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# Notes and Comments

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## Attempts in English Criminal Law

Jennifer Temkin\* and Graham Zellick\*\*

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There has been no lack of attention paid to the intractable problems surrounding the law of attempt. Interest in them has been revived in England by the publication of the Law Commission's Working Paper on *Inchoate Offences*<sup>1</sup> and by the decision of the House of Lords in *R. v. Smith*<sup>2</sup>. As these are difficulties common to all common law jurisdictions, Canadian lawyers may be interested to learn of these recent developments. It is proposed to concentrate here on two main issues<sup>3</sup>: first, what conduct constitutes an attempt and secondly, the question of impossibility. Both are discussed in the working paper; *Smith* deals only with impossibility. Before considering these, however, it may be useful for Canadian lawyers to have some information as to the nature of the Law Commission and the way it operates.

The Commission, a full-time statutory body created in 1965 to keep English law under continuous review<sup>4</sup>, is similar to the Law Reform Commission of Canada<sup>5</sup>. It is examining, *inter alia*, the general principles of the criminal law with a view to their codification. To this end it has set up a working party consisting of Law Commissioners, members of the Criminal Law Revision Committee, representatives of the Home Office and practising lawyers to prepare working papers<sup>6</sup>. These papers are widely circulated for comment and criticism. They do not represent the Commission's final view,

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\*J. Temkin, Lecturer in Law, London School of Economics and Political Science, University of London.

\*\*G. J. Zellick, Lecturer in Law, Queen Mary College, University of London.

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1. Working Paper No. 50 — *Inchoate Offences: Conspiracy, Attempt and Incitement*, June 1973 (H. M. Stationery Office, London).
  2. [1974] 2 W.L.R. 1., *sub. nom. Haughton v. Smith*, [1973] 3 All E.R. 1109.
  3. Other matters discussed include the mental element in attempt, attempts which are successful, penalties, and a defence of withdrawal.
  4. Law Commissions Act 1965.
  5. Law Reform Commission Act, R.S.C. 1970 (1st Supp.), c. 23.
  6. There have been three earlier working papers by the working party on general principles of the criminal law: *The Mental Element in Crime* (W.P. No. 31); *Parties, Complicity and Liability for the Acts of Another* (W.P. No. 43); and *Criminal*

nor do they necessarily have its approval. Reactions to each paper are considered and the Commission itself prepares a formal report embodying its own recommendations, including a draft bill, which is presented to the Lord Chancellor, laid before Parliament and published<sup>7</sup>.

### *What Constitutes an Attempt*

When do acts not culminating in a criminal offence amount to an attempt to commit that offence? There must, of course, be the necessary mental element; but that alone is insufficient to impose criminal liability. There must also be some conduct. The question then arises: how far must the defendant go in seeking to commit his crime before he is guilty of an attempt? To find an answer to that question has long been an objective of criminal lawyers. Not that there has been any shortage of proffered answers: the "first stage" theory; the "final stage" theory; the "unequivocal act" theory; the "on the job" test; the "proximity" rule. All have been found wanting in one way or another; only the "proximity" rule — it is rather a rule than a test — has survived as a general guide. The working party point out that no abstract test has been evolved for determining whether an act is sufficiently proximate to the offence to be an attempt, so that it is impossible to know with any precision when there is that proximity which is required. Indeed, many jurists have concluded that it is impossible to fashion an abstract test capable of producing a certain answer<sup>8</sup>.

The proximity test does no more than distinguish mere acts of preparation from acts immediately connected with the commission of the offence. Only the latter attract penal liability, but the test fails to indicate where the line should be drawn in particular instances. As *Russell on Crime* puts it: "To say that the act done must be 'suffi-

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*Liability of Corporations* (W.P. No. 44). The fifth has just been published: *Defences of General Application* (W.P. No. 55).

7. No final reports have yet been published on the general principles of the criminal law.

8. See e.g. *R. v. Roberts* (1885), Dears. 539, 550 *per* Jervis C. J.; J. F. Stephen, *History of the Criminal Law* vol. 2 at 224; *R. v. Brown* (1899), 63 J.P. 790 *per* Darling J.; C.S. Kenney, *Outlines of Criminal Law* (14th ed: Cambridge University Press, 1933) 82; and P.R. Glazebrook, "Should We Have A Law of Attempted Crime?" (1969), 85 L.Q. Rev. 28, 36. American views to the same effect are cited in J. Hall, *General Principles of Criminal Law* (2nd ed: Bobbs — Merrill, Indianapolis, 1960) 577-578.

ciently proximate'<sup>9</sup> or that 'acts remotely leading to the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are'<sup>10</sup> is in fact merely to state the problem without solving it.'<sup>11</sup> A majority of the working party reject the test, since it has given rise to acquittals which in their view should have led to convictions. They cite *R. v. Robinson*<sup>12</sup>, *R. v. Komaroni*<sup>13</sup> and *Comer v. Bloomfield*<sup>14</sup> as instances of undesirable acquittals.

In *Robinson*, a jeweller had insured his stock against theft, concealed some on his premises, tied himself up and called for help. He told the police that his safe had been robbed, but confessed when the property was later discovered hidden under the safe that he had hoped to obtain money from the insurers. His conviction for attempting to obtain money by false pretences was quashed, since the false pretence had never been made: he had merely prepared the supporting evidence. Similarly in *Comer v. Bloomfield*, the defendant, having hidden his vehicle, enquired of the insurers whether a claim would lie for its loss. This was held to be too remote, as he had made only a preliminary enquiry and might not have proceeded to a formal claim<sup>15</sup>. In *Komaroni*, the defendants trailed a lorry for 130 miles with a view to stealing it and its load. This was held to be merely a continuous act of preparation and again not sufficiently proximate.

These cases do no more than demonstrate that courts may apply, or misapply, the test in a manner surprisingly favourable to the accused. They do not prove that the test is intrinsically defective. But the working party argue: "If it is right that one of the main reasons for a law of attempt is to allow the authorities to intervene at a sufficiently early stage to prevent a real danger of the substantive offence being committed, all these cases demonstrate that the present law is unsatisfactory".<sup>16</sup> This law-enforcement argument is their chief reason for urging extensions of the law<sup>17</sup>. Yet no mention is made of

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9. Kenny, *Outlines of Criminal Law, op. cit.*, at 93.

10. *R. v. Robinson*, [1915] 2 K.B. 342, 348, quoting Parke B. in *R. v. Eagleton* (1855), Dears. 515, 538.

11. 12th ed., 1964 (ed. J.W.C. Turner), vol. 1 at 182.

12. [1915] 2 K.B. 342.

13. (1953), 103 L.J. 97; see (1954), 104 L.J. 211.

14. (1971), 55 Cr. App. R. 305.

15. *Cf. R. v. Button*, [1900] 2 Q.B. 597.

16. Para. 73.

17. J. C. Smith and B. Hogan, *Criminal Law* (3rd ed.: Butterworths, London, 1973) 198, also recognizes the difficulty of the police in this respect, citing *R. v. Mills*,

the large number of cases where the result would be regarded as satisfactory; or of those decisions as favourable to the Crown as these three cases seized on by the working party are to the accused<sup>18</sup>. To have selected just these three cases — one of which, *Komaroni*, is not fully reported and is so obscure that it is not cited in any of the leading books — on which to support their entire thesis is a highly suspect way of proceeding.

There is always virtue in precision in the criminal law, and not just from the point of view of enabling the police to move in at exactly the right moment. It must be admitted, however, that the vagueness of the proximity rule does not necessarily work hardship to the accused, since he must not only have a guilty mind but have taken steps towards achieving his goal. The usual arguments for certainty in the criminal law do not, therefore, apply so stringently in this area, for the defendant knows full well that he is engaged in an unlawful pursuit.<sup>19</sup> The true reason for circumspection here is to avoid convicting the person who would not in fact have gone the whole way in any event but might have resiled from the final act. We need to be satisfied, in Glanville Williams' phrase, of his "constancy of purpose".<sup>20</sup> Mere acts of preparation do not unequivocally designate a potential criminal who is truly a threat to the community, at the time or in the future, although there is no indication that such a consideration carried any weight with the working party. Recognition of this led to the development of the unworkable "equivocality test" in New Zealand,<sup>21</sup> ephemeraly adopted in England.<sup>22</sup>

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[1963] 1 Q.B. 522 and *R. v. Lawson*, [1959] Crim. L. Rev. 134 as illustrations. But *Mills* is not about attempt at all and *Lawson* not only shows the needs to maintain the distinction between preparatory and proximate acts but also seems to have applied it sensibly. While the police may have been in some difficulty in *Lawson*, it is by no means certain that an act of gross indecency with the child was in contemplation. 18. See e.g. *R. v. Button*, *supra*, note 15; *Jones v. Brooks* (1968), 52 Cr. App. R. 614.

19. This point is also made by R. Buston, [1973] Crim. L. Rev. 651, 665.

20. *Criminal Law: The General Part* (2nd ed: Stevens, London, 1961) 631.

21. The theory was first propounded by Salmond in his *Jurisprudence* (6th ed.: Sweet & Maxwell, London, 1920) 346 and applied by him in *R. v. Barker*, [1924] N.Z.L.R. 856. It was discarded by the Crimes Act, N.Z. 1961, s. 72(3) restating the ordinary proximity rule.

22. It was first taken up in England by Dr. Turner in "Attempts to Commit Crimes" (1934), 5 C.L.J. 230 and found its way into *Russell and Kenny* of which Dr. Turner was editor, although he later modified the theory: see *Russell on Crime* (12th ed.: Stevens, London, 1964) vol. 1, at 184; Kenny's *Outlines of Criminal Law* (18th ed., 1962) 98. It was given impetus when *Archibold's Pleading, Evidence and Practice in Criminal Cases* (33rd ed.: Sweet & Maxwell, London, 1954, at 1489) adopted it,

Take, for example, an enraged husband who, having learned of his wife's adultery, seizes a knife from the kitchen drawer and makes straight for her lover's house. Many perfectly respectable persons may have done this, or something comparable, with every intention of committing the crime; yet long before the arrival at the lover's house, the rage has subsided, the criminal intent evaporated, the constancy of purpose eroded. Can it be said that such a person was at some point along the line guilty of attempted murder? The law would be not only absurd but oppressive if it answered affirmatively. The way to discourage persons from arming themselves with knives in public places is to create specific substantive offences such as possessing offensive weapons, and that of course is precisely what is done.<sup>23</sup> There is no need to invoke the law of attempt. Often, also, that other inchoate offence, conspiracy, will be appropriate.

Precision would be attained by wholly abandoning the distinction between preparatory and proximate acts and making punishable any overt act evidencing a criminal intention, as the law originally did,<sup>24</sup> but the working party wisely reject so wide an extension. Instead, the majority favour the "substantial step" test — it is hardly a "theory" — found in the Australian Territories Draft Criminal Code<sup>25</sup> and the American Law Institute's Model Penal Code.<sup>26</sup>

They concede that "the words 'substantial step' are not words of much precision in themselves, nor do they relate the closeness of the step to the commission of the crime"; and also that "the adoption of the test would cast very much wider the net by which acts preceding the commission of an offence would be brought within the operation of the criminal law".<sup>27</sup>

That the "substantial step" formula is no less imprecise than any which have gone before is evinced by the Australian draft code,

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leading to some judicial approval in *Davey v. Lee*, [1968] 1 Q.B. 336 and *Jones v. Brooks* (1968), Cr. App. R. 614. *Archibold* is alone in continuing to assert that the test as modified still represents English Law: 38th ed., 1975, Para. 4105 at 1551. For its defects, see *Williams, op. cit.*, Para. 202 and J. C. Smith, [1967] Crim. L. Rev. 358. The theory was early rejected in Canada: see e.g. *R. v. Cline* [1956] O.R. 539; 4 D.L.R. 480.

23. The Prevention of Crime Act 1953. The unlawful carrying of firearms is punished by the Firearms Act, 1968.

24. See *Glazebrooke, op. cit.*, at 29 *et seq.* See also *R. v. Gurmit Singh*, [1966] 2 Q.B. 53.

25. Ss. 52-53. Set out in App. E. to the working paper.

26. Proposed Official Draft (1962), 501 (1) (c), (2). Set out in App. F to the paper.

27. Para. 75.

for in describing the circumstances constituting a substantial step it is expressly declared that "conduct constituting mere preparation for the commission of an offence may, according to the circumstances, amount to a substantial step".<sup>28</sup> Examples, not designed to be exhaustive, then follow:<sup>29</sup>

- (a) lying in wait for, searching out or following the contemplated victim of the intended offence;
- (b) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;
- (c) reconnoitring the place contemplated for the commission of the intended offence;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offence will be committed;
- (e) possession of materials to be employed in the commission of the offence which are specially designed for such unlawful use, or which can serve no lawful purpose in the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the offence, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose in the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the offence.

The Model Penal Code uses exactly the same examples.<sup>30</sup> Several of these, (a) and (c) for example, would clearly be merely preparatory acts in English and Canadian law such as to exclude liability. The working party observe that this may be said to penalise conduct which is too remote from a contemplated offence and comes close to punishing mere intent. The majority feel, however, "that these possible disadvantages are outweighed"<sup>31</sup> by the convictions that would result in cases like *Robinson* and *Comer v. Bloomfield*. Such a result, however, is no answer to the uneasy feeling generated by the proposal: it is no reassurance to those who fear that the sweep of the law will be too wide to answer that a few undesirable acquittals, if indeed that is what they are, would be avoided when that was manifestly at the cost of an unknown number of undesirable and unwanted convictions. The working party tacitly recognise this, since they see the provision of specific examples appended to the

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28. S. 53.

29. *Ibid.*

30. S. 5.01(2).

31. Para. 75.

statute as ensuring that “preliminary steps only, which are not substantial, are not held to be attempts”.<sup>32</sup>

It is curious that the phrase “substantial step” commends itself so strongly, since the working party state explicitly that they wish to see merely preliminary steps excluded while the Australian code explicitly includes them. But then, on examining the examples which the working paper lists, no such distinction is apparent. The two codes are followed so closely, with but minor modification, that it cannot be said that “preliminary steps only” do fall outside its ambit, unless that concept has been given a fresh and unarticulated meaning very much narrower than the one to which we are accustomed.

The illustrations given in the working paper provide the only guide to the proposed test, which apparently defies either analysis or definition. Indeed, no attempt is made at either. What is more, the examples themselves are not intended to be exhaustive descriptions of what may amount to a substantial step. The working party are content with this since it would be for the judge to decide whether the particular acts alleged constituted a substantial step and to direct the jury accordingly. Where the judge is to derive guidance, in the absence of any conceptual framework, is not specified. The working party admit that the expression “substantial step” is “not ideally clear”.<sup>33</sup> In fact, is it not so lacking in precision as to be virtually meaningless? At least the proximity rule supplies the somewhat rough and ready starting point of excluding merely preparatory acts. The “substantial step” test does, however, find favour with the learned editors of *Archbold* who commend it enthusiastically: “This theory has the advantages of making it tolerably clear to the police at what stage they may intervene, of being easy for a judge to adopt in directing a jury, and of being easy to understand, and it remains a question whether ultimately English law will adopt this principle.”<sup>34</sup> It is to the examples, then, that we must turn to divine the majority’s thinking.

There are eight illustrative situations, as follows:<sup>35</sup>

- (a) Committing an assault for the purpose of the intended offence.

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32. *Ibid.*

33. Para. 77.

34. 38th edn., 1973 (ed. T.R.R. Butler and S. Mitchell), Para. 4106, at 1552. See also R. Buxton, “The Working Paper on Inchoate Offences: (1) Incitement and Attempt” [1973] *Crim. L. Rev.* 656, 665-668.

35. Paras. 79-87.



- (b) Lying in wait for, searching out or following the contemplated victim or object of the intended offence.
- (c) Enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission.
- (d) Reconnoitring the place contemplated for the commission of the intended offence.
- (e) Unlawful entry upon a structure, vehicle or enclosure, or remaining thereon unlawfully for the purpose of committing or preparing to commit the intended offence.
- (f) Acquiring, preparing or equipping oneself with materials to be employed in the commission of the offence, which are specially designed for such unlawful use or which serve no lawful purpose in the circumstances.
- (g) Preparing or acting a falsehood for the purpose of an offence of fraud or deception.
- (h) Soliciting any person, whether innocent or not,<sup>36</sup> to engage in conduct constituting an external element of the offence.

Illustration (a) would be apt to cover an indirect assault, such as an assault on a mother for the purpose of kidnapping her child. Illustrations (b), (c) and (d) are taken from the Australia and Model Penal Codes, the only modification being the addition of the word "object" in (b) so as to cover a vehicle as in *Komaroni*. Illustration (e) is similar to the two codes except that it is widened to include a person who unlawfully hides in a building after it has been closed in order to steal and to cover a situation in which it is not intended to commit the offence in the place in question, as where a person enters a room adjacent to a bank for the purpose of tunnelling into the bank.

Illustration (f) is an amended amalgam of (e) and (f) in the Australian draft code, where the emphasis is on mere "possession", which the working party dislike. This category would include, for example, acquisition of a pen for the purpose of forgery or of matches for arson "where the circumstances provide ample evidence of why the materials were acquired".<sup>37</sup> This graphically illustrates the extent to which this new test would extend the law,<sup>38</sup> and how dangerously close it comes to punishing any overt act. The enraged and betrayed

36. The solicitation of a non-innocent agent is expressly included here, although it now amounts only to the offence of incitement, in order to avoid the defendant's being acquitted solely because the Crown, having charged an attempt, cannot prove the agent's innocence. It would not give rise to a conviction in circumstances not presently amounting to one inchoate offence or another.

37. Para. 83.

38. For example, in *R. v. Taylor* (1859), 1 F. & F. 511, Pollock C.B. thought that buying matches with intent to commit arson would not be sufficiently proximate. Cf. *Gurmit Singh, supra*, at note 24.

husband hypothesised earlier would be caught by this provision and turned into a criminal even before he had emerged from his own house. The other difference from the Australian code is the addition of the words “equipping oneself with”, designed to cover the situation where both “acquisition” and “possession” are inappropriate because the person proposes to commit a crime with an object already in his possession. Again, the taking of the kitchen knife provides an illustration.

Illustration (g) is specifically intended to deal with cases like *Robinson and Comer v. Bloomfield*. Even if substantial steps were taken in those cases, this illustration goes further. Suppose the defendant in *Comer v. Bloomfield* had merely concealed his vehicle but had not yet made even his preliminary enquiry of the insurers. This would still satisfy the illustration, but it is far from clear that liability should be imposed in circumstances so remote from the commission of the offence.

The need to improve the present test is beyond argument,<sup>39</sup> but the difficulties involved are formidable, as the working paper unintentionally reveals. Whether the present test is entirely discredited because a few decisions are aberrant remains questionable and is certainly not justified in the paper. Without any definition or statement of purpose, it is difficult to know what the majority think the law ought to accomplish in this field, beyond enabling the police to intervene at the right moment. But what is the right moment? While much impressive thought has clearly gone into the detail of the illustrations, the paper is weak in developing the reasoning that has produced them.<sup>40</sup> Perhaps a more rigorous base would have emerged had the arguments of the minority been fully set out, requiring the majority to justify their case more cogently.

Many of these reservations seem to be entertained by the Law Commission itself. In a brief introduction to the working paper, the Commission realise that the proposal would very likely be controversial. They note that the fact that the proposed test would allow conviction in cases like *Robinson* does not demonstrate that it is in itself satisfactory. Admitting the imprecision of the present law, the Commission point to what they regard as its two valuable features:

39. For a thorough analysis and devastating critique of the “perpetration” test, as it is called in Scotland, see G. H. Gordon, *The Criminal Law of Scotland* (Green & Sons, Edinburgh, 1967) 161-167.

40. A different and very favourable view of the paper’s quality, however, is expressed by Buxton, *op. cit.*

one, that it requires a distinction between acts of preparation and acts constituting an attempt; and two, that it is for the jury to determine whether the conduct is sufficiently proximate.<sup>41</sup> They conclude:<sup>42</sup> “If, as has been suggested,<sup>43</sup> the whole question of what conduct amounts to an attempt must be decided as a matter of common sense in each particular case, it is for careful consideration whether the definition of an attempt can be better formulated than in terms of adequate proximity by a properly instructed jury.” However, any failure by the working party to persuade the Commission that the substantial step test is the answer need not be taken as a final confirmation that the present law is incapable of improvement. It would indeed be sad if that were so and we were left for all time with a test with which no one in recent years save the Law Commission itself was happy. Yet it is idle to seek to formulate a verbal test until we have determined what stage in any sequence of actions leading towards the commission of a crime ought to justify both police intervention and conviction; and that is as much a moral as a legal enquiry.

### *Attempting the Impossible*

It has been unclear for some time whether the man who tries to steal his own umbrella, to handle goods which he wrongly believes to be stolen or to shoot his friend with a pistol which turns out to be a toy can be convicted of attempt in an English court. Recently, there have been two discussions of the conflict in the authorities. The House of Lords in *R. v. Smith* and the Law Commission’s working party have arrived at very different conclusions, however.

Prior to these endeavours, a distinction was commonly drawn between four different types of impossibility: (1) Where the defendant’s failure was due to insufficiency of means, as where he tried to poison his victim with an inadequate quantity of cyanide, he would be criminally liable. (2) Where there was what was sometimes referred to as a physical impossibility arising otherwise than through an insufficiency of means, the defendant’s liability was once again assured. Typical examples of this class of impossibility were where

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41. See *R. v. Cook* (1964), 48 Cr. App. R. 98. The view before *Cook* was that it was a matter for the judge: see e.g. *Archibold* (35th ed., 1962), Para. 4105; *Russell on Crime, op. cit.*, vol. 1 at 178.

42. *Op. cit.*, at viii.

43. *Smith and Hogan, op. cit.*, at 198.

the defendant tried to steal a ring from an empty pocket or to shoot into an empty room believing his victim to be there. In *R. v. Macpherson*<sup>44</sup> and *R. v. Collins*,<sup>45</sup> it was held that there could be no liability in such circumstances, but these decisions were overruled in *R. v. Ring*<sup>46</sup> and similarly rejected in Canada.<sup>47</sup> (3) Where the defendant intends to commit a non-existent crime, as where a male over 21 intends to have sexual relations with another consenting male adult believing this to be a criminal offence. There was universal agreement that there could be no liability for attempt in this situation. (4) What was known as legal impossibility where the defendant was able to put into effect his exact intentions but by a stroke of good fortune and contrary to his own expectations, he had not and could not have committed a crime in any case. A common example of this type of case which constantly appeared in the case law and was in fact the situation in *Smith* was where the defendant had every intention of receiving stolen goods and took proximate steps towards or managed to obtain possession of them. It would then transpire that the goods had been returned to lawful possession and had consequently ceased to be stolen. It was this final class of impossibility which had led to conflict in the case law. In *R. v. Percy Dalton*,<sup>48</sup> *R. v. Donnelly*<sup>49</sup> and *R. v. McDonough*,<sup>50</sup> it was held that there could be no liability, whilst in *R. v. Millar and Page*<sup>51</sup> and *R. v. Crispin and Curbishley*<sup>52</sup> the opposite was held.

Conflict in the case law was matched by disagreement among academic writers as to the proper scope of the law. Professor J. C. Smith<sup>53</sup> had argued forcefully in favour of the *Dalton* approach on two main grounds. First, that where a man has accomplished all that he set out to achieve and the law has not declared such conduct to be an offence, it is not appropriate for his conduct to be converted into a crime by the law of attempt. If a gap in the law is thereby revealed, what is called for is further legislative provision. Secondly, in such

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44. (1857), Dears. & B. 197.

45. (1864), 9 Cox C.C. 497.

46. (1892), 17 Cox C.C. 491.

47. See for example, *R. v. Scott*, [1964] 2 C.C.C. 257.

48. (1949), 33 Cr. App. R. 102.

49. [1970] N.Z.L.R. 980.

50. (1962), 47 Cr. App. R. 37.

51. (1965), 49 Cr. App. R. 241.

52. (1970), 55 Cr. App. R. 310.

53. "Two Problems in Criminal Attempts" (1957), 70 Harv. L. Rev. 422; "Two Problems in Criminal Attempts Re-examined" [1962] Crim. L. Rev. 212.

circumstances, the defendant's actions cannot properly be described as an attempt. They neither sound like nor resemble an attempt since the defendant has succeeded in his purpose. Professor Glanville Williams,<sup>54</sup> on the other hand, had argued equally forcefully that where the defendant's *intentions* were criminal and he took action towards their implementation, he should be guilty of attempt. To try to sub-divide this category into legal and factual impossibility and distinguish between them so far as criminal liability was concerned was, he argued, neither logically nor socially justifiable.

In *Smith* in the Court of Appeal,<sup>55</sup> the decision in *Percy Dalton* was upheld and the defendant's conviction was quashed. In the view of Lord Widgery C. J., it would be wrong to charge a defendant with an attempt where he had accomplished everything he had set out to accomplish. (Smith had actually taken possession of the goods.) The offence of attempt, it was held, presupposed a failure to execute one's purpose and it ought not to be made use of in order to impose liability upon persons whose conduct had not infringed the law. The problem raised by this rationalisation is that it leaves open the question of whether there ought to be liability where the defendant does not accomplish all that he set out to do, though he takes proximate steps in that direction, but where even had he done so, his actions would not have amounted to a crime: for example, if Smith had taken proximate steps towards receiving the goods without actually managing to do so.

However, such doubts were dispelled by the House of Lords which upheld the judgment of the Court of Appeal and took the opportunity to offer a further exposition of the law. The main speech was delivered by Lord Hailsham of St. Marylebone, L.C., who adopted the sixfold classification of attempts suggested by Turner J. in the New Zealand case of *R. v. Donnelly*.<sup>56</sup> The four classes of impossible attempts mentioned above are covered by categories 4, 5 and 6 of this classification. Category 4 is described as covering situations where the attempt fails through inefficiency, ineptitude or insufficient means. Hence, it includes attempts which fail not only through impossibility (lack of means) but also those which fail for other reasons. In Lord Hailsham's view, category-4 defendants ought to be liable for attempt.

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54. "Criminal Attempt — A Reply" [1962] Crim. L. Rev. 300.

55. [1973] 2 All E.R. 896.

56. [1970] N.Z.L.R. 980, 990-991.

It is in the approach to category-5 defendants that the judgment becomes controversial and goes further in restricting liability than any academic opinion would allow. Turner J.'s fifth category covers those cases in which the defendant finds that "what he is proposing to do is after all impossible — not because of insufficiency of means, but because it is for some reason physically not possible, whatever means be adopted". It was the view of the whole House that *Macpherson* and *Collins* had been correctly decided, *Ring* having been decided without full reasons.<sup>57</sup>

Lord Hailsham provided some further examples of situations which would come within category 5 and exclude liability for attempt. He instanced the defendant who shot at a wax image of an individual he intended to kill; who administered a glass of pure water to his victim believing it to contain cyanide; and who attempted to "assassinate" a corpse or a bolster in a bed, believing it to be the living body of his enemy. Turner J.'s sixth category was "legal impossibility" and covered attempts to commit non-existent crimes. The House held that *Percy Dalton* had been correctly decided and there could be no liability in these situations. Moreover, the decision in *Curbishley and Crispin* was expressly disapproved, thus determining the issue left open by Lord Widgery in favour of excluding liability where the defendant's unaccomplished purpose would not, if completed, have been an offence. The House of Lords has thus favoured a very different approach from the one taken by the Canadian Criminal Code.<sup>58</sup>

The Lord Chancellor did, however, suggest that the defendants might instead have been charged with conspiracy. The working party point out that the problem of impossibility must affect all the inchoate offences alike and that liability ought to depend upon the same principles. It is not to be supposed that the Lord Chancellor does not share this view. On the facts in *Smith*, the defendants formed an agreement to handle the stolen property some time before it was intercepted by the police; hence, at the time of the commission of the offence of conspiracy, there was no question of impossibility.

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57. The House similarly expressed disapproval of *R. v. Brown* (1889), 24 Q.B.D. 357.

58. S.24(1) reads: "Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his attention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence."

The working paper, which had declared itself in favour of the so-called subjective approach,<sup>59</sup> was not followed by the House of Lords. The man who is through circumstances unable to carry out his criminal designs is as morally guilty, as dangerous and as deserving of punishment as the man whose project is unclouded by impossibility. Hence the working party favour the imposition of liability in most impossibility situations, the only exception being where the defendant is mistakenly under the belief that his intended actions will infringe the criminal law when the law does not cover such activity at all; for example, where the defendant, a male over 21, believes that it is a criminal offence to have sexual relations with another consenting male of the same age.

The working party have chosen to achieve this result by a formulation which they evolved after considering a series of typical examples of impossibility situations. It is submitted that the working party's aims could have been realised far more effectively and simply by adopting section 24 of the Canadian Criminal Code which would seem clearly to articulate the principle at issue in a way that the working party's formulation utterly fails to do. The working party's proposals are as follows:<sup>60</sup>

- (i) A person may be guilty of an attempt to commit a crime notwithstanding that the means by which the crime is intended to be committed would in fact be inadequate for the commission of the crime.
- (ii) A person may be guilty of an attempt to commit a crime notwithstanding that -
  - (a) the person in respect of whom the crime is intended to be committed is dead, does not exist or does not possess a characteristic which the person believes him to possess (necessary for the crime);
  - (b) the property in respect of which the crime is intended to be committed does not exist or does not possess a characteristic which the person believes it to possess (necessary for the crime);
- (iii) Save as aforesaid a person is not guilty of an attempt to commit the crime if he could not commit the crime contemplated owing to the non-existence of an element required by law for that crime;
- (iv) The principles outlined in (i), (ii) and (iii) should apply also to incitement and conspiracy.

Several examples are provided of situations which the above is intended to cover: (A) The defendant, intending to kill P, fires a

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59. Para. 129.

60. Para. 136.

number of bullets into the bed in which he believes P to be sleeping. In fact P is (1) behind the wardrobe, or (2) in the next room, or (3) even in another country.<sup>61</sup> (B) The defendant shoots at a stump wrongly believing it to be a man.<sup>62</sup> In fact, it is arguable that A (1) and (2) are not impossibility situations at all, but, assuming that they are, it is difficult to see how either A or B fits within the classification. The chief reason for this appears to be the confusion which runs throughout the paper on the difference between the presence and the existence of a person or object. Example A is described in the working paper as involving persons who do not exist; yet this is clearly not the case. They do exist, but they are not present at the right time or place. The question remains how A and B are to be dealt with, since they also fall outside paragraph (iii), which relates only to situations apart from those mentioned in paragraphs (i) and (ii) where the impossibility is due to the non-existence of an element required by *law* for that crime. The classification itself provides no answer to this. There is clearly a danger in permitting examples to determine a classification. Where a slightly different factual situation arises, it cannot be guaranteed to cope and inconsistency is a likely result. Finally, the working party is forced to concede that its proposals, owing to their "extreme breadth of operation", are capable of causing injustice and that it will therefore be for the police and the courts to use their discretion to avoid this!<sup>63</sup>

But perhaps the principal objection to the working paper is its failure adequately to advert to the crucial question of what our penal system can do about people with dangerous thoughts which cannot in the circumstances possibly be translated into criminal action. It is clear that, as far as the working party is concerned, the resolution of problems of substantive law is not to be impeded by consideration of matters of penology. However, once it is proposed to deal with people on the basis of their intentions, it is hard to remain aloof from the fact that our penal system has manifestly failed to cope with the individuals brought within it. It is true that in certain circumstances dangerous men have to be kept from the successful execution of their plans, as where there is an intent to murder or to do serious harm to a specific individual. In such cases, however, there will be no need to make use of the law of attempt, since the defendants will generally

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61. Para. 131(b).

62. Para. 128.

63. Para. 134.



have committed some lesser substantive offence.<sup>64</sup> It is not even as if punishment in these circumstances can serve the interests of general deterrence, since no-one plans to attempt the impossible. Arguably, therefore, the only end to be served here is retribution. It is submitted that recognition of the limitations of our penal system should make us very wary of imposing punishment upon those whose actions could not in the circumstances have brought about the state of affairs the law seeks to prevent. The decision in *Smith* is thus a welcome one in that it insists upon upholding the fundamental principle of the criminal law that there must be a criminal act as well as a guilty mind, for, in the words of Lord Reid, “to punish people for their guilty intention [would be to introduce] a radical change in the principles of our law”.<sup>65</sup>

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64. See *e.g. supra*, at note 23.

65. [1973] 3 All E.R. 1109, 1121.