CHAPTER 13

INCHOATE LIABILITY

The structure of inchoate liability

13.1 'Inchoate' offences criminalise preliminary steps taken in the execution of some unlawful design. There are three basic forms of inchoate liability under the Penal Codes:

- Attempting to commit an offence: SI ss 378-379; Ki/Tu ss 371-372. Attempting to commit a felony that would be punishable by 14 years' imprisonment or above is a felony generally punishable by 7 years' imprisonment: SI s 380; Ki/Tu s 373. Otherwise, attempts are generally misdemeanours punishable by up to two years or a fine or both: SI/Ki/Tu s 41.
- Soliciting or inciting the commission of an offence: SI s 381; Ki/Tu s 374. There is generally liability to the same punishment as for an attempt.
- Conspiring with another person to act unlawfully: SI ss 382-384; Ki/Tu ss 376-378. Conspiring to commit a felony is a felony generally punishable by 7 years' imprisonment: SI s 383; Ki/Tu s 376. Otherwise, conspiracies are generally misdemeanours punishable by up to two years or a fine or both: SI/Ki/Tu s 41.

13.2 Some instances of inchoate liability fall outside the general scheme:

- There are provisions establishing penal liability for specific inchoate offences. Examples include: SI s 136F(3)-(5) prescribing various measures of penal liability for attempted rape with different circumstances or consequences; SI s 215(a); Ki/Tu s 208(a) prescribing liability to life imprisonment for attempt to murder; SI s 218; Ki/Tu s 211 prescribing liability to 10 years imprisonment for conspiracy to murder.
- Some offences are designed in inchoate form or to include inchoate forms. See, for example: SI s 157; Ki/Tu s 110 extending the offence of abortion to attempting to perform an abortion; SI s 116; Ki/Tu s 110 on conspiracy to defeat the course of justice.

13.3 In addition to the inchoate offences, there are some other kinds of offences that deal with steps taken towards the commission of some harm rather than with the occurrence of the harm itself. In particular, some offences focus on an intention to cause harm that is ulterior to the physical elements of the offence. Examples are burglary and housebreaking under SI ss 299, 301; Ki/Tu ss 292, 294, which require entering with intent to commit a felony such as theft. The felony need not occur. The intent to commit a felony is therefore an ulterior intent. Some general principles respecting inchoate liability are equally applicable to these offences of ulterior intent. See, for example, *Cogley v R* [1989] VR 799

where general principles respecting liability for attempting the impossible (see below, **13.33-13.35**) were applied to an offence of assault with intent to rape.

13.4 A person charged with committing an offence may be convicted of attempting to commit that offence: SI s 160; Ki/Tu s 158. However, other forms of inchoate liability need to be specifically charged.

Attempt

13.5 At common law, an attempt requires:

- an intention to commit an offence; and
- conduct pursuant to this intention which is more than merely 'preparatory' to the commission of the offence.

These two elements are also required under the Penal Codes.

13.6 The Codes provide a complicated definition of an attempt in SI s 378 first para; Ki s 371 first para; Tu s 371(1). The definition is the same as that which was originally set out in the Griffith Code, so that authorities from Queensland can assist in its interpretation:

> When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

There are three elements to this definition:

1. an intention to commit an offence;
2. the commencement of the execution of the intention 'by means adapted to its fulfilment';
3. the manifestation of the intention by some overt act.

There appears to be an overlap between the requirement in the second element that the intention be put into execution and the requirement of the third element that the intention be manifested in an overt act. There is no express requirement for the conduct to be more than merely preparatory. However, it may be that this requirement can be read into the provision through the second element: 'by means adapted to its fulfilment'. This mysterious provision is discussed further in **13.35.**

13.7 In the final part of the definition, an attempt is said to occur when the actor pursues the intention 'but does not fulfil his intention to such an extent as to commit the offence'. It has been held that this part of the definition merely identifies the commencement of

an attempt. It does not identify an element the prosecution must prove: *R v Barbeler* [1977] Qd R 80. There can be a conviction for an offence of attempt even though the complete offence has been committed. However, a person cannot be convicted of both attempting an offence and actually committing the same offence: *R v Lee, Tan and Ong* (1990) 47 A Crim R 187 at 201, 209–10.

13.8 Voluntary desistance from an attempt is immaterial to liability, although it may affect punishment: SI s 378 second para; Ki s 371 second para; Tu s 371(2).

13.9 It is immaterial that it is impossible in fact to complete the offence: SI s 378 third para; Ki s 371 third para; Tu s 371(3). Questions about the significance of impossibility of completion can arise in relation to any form of inchoate or ulterior liability. Impossibility is discussed in **13.33**–**13.35**.

The mental element in an attempt

13.10 The mental element of an attempted offence is determined by reference to the general law of attempts and not by reference to any mental element of the completed offence. As the conduct involved in an attempt is often innocuous, mental elements assume special significance.

13.11 The Codes SI s 378 first para; Ki s 371 first para; Tu s 371(1) require intention to commit an offence before there can be an attempt. Intention is similarly required at common law: *Giorgianni v R* (1985) 156 CLR 473 at 506; 58 ALR 641 at 665. Moreover, in *R v Leavitt* [1985] 1 Qd R 343, it was held that, as a matter of ordinary language, the notion of attempting to achieve a result involves intending to achieve it. The court in *Leavitt* was explicit in its view that states of mind, such as contemplating the possibility or even the likelihood of the result, are not sufficient. An attempt must therefore be made with the purpose of bringing about all elements of the completed offence or perhaps also with the knowledge that these elements will occur: see **4.50**–**4.55** on the concept of intention. It is generally immaterial to liability for attempts that some state of mind other than intention would suffice for the completed offence. For example, attempted murder always requires intention to kill, even though some other states of mind may suffice for the completed offence of murder: see, for example, *R v Funifaka* [1997] SBHC 31; *R v Whybrow* (1951) 35 Cr App R 141; *Cutter v R* (1997) 143 ALR 498; [1997] HCA 7.

13.12 Some concern has been expressed about the consequences of requiring intention with respect to all elements of the offence of attempted rape. Suppose that a person

seeking to have sexual intercourse is aware of a risk that there is no consent but does not care and is determined to proceed in any event. Intuitively it seems wrong that such a person should escape liability for attempted rape on the ground that the state of mind respecting lack of consent amounts to recklessness rather than intention. Two ways of dealing with this problem have been proposed:

1. In some cases at common law, it has been held that, although intention is required for consequential elements of offences, recklessness (or reckless indifference) will suffice for circumstantial elements: see, for example, *Evans v R* (1987) 30 A Crim R 262. But this approach does not fit easily with the express reference to intention in the Codes. Applying it to the Codes would involve giving the concept of intention a broad scope that has been rejected in other contexts: see, for example, *R v Willmot (No 2)* [1985] 2 Qd R 413.
2. It might be argued that a person who does not care whether there is consent has a conditional intention to proceed in the event that consent is withheld. In the event that there is no consent, the intention is to proceed anyway. On the concept of conditional intention, see **4.56**. Conditional intention has been recognised in other contexts: see, for example, *R v Zhan Yu Zhong* (2003) 139 A Crim R 220; [2003] VSCA 56, on offences of incitement; *Smith v The Queen; The Queen v Afford* (2017) 259 CLR 291; [2017] HCA 19 at [6] on importing drugs. Recognising conditional intention in the law of attempts would enable the intuitively correct result to be achieved in a way consistent with the language of the Codes.

Attempts and preparatory acts

13.13 The common law has traditionally drawn a distinction between attempts, which attract criminal liability, and mere preparatory acts, which do not. There is no express mention of the distinction in SI s 378 first para.; Ki s 371 first para; Tu s 371(1) but it is generally assumed that it is implicit in this provision: see the comments of the majority in *R v De Silva* (2007) 176 A Crim R 238; [2007] QCA 301, but see also the reservations of Holmes JA at [30]. The words 'by means adapted to its fulfilment' have sometimes been identified as authority for applying this distinction in Queensland.

13.14 Various tests have been proposed for distinguishing attempts from preparatory acts. None has gathered widespread support. They are either too restrictive or too vague. Following are some of the most often discussed tests:

- The '*last step*' test — this requires the accused to have taken his or her last step towards the commission of the offence. This test is precise but has been generally rejected on the ground that it is too restrictive. The Codes SI s 378

second para; Ki s 371 second para; Tu s 371(2) expressly exclude the test by providing that it is immaterial, except as respects punishment, whether the accused has done everything necessary on his or her own part.

- The '*on the job*' test — this requires the accused to be at the scene of the completed offence and executing the final stages of the criminal design. This test is arguably too restrictive.
- The '*proximity*' test — this requires an act which is close to the completed offence. This test is vague.
- The '*substantial step*' test — this requires substantial progress to have been made towards the execution of the criminal design. The test considers how much progress has been made as well as how much remains to be accomplished. Again, vagueness is a problem.
- The '*unequivocality*' test — this requires an act that unequivocally indicates an intention to commit the offence. Any conduct which is susceptible to an innocent interpretation is excluded, even though the intention to commit the offence could be proved through other evidence such as a confession or similar fact evidence. Like the 'last step' test, the 'unequivocality' test is precise but is generally considered too restrictive.

13.15 Increasingly, judges have stressed that no single test can provide conclusive answers. Each case requires a judgment on the particular facts in light of the nature of the particular offence in issue. An example of this kind of reasoning is offered in *Deutsch v R* [1986] 2 SCR 2 at 22–3, where Le Dain J said:

> It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment … In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

13.16 Authorities are divided on the question whether or not an attempt requires the perpetrator to be at the scene of the offence. In *R v Campbell* [1991] Crim LR 268, the English Court of Appeal suggested that it was doubtful whether a person could ever commit an attempt before arriving at the place where the offence was to be executed. In

that case, the accused approached to within 30 yards of the post office where the robbery was to occur, carrying an imitation gun and a threatening note. It was held that this did not constitute an attempted robbery. In *R v Aston-Brien* [2004] QCA 23, the Queensland Court of Appeal held that an attempt had not yet been committed when housebreakers were found 360 metres from their intended target. However, there are other cases in which an attempted offence has been committed before the accused arrived at the scene to execute the principal offence. See, for example, *Weggers v Western Australia* (2014) 240 A Crim R 205; [2014] WASCA 57, where the Court of Appeal were divided on the question of whether acts done for the manufacture of methylamphetamine were more than merely preparatory. See also *Henderson v R* (1949) 2 DLR 121, where a majority of the Supreme Court of Canada held that, when persons were stopped by police while driving towards a bank and carrying guns, they were attempting to commit an armed robbery. The opposite conclusion was reached by the New Zealand Court of Appeal in *R v Wilcox* [1982] 1 NZLR 191 (CA). However, that decision has been subject to criticism in New Zealand and more recent decisions appear to indicate that the issue of proximity needs to be considered in light of the clarity of the intent of the person: actions which clearly indicate intent to carry out the offence are likely to be held sufficiently proximate for an attempt: see *R v Harpur* [2010] NZCA 319; *Johnston v R* [2012] NZCA 559. See the discussion in Briggs, 'Criminal attempts: how close is too close?' (2018) 15 Otago LR 241.

Soliciting, inciting and attempting to procure

13.17 A person who encourages another person to commit an offence can be criminally liable in two different ways:

- a person counselling or procuring an offence that Is committed may become a party to the offence under the Codes SI s 21 first para (d); Ki/Tu s 21(1)(d): see **14.22**.
- a person soliciting, inciting or attempting to procure an offence that is not committed may commit a separate inchoate offence under SI s 381 first para (d); Ki/Tu s 374 first para.

'The present discussion is confined to soliciting, inciting or attempting to procure an uncommitted offence. 'Soliciting' and 'inciting' may be regarded as synonyms for encouraging. 'Procuring' has the additional element of causing an event that would otherwise not occur: see **14.22**.

13.18 A person who encourages the commission of an offence commits the physical element of the inchoate offence under SI s 381 first para (d); Ki/Tu s 374 first para.

Expressions such as 'soliciting' and 'inciting' suggest communication. An offence is not committed unless the message is received by another person. Failed attempts to encourage might be punishable under the law of attempts: see above: **13.5-13.16**. It is, however, unclear whether 'doubling-up' of inchoate liability is permitted: see below, **13.30**.

13.19 No fault element is expressed in SI s 381 first para (d); Ki/Tu s 374 first para. Nevertheless, there is authority to the effect that intention is required, as it is for an attempt: *Jervis v R* [1003] 1 Qd R 643; *R v Dausabea* [2007] SBHC 128 at [40].

13.20 It is sufficient that a person intentionally urges the commission of some kind of offence. There is no reason why the urging should have to include details such as a precise mode or time of commission.

13.21 However, there may be difficult cases in which the offence to be committed was not clearly identified. Suppose that a person makes a general exhortation to a crowd to attack some other persons or their property, without identifying a particular kind of attack. The incitement is indeterminate. Nevertheless, it is submitted that there can still be liability. The person is guilty of inciting any offence which can be inferred to be within the range contemplated by the inciter and the recipient. This is consistent with the approach which has been taken with respect to indeterminate aiding and abetting in the law of secondary participation: see *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 (HL) discussed at **14.18**. It is sometimes objected that such an approach involves imposing liability on the basis of recklessness. However, it can be said that the inciter in such a case has a *conditional intent* to incite any offence which it is contemplated might follow from the incitement: see above, **13.12** on conditional intent in relation to attempts.

Conspiracy

13.22 The Penal Codes establish structures of general liability for conspiracy: Codes SI ss 382-384; Ki/Tu ss 376-378. These general schemes are supplemented by specific provisions such as those relating to conspiracy to conspiracy to defeat the course of justice under SI s 116; Ki/Tu s 110 and conspiracy to murder under SI s 218; Ki/Tu s 211.

13.23 The general scheme covers not only conspiracies to commit offences under SI ss 382-383; Ki/Tu ss 376-377 but also conspiracies to achieve certain other objects that may be regarded as injurious. There are general provisions making it an offence to conspire to effect any unlawful purpose or to effect any lawful purpose by unlawful means: SI ss 384; Ki/Tu ss 378. These provisions reflect the extended scope of criminal liability for

conspiracy at common law. At common law, it is a criminal offence to conspire to commit a civil wrong such as a tort and even to commit a moral wrong which is not ordinarily actionable in civil law: see *Shaw v DPP* [1962] AC 220. The rationale is that conspiracies are an appropriate target of the criminal law on grounds other than their inchoate character. This older view of conspiracy has fallen out of favour in most jurisdictions. Moreover, the House of Lords has now decided that the categories of wrongs which can ground liability for conspiracy at common law are closed: *DPP v Withers* [1975] AC 842; [1974] 3 All ER 984. Some anchor in the precedents must, therefore, be found for any charge of conspiracy to achieve something which is not of itself an offence.

13.24 There is no technical bar to convictions for both conspiring to commit an offence and actually committing that offence. There can be certain advantages to the prosecution in proceeding on both fronts. In conspiracy charges there are liberal rules as to when the actions and statements of one accused are admissible as evidence against another accused: *Ahern v R* (1988) 165 CLR 87; 80 ALR 161. Joining a conspiracy charge with a charge of the completed offence can ensure there is a conviction of at least some offence and can even increase the likelihood of a conviction of the completed offence. Yet, there is an obvious risk of prejudice even though the trial judge must instruct the jury as to what evidence is admissible on each charge. Courts everywhere have criticised and sought to discourage this practice: see the discussion in *R v Weaver* (1931) 45 CLR 321; ALR 249. See also *R v Hoar* (1981) 148 CLR 32; 37 ALR 357, where the High Court of Australia criticised the use of a conspiracy charge by the prosecution instead of a charge of a substantive offence.

Elements of conspiracy

13.25 It has been said: 'The essence of a conspiracy is an agreement between two or more persons to achieve a common objective': *Mulcahy v R* (1868) LR 3 HL 306. The law of conspiracy pushes inchoate liability back towards what would usually be regarded as a mere preparatory act in the law of attempts. The term 'conspiracy' is not defined in the Codes. The common law therefore determines the elements of conspiracy.

13.26 Usually each party will agree to take some action towards achieving the common objective, although not necessarily so. Someone can be made liable as a conspirator merely by becoming a party to an agreement, even though another person will carry out the conduct necessary to achieve the common objective. Liability arises once the agreement is made. Nothing need be done in furtherance of the agreement, although very often the existence of the conspiracy will be proved by inference from what was

done. Making an agreement may well involve one of the parties inciting or attempting to procure the other to commit an offence under SI s 381 first para (d); Ki/Tu s 374 first para. However, this is not essential.

13.27 An agreement to pursue a common objective cannot exist without some communication between the parties. However, it is not necessary that all conspirators be known to one another. It is possible for one person to play a central coordinating role, or for communication to pass from one person down a line through several other persons. These scenarios have sometimes been expressed through the metaphors of 'wheels' and 'chains'. It is essential that all conspirators be committed to a common objective. Where one person operates a broad scheme with a number of participants, it must be determined whether there is one conspiracy or several. Charges which allege the wrong kind of conspiracy can fail: see, for example, *Gerakiteys v R* (1984) 153 CLR 317. In addition, conspiracy must be distinguished from what has been called 'conscious parallelism' or 'coincidence of aims' where several persons adopt similar courses of action, in light of expectations of what the others will do, but without an agreement having been made between them. See, for example, *Atlantic Sugar Refineries Co Ltd v Attorney-General of Canada* [1980] 2 SCR 644, where a prosecution for conspiracy to illegally maintain prices failed because there was no evidence of communication between the companies concerned.

13.28 The fault element in conspiracy is intention to achieve an unlawful object: *R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17 at [67], [110]–[114]. Recklessness will not suffice. There is no liability under the law of conspiracy for consequences which are merely foreseen as possible or even probable consequences of carrying out the agreement. Quite apart from any considerations about the proper scope of inchoate liability, a requirement for intention appears to follow from the requirement for an agreement. The notion of agreement carries with it the idea of parties intending to give effect to what has been agreed.

13.29 It is unclear whether the parties to an agreement can be liable for conspiracy to commit offences upon which they have not actually agreed, but which they know are virtually certain consequences of doing what has been agreed: see **4.50** on the two forms of intention. In *Peters* (1998) 192 CLR 493; [1998] HCA 7 at [69], McHugh J said:

> … although it is wrong to impute a constructive intention to defendants charged with conspiracy, they may have intended to injure or defraud a person even though that person or his or her interests were not the object of the conspiracy.

McHugh J cited the example of *R v Cooke* [1986] AC 909; [1986] 2 All ER 985, where the

House of Lords held that there was a conspiracy to defraud British Rail when its employees had agreed to sell their own refreshments to passengers. That example, however, does not support the argument. The explicit objective of the conspiracy in *Cooke* may have been to make money rather than to defraud British Rail. Yet defrauding British Rail was a necessary step on the way to making money. Therefore, it was properly to be regarded as part of what had been agreed. Going beyond what has been agreed is a different matter. A better example of liability stretching beyond the agreement is *Sokoloski v R* [1977] 2 SCR 523. In that case, the Supreme Court of Canada appeared to hold that, if A sells drugs to B, knowing that B intends to sell them again, then A and B conspire with respect to the trafficking by B. The decision in *Sokoloski* has been widely criticised. It does not sit easily with the notions of 'common design', 'common purpose', 'common plot' and 'common objective' which permeate statements on the law of conspiracy.

Parties to a conspiracy

13.30 An agreement necessarily requires at least two parties. There can be no conspiracy if only one person intends to execute the agreement: *R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17 at [63]. However, if only one person intended that the agreement be put into effect, can there be a conviction of attempted conspiracy? A negative answer was given by Canadian courts in *R v Dungey* (1979) (2d) 51 CCC (2d) 86 and *R v Dery* 2006 SCC 53. In *Dery* at [50], it was said that 'an attempt to conspire amounts, at best, to a risk that a risk will materialise'.

13.31 The conviction of one conspirator is not precluded just because the other cannot be brought to trial. Moreover, it is possible for one co-accused to be convicted of conspiracy and the other to be acquitted, where the evidence against them differs and the divergent results are not inconsistent: *R v Darby* (1982) 148 CLR 668; 40 ALR 594.

13.32 Some persons are not recognised in law as co-conspirators:

- At common law, a corporation cannot conspire with an individual who is functioning as its sole 'directing mind': *R v McDonnell* [1966] 1 QB 233; [1966] 1 All ER 193.
- For offences that necessarily involve two persons, the exemption of one person from the completed offence impliedly also excludes that person from liability for conspiring with the other. Therefore, for example, the purchaser of illegal drugs does not conspire with the seller to traffic in the drugs; a young person who agrees to unlawful sexual relations with an adult does not conspire to commit the adult's offence. Indeed, it would seem wrong in principle that either of the parties to such transactions can be liable for conspiracy. However, there are some cases that hold

that the party who can commit the substantive offence can also commit conspiracy with the exempt party: *R v Duguid* (1906) 75 LJR (NS) 470; *R v Murphy and Bieneck* (1981) 60 CCC (2d) 1. This is also the position under the Australian Criminal Code (Cth) s 11.5(4)(b).

Defences to inchoate liability

13.33 Desistance or withdrawal is not generally a defence to inchoate liability but, depending on the type of inchoate liability in issue, can sometimes negate liability.

- Desistance is not a defence in relation to *attempt*. When the line from a preparatory act to an attempt is crossed, liability attaches and cannot be cancelled by subsequent action or inaction. The Penal Codes provide that voluntary desistance from an attempt is immaterial to liability, although it may affect punishment: SI s 378 second para; Ki s 371 second para; Tu s 371(2). It is immaterial to liability even if the offender desisted of his or her own motion.
- Desistance is not a defence to *incitement*, either at common law or under the Codes. Nevertheless, it might be open to a defendant to argue that initial effect of some message was cancelled by a subsequent repudiation or withdrawal, so that the overall effect was not to urge the commission of an offence.
- Withdrawal from an agreement might be a defence to *conspiracy*, as long as the defendant took all reasonable steps to prevent the commission of the offence. This is the position in relation to common purpose liability: see **14.42**. Depending on the circumstances, all reasonable steps might involve communication to the co-conspirators and to the police.

Even where desistance or withdrawal does not provide a defence, it is a factor which presumably can mitigate the sentence.

13.34 Persons may attempt, incite or conspire to do something that is impossible to achieve. There is no problem about liability as long as the objective is an offence or another unlawful object recognised at common law:

- For attempts, s SI s 378 third para; Ki s 371 third para; Tu s 371(3) provide that it is immaterial that circumstances unknown to the actor make it impossible in fact to commit the offence. This reflects the common law.
- The same rule has been recognised at common law for other forms of inchoate and ulterior liability, including conspiracy: *Director of Public Prosecutions v Nock* [1978] 2 All ER 654 (HL); *Cogley v R* [1989] VR 799 (FC).

There is no liability for attempting or conspiring to achieve a lawful object under the misapprehension that it is unlawful. It is sometimes said that, although there can be

liability for attempting or conspiring to commit an offence which it is factually impossible to commit, there can be no liability for attempting or conspiring to commit an offence that it is legally impossible to commit: see the discussion of *R v Willis* (1864) 4 SCR (NSW) 59 in *R v English* (1993) 10 WAR 355.

13.35 The proper scope of liability for attempting and conspiring to achieve the impossible has been controversial in the history of the common law. There has never been any problem about liability as long as the reason why the object is impossible to achieve is simply that inefficacious means have been used, such as an inadequate dose of poison in a case of attempted murder. However, although opinion has now swung against restrictions, it has sometimes been suggested that there may be no liability where the objective cannot be achieved whatever means are adopted. There are two types of case in which this problem can occur. In the first type, the absence of some essential element of the completed offence makes it impossible to carry out a plan of action; for example, a person may possess a substance, believing it to be a drug, when it is not: see *R v Lee, Tan and Ong* (1990) 47 A Crim R 187 (WACCA). In the second type, the plan of action is completed, but the absence of some expected incident or consequence prevents the commission of the offence; for example, property received may be believed to have been stolen when it has not been: see *R v English* (1993) 10 WAR 355. The weight of contemporary opinion appears to be in favour of liability even in cases of impossibility by any means. This approach has been endorsed by the House of Lords in *R v Shivpuri* [1987] AC 1 and by Australian courts in *Lee, Tan and Ong* and in *English*. Moreover, the High Court of Australia has assumed that there can be an offence of attempting to possess drugs when the police had previously removed them from a parcel: *Tabe v R* (2005) 225 CLR 418; 221 ALR 503; [2005] HCA 59.

13.36 There may be a restriction on liability for attempting the impossible depending on the interpretation of the requirement in SI s 378 first para.; Ki s 371 first para; Tu s 371(1) that the intention to commit the offence be put 'into execution by means adapted to its fulfilment'. The significance of this provision is uncertain. It has sometimes been viewed as authority for the introduction of the distinction between attempts and mere preparatory acts. It might also be taken as a direction that the means used for an attempt must have the basic capability of achieving the objective, even though its actual achievement may be frustrated by other factors. There may, therefore, be no liability for attempting to kill by witchcraft, or by the administration of a wholly innocuous amount of a chemical which only begins to be poisonous in larger quantities. However, it would be odd for the interpretation of a provision dealing specifically with the question of impossibility to be narrowed by reference to such a loose phrase in the earlier subsection. It would be preferable for the matter to be settled through a statutory amendment.

13.37 General defences that would be available for other offences are also available for offences of inchoate liability: for example, self-defence, compulsion and insanity.