacobellis v Ohio*.79 In a concurring opinion that concerned the definition of obscenity for purposes of the First and Fourteenth Amendments to the US Constitution, Justice Stewart wrote:80

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...
5. The issue of voluntary desistance

What of the situation in which an accused is *prima facie* guilty of an attempt, but voluntarily abandons his or her criminal scheme before the subject offence is consummated? Will such voluntary desistance absolve an accused of liability for an attempt? The answer is ‘no’ in both the UK and the Australian jurisdictions that have considered the issue. There is some support for voluntary desistance as a defence in the USA. It is clear, however, that voluntary desistance is not a defence in these jurisdictions if the abandonment is prompted by outside forces such as the sight of police officers, discovery that the intended crime is under police surveillance, or similar factors. In other words, the abandonment must be prompted by a bona fide change of heart rather than a desire to avoid detection.

The underlying rationale for the English and Australian position is a desire to avoid the difficulties that will often arise in proving that the desistance was not in fact prompted by a bona fide change of heart, but by outside forces of such as fear of police presence or surveillance. The English and Australian position assumes that this objective outweighs whatever incentive for abandonment may be derived from allowing voluntary desistance as a defence. Even if one disagrees with this assessment of the relative costs and benefits of the English and Australian position, in the absence of mandatory sentencing provisions the issue of voluntary desistance can and should be an important factor in sentencing discretion.

6. Impossibility as a defence to attempts

The doctrine of ‘impossibility’ as a defence has been the subject of much controversy and confusion over the years. Before proceeding to the cases and statutes that presently govern this issue in Australia, it is appropriate to explain the important distinction between ‘legal’ and


83 *People v Sittes*, 75 Cal 570 (1888); *People v Davis*, 70 Ill App 3d 454 (1979); *People v Lombard*, 131 Cal App 525 (1933); *State v Hansen*, 290 Minn 552 (1971).


86 Ibid.
‘factual’ impossibility. Under what is commonly referred to as the doctrine of ‘legal impossibility’, if an accused manages to accomplish everything that he or she intended but, contrary to his or her belief at the time, what is accomplished does not amount to a criminal offence, then neither an attempt nor any other offence has been committed. In principle, it is difficult to find fault with this doctrine. If one’s ultimate objective is not a criminal offence, this fact cannot be altered by an accused’s mistaken belief that his or her objective was in contravention of the criminal law.

The doctrine of legal impossibility arises in two scenarios. The first is where an accused mistakenly believes that his or her ultimate objective is in fact criminal. This occurs, for example, when a person smuggles a substance into Australia in the mistaken belief that its importation and possession are criminal offences. The second is where a person is not within the class of persons who, by law, are capable of committing the subject offence. An example would be a person who commits what would otherwise be a crime, but is below the age of capacity to incur criminal liability. The same is true of statutory offences that evince a clear legislative intent to exclude a particular class of persons from liability for an attempt to commit the subject offence. As explained by Professor Brent Fisse in Howard’s Criminal Law:

A statutory illustration is s 33A of the Crimes Act (N.S.W.) which provides that it is an offence to discharge or attempt to discharge any kind of loaded firearm with intent to inflict grievous bodily harm. It would not amount to an attempt under this section to endeavour to fire a rifle with an intent to inflict grievous bodily harm if, contrary to D’s belief, the rifle was not in fact loaded. The wording of the provision, coupled with the severe maximum jail penalty (14 years), evince a legislative intention to confine liability for attempt to the extreme danger arising from the intentional misuse of loaded firearms . . .

Although it is often said that legal impossibility is a complete defence to a charge of attempt, this is actually a misnomer. Simply stated, if no crime has been committed, then there is no need to interpose this or any other defence.

The doctrine of ‘factual’ impossibility, on the other hand, has proved to be more problematic over the years. The scenario envisaged by this doctrine is that the accused’s intended objective would have amounted to a crime on the facts as he or she believed them to be, but he or she failed to consummate the crime due to the existence of facts unbeknownst to him or her which made its completion impossible. Suppose, for example, that an accused enters the bedroom of an intended victim with the intention of shooting him to death. Assume further that the accused then fires several live rounds into a pile of laundry, mistakenly believing the pile to be the intended victim. Or, suppose that an accused intends to poison the victim by placing a lethal dose of cyanide in his or her drink.

87 Willis (1864) 4 SCR (NSW) (L) 59.
88 5th edn (Law Book Co: 1990) at 409.
Fortunately for the intended victim, the accused mistakenly places a harmless substance in the drink. These are classical examples of ‘factual’ as distinguished from ‘legal’ impossibility. In both instances the accused has acted with the requisite mens rea for attempted murder. Moreover, under any formulation other than the ‘if not interrupted’ test, the accused’s conduct has progressed far enough towards the commission of the subject offence to satisfy the actus reus for attempted murder. Is ‘factual’ impossibility a defence to a charge of attempted murder under these fact patterns?

In *Haughton v Smith*, the House of Lords held that ‘factual’ impossibility is a defence to what would otherwise have been an attempt. The decision came under severe criticism, and rightly so. If an accused has satisfied both the mens rea and actus reus components of an attempt, is there any reason he or she should be absolved of liability solely on the basis of ‘factual impossibility’? If one accepts that the three paramount objectives of the criminal law are deterrence, retribution, and rehabilitation, are any of these interests served by drawing a distinction between one who fails to consummate a crime due to factual impossibility and one who fails due to other factors such as personal ineptitude? Is the person who fires several live rounds at a pile of laundry in the mistaken belief that it is his or her intended victim any less culpable than the person who, with murderous intent, fires several live rounds at the intended victim and misses due to poor marksmanship?

The criticism of *Haughton v Smith* culminated in the Criminal Attempts Act 1981 (UK) that appeared to abolish the defence of factual impossibility. In *Anderton v Ryan*, however, the House of Lords construed the new legislation as sanctioning factual impossibility as a defence to attempt. The House of Lords subsequently revisited this issue in *R v Shivpuri*.

In *Shivpuri*, the House of Lords dealt with an accused that was in possession of a substance which he believed to be heroin, but which in fact was a legal vegetable material. The accused was charged with attempting to distribute heroin. The question presented on appeal was whether factual impossibility constituted a defence to the crime of attempt.

In dismissing the appeal, the House of Lords had no difficulty in finding that the accused intended to smuggle heroin and that his conduct in furtherance of that objective had gone beyond the preparation phase of the intended crime. The court opined that in determining whether the actus reus was satisfied, it should evaluate the degree of proximity between the accused’s acts and the intended crime. The court further opined that to evaluate acts according to their proximity to the

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94 Ibid. at 2.
95 Ibid. at 4.
96 Ibid. at 19.
97 Ibid.
intended crime would, in effect, allow factual impossibility to be a perfect defence because it is impossible for an act to be proximate to an event that cannot occur.98 Ultimately, the court reasoned that to accord this status to factual impossibility would create an irreconcilable conflict between ss. 1(1) and (2) of the Criminal Attempts Act 1981 (UK).

The House of Lords went on99 to analyse Anderton v Ryan,100 a case in which the accused was charged with and later acquitted of attempted theft; specifically, the accused had purchased goods that he falsely believed to be stolen.101 In reaching its decision, the court drew a distinction between ‘objectively innocent’ and ‘objectively guilty’ acts.102 An act is ‘objectively innocent’ when ‘the mind alone is guilty’,103 as where a person tries to steal an item in the mistaken belief that he or she is not the owner. ‘Subjectively’ the person is stealing, but ‘objectively’ the person is merely taking his or her own property.

Upon analysis of Ryan, the House of Lords found this distinction unworkable.104 The court reasoned that all acts which fall short of committing a crime are regarded in law as ‘objectively’ innocent.105 The court then considered whether Ryan might be distinguished on account of the ‘dominant intention’ of the defendant.106 The court also found this ground of distinction unworkable, not only because of the difficulty in defining ‘dominant intention’ to a jury,107 but also because of the theoretical hurdles it encountered in attempting to categorise the mens rea of intent into lesser and greater parts.108 Accordingly, the court overruled Ryan, stating that it was a ‘wrong’ decision.109 In light of Shivpuri, it is clear that factual impossibility in any form is not defence to the crime of attempt; this is also the current position in most Australian jurisdictions.110

In the Northern Territory and Queensland, the rejection of factual impossibility as a defence is subject to the qualification that the accused’s intention to commit the intended offence must be put into execution ‘by means adapted to its fulfilment . . .’.111 Though the foregoing qualification is stated as an actus reus requirement of an attempt, its practical effect is to allow factual impossibility to be raised as a defence whenever the circumstances were such that it was impossible for the accused to consummate the subject offence because the means used were not

99 Ibid.
100 [1985] AC 560
101 Ibid. at 560.
102 Ibid. at 584.
103 Ibid. at 583.
105 Ibid. at 22.
106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid. at 23.
110 Criminal Code (Qld) s. 4(3), Criminal Code (WA) s. 4; Criminal Code (Tas) s. 2(2); Criminal Code (NT) s 4(2); R v Mai and Tran (1992) 26 NSWLR 371; Britten v Alpogut [1987] VR 929 at 935–36, 938; R v Cegley [1989] VR 799; R v Lee (1990) 1 WAR 411 (CA WA) at 423, 433.
111 Criminal Code (NT) s. 4(1); Criminal Code (Qld) s. 4(1).
adapted to the fulfilment of his or her criminal objective. Thus, the above-quoted statutory expression appears to denote means which, under normal circumstances, would be sufficient to consummate the intended crime. Curiously, the statutory offences of attempt in Queensland and the Northern Territory are conspicuously silent on the question of how far an accused must progress towards the commission of the subject offence in order to incur liability for an attempt: Criminal Code (NT) s. 4; Criminal Code (Qld) s. 4. Nonetheless, at least one appellate court judgment has construed these provisions as adopting the common law position that the conduct in question must be immediately and not merely remotely connected with the commission of the subject offence.112 Though not expressed in the judgment of Mildren J, this construction was likely based on the precept that even in Code jurisdictions the common law is highly persuasive in resolving statutory ambiguities.113 The natural wording of s. 4, however, does not lend itself to such an interpretation. Assuming that the Northern Territory and Queensland legislatures intended to limit liability for attempt to conduct that is more than merely preparatory to the commission of the subject offence, the statutes in question should be amended to incorporate one of the various ‘proximity’ tests noted above.

The reason for allowing what amounts to a very limited defence of factual impossibility is that there are arguably situations in which it would be patently absurd to initiate a prosecution for attempt, notwithstanding that an accused has acted with the requisite mens rea and progressed beyond the preparatory phase of committing the subject offence.114 A classical example of this would be where D places a voodoo curse on V, fully intending and believing that the curse will result in V’s imminent death. As the means (the curse) are clearly not adapted to fulfilling D’s intention to kill, D could not be successfully prosecuted for attempted murder. While there is a certain appeal in allowing a limited defence of factual impossibility under such circumstances, it is important to keep in mind that attempt, like the other inchoate offences, is designed to allow law enforcement to pre-emptively strike out against persons who, despite possessing the requisite mens rea for an intended crime, have yet to fully express it in their conduct. But if that is so, is it not reasonable to assume that one who fails to consummate an offence because of insufficient means will later commit, or at least attempt to commit, the same offence through means that are adapted to fulfilling the criminal objective? It is the view of this author that the better approach is to abrogate the defence of factual impossibility in its entirety and leave the decision of whether to prosecute cases of this type within the discretion of the executive branch of the government.

Another limited version of the factual impossibility defence has been recognised in South Australian cases such as R v Collingridge115 and R v

112 Prior v R (1992) 91 NTR 53 at 58 (per Mildren J).
115 (1976) 16 SASR 117 at 122, 124.
These decisions held that factual impossibility can be a defence to a charge of attempt, but only when the circumstances were such that it was absolutely impossible to consummate the subject offence, regardless of the means adopted. According to these decisions, absolute impossibility does not include instances in which the commission of the subject offence is frustrated by human intervention such as an accused’s personal ineptitude, lack of sufficient means to accomplish the intended crime, voluntary desistance, or the intervention of a police officer or other interested party. This version of a limited defence of factual impossibility is also fraught with difficulty. Aside from the fact that the distinction between absolute impossibility and instances in which the commission of an intended offence is frustrated through human intervention is difficult to reconcile with the underlying rationale for inchoate offences, in many instances this distinction is simply unworkable. For example, suppose that D, intending to murder V, fires several live rounds into a large object located under a blanket on V’s bed. Unbeknown to D, V has gone to use the bathroom and the large object turns out to be nothing more than a pile of dirty laundry. Is this a case of absolute impossibility, or one in which the commission of the intended crime was frustrated through human intervention, in this case the human intervention of V in leaving the room just moments before the shots were fired?

7. Conclusion

As the foregoing discussion has demonstrated, the law of attempt has been riddled with seemingly insurmountable problems that considerable judicial and legislative efforts have, regrettably, failed to abate. The purpose of this article is not to provide a panacea for all of these contentious issues; rather, it is to analyse them from a new perspective that will facilitate a better understanding of their pitfalls and re-energise the type of academic discourse that will provide the impetus for much needed reform in this troubled area of the law. To be sure, the lesson of decades past is that just reform will only be possible if the courts and legislatures are prepared to look at these old problems from a different vantage point.