

11. Attempts

Criminal liability does not always require completion of the intended offence. Canadian criminal law recognizes several forms of incomplete or inchoate criminal liability. Counselling an offence that is not committed is separately addressed by s. 464 of the Criminal Code, conspiracy criminalizes the agreement to commit specified unlawful conduct under s. 465, and s. 24 creates liability for attempting to commit an offence. The NCA syllabus identifies *R. v. Ancio* for the mens rea of attempts, *R. v. Deutsch* for the distinction between preparation and attempt, and *R. v. Déry* for the limits on combining incomplete forms of criminal liability.

Section 24(1) provides that a person who, having an intent to commit an offence, does or omits to do something for the purpose of carrying out that intention is guilty of an attempt, whether or not it was possible in the circumstances to complete the offence.

An attempt therefore focuses upon an accused who has formed the required criminal intention and has moved sufficiently far from planning or preparation toward carrying out the intended offence.

Elements of Attempt

An attempt generally requires:

1. An intention to commit the completed offence; and
2. An act or omission performed for the purpose of carrying out that intention which goes beyond mere preparation.

The intended substantive offence need not ultimately succeed. Indeed, attempt liability is principally significant where the target offence is not completed or the Crown cannot prove its completion.

Non-completion of the offence helps distinguish an attempt from the completed offence, but s. 24 does not formulate non-completion as an independent actus reus element. This is useful for distinguishing an attempt from the completed offence, but s. 24 itself does not formulate non-completion as an independent actus reus element. The central statutory requirements are the required intent and sufficiently proximate conduct undertaken to carry out that intent.

For example, if A intends to kill B, puts poison into B's drink and B drinks it but survives because of emergency medical treatment, A may be guilty of attempted murder. The death required for murder did not occur, but A possessed the intention to kill and performed acts well beyond mere preparation.

Similarly, if A points a loaded firearm at B and deliberately fires intending to kill B, but misses, the absence of death does not prevent liability for attempted murder.

Mens Rea of Attempt

Section 24 expressly requires an “intent to commit an offence.” Attempt liability therefore requires subjective intention directed toward commission of the target offence.

It is not enough that the accused merely thinks about committing an offence, wishes that an offence might occur, negligently creates a risk of the offence occurring, or merely foresees the possibility that the offence might occur.

The essence of attempt liability is that the accused intends the target crime and then acts sufficiently far toward carrying it out.

This can mean that an attempt requires a more demanding mental state than some forms of the completed offence. Attempted murder provides the clearest example. Murder can arise under the specific statutory forms of mens rea in s. 229, but attempted murder requires a specific intention to kill. *R. v. Ancio*, [1984] 1 S.C.R. 225.

Motive remains distinct from intent. A person may intend to commit an offence for financial, emotional, political or other reasons. The reason why the accused wants to commit the offence does not ordinarily replace the question whether the accused actually intended its commission.

R. v. Ancio, [1984] 1 S.C.R. 225

Facts

Ancio went to the apartment building where his estranged wife was living with another man, Kurely. He carried a loaded sawed-off shotgun and broke the glass in the entrance door to gain entry.

Kurely heard the breaking glass and approached Ancio carrying a chair. He threw the chair at Ancio, the shotgun discharged without striking Kurely, and a struggle followed.

Ancio was convicted of attempted murder. The Ontario Court of Appeal set aside the conviction and ordered a new trial. The Crown appealed to the Supreme Court.

Issue

What mens rea is required for attempted murder? In particular, can attempted murder be established by a state of mind falling short of a specific intention to kill?

Held

No. The Supreme Court held that attempted murder requires a specific intention to kill. The Crown's appeal was dismissed, leaving the order for a new trial in place.

Reasoning

Attempt is a separate and incomplete offence governed by s. 24 of the Criminal Code. Although both actus reus and mens rea must be proved, intention assumes particular importance because the prohibited consequence of the completed offence has not occurred.

A person cannot attempt to cause an unintended consequence. Accordingly, where death does not occur, the Crown must prove that the accused actually intended to cause death.

This makes the mens rea of attempted murder narrower than the mens rea of completed murder. For completed murder, certain forms of liability may arise where the accused intends

bodily harm knowing that death is likely and is reckless whether death ensues. That lesser state of mind is insufficient for attempted murder.

Recklessness concerning death, an intention merely to cause serious bodily harm, or any other mental state falling short of an intention to kill cannot support a conviction for attempted murder.

Legal Test

Attempted murder requires:

1. A specific intention to cause death; and
2. An act or omission undertaken for the purpose of carrying out that intention which proceeds beyond mere preparation.

Legal Principle

Nothing short of a specific intention to kill satisfies the mens rea of attempted murder.

Ancio therefore illustrates an important feature of attempt liability: because the completed prohibited consequence has not occurred, the Crown must prove the intention to bring about that consequence.

Takeaway

Attempted murder requires proof that the accused actually intended to kill. An intention to cause bodily harm, even serious bodily harm, together with recklessness concerning death is insufficient.

Actus Reus of Attempt

An intention alone is never enough. Criminal law does not punish a person merely for thinking about committing an offence.

The accused must do or omit to do something for the purpose of carrying out the criminal intention.

The difficult question is determining when preparation ends and attempt begins.

Section 24(2) expressly provides that whether conduct is merely preparatory and too remote to constitute an attempt is a question of law.

There is no universal formula. The distinction depends upon the particular target offence and the nature of the accused's conduct.

R. v. Cline expresses the general idea that criminal attempt begins once preparation has ended and the accused begins carrying out the intended offence. R. v. Sarrazin, 2010 ONCA 577 similarly emphasizes that an accused must proceed beyond mere preparation. R. v. Root, 2008 ONCA 869 describes the question as whether the accused has travelled sufficiently far beyond preparation down the intended path toward commission of the crime.

Preparation Versus Attempt

Preparation consists of arranging, planning or equipping oneself to commit an offence.

Attempt begins when the accused moves from preparing for the offence to carrying out the criminal purpose sufficiently closely connected with the completed offence.

For example, suppose A intends to kill B.

A researches B's routine and writes down a plan. This will ordinarily remain preparation.

A purchases a knife intending eventually to use it against B. Depending upon all the circumstances, this may still be preparation.

A travels toward B's home with the knife. Whether this has become an attempt depends upon the relationship between A's conduct and the intended killing. Merely travelling toward the location may still be too remote.

A breaks into B's home, approaches B's bedroom carrying the weapon and begins implementing the killing plan. The conduct is much more likely to have crossed the line into attempt.

A attacks B intending to kill but B survives. This clearly goes beyond preparation and can amount to attempted murder.

The same distinction applies to other offences. If A merely researches how to commit a bank robbery and purchases a mask, the conduct may remain preparatory. If A enters the bank wearing the mask, produces a weapon and begins carrying out the robbery but is immediately arrested before obtaining money, the conduct has ordinarily proceeded much further toward the completed offence.

A numerical model, such as saying the accused has completed "eight out of ten steps," may help illustrate the concept, but it is not the legal test. The inquiry is qualitative, not mathematical.

R. v. Deutsch, [1986] 2 S.C.R. 2

Facts

Deutsch advertised for a secretary-sales assistant. During interviews with female applicants, he explained that obtaining or retaining clients could require them to engage in sexual intercourse with customers. He also held out substantial financial bonuses for doing so. An undercover police officer attended one of the interviews and received essentially the same explanation. No applicant was ultimately hired or formally offered the position.

Deutsch was charged with attempting to procure women to have illicit sexual intercourse with other persons. The trial judge concluded that the necessary intention existed but treated Deutsch's conduct as mere preparation. The Court of Appeal ordered a new trial on the relevant attempt count, and Deutsch appealed to the Supreme Court.

Issue

When does conduct cross the line from mere preparation into the actus reus of an attempt?

Held

The Supreme Court dismissed Deutsch's appeal. His conduct was capable of constituting an attempt because the financial inducements and representations made directly to applicants could amount to acts sufficiently proximate to the completed offence rather than mere preparation. The order for a new trial therefore remained in place.

Reasoning

There is no rigid or universally applicable formula for distinguishing preparation from attempt. The distinction must be made according to the circumstances of the particular offence and is essentially qualitative. The court considers the relationship between:

1. The nature and quality of the acts already performed; and
2. The nature of the completed offence.

Relative proximity is an important consideration. Relevant factors may include:

- Proximity in time;
- Proximity in place;
- The nature of the acts already completed; and
- The acts remaining within the accused's control before completion of the offence.

No single factor is decisive, and the accused need not perform the final or "last" act necessary to complete the offence.

Deutsch had done substantially more than formulate a plan or prepare to approach potential employees. He had advertised the position, interviewed applicants, directly explained the contemplated sexual activity, and offered substantial financial inducements. Viewed in relation to the nature of the procurement offence, those acts were capable of crossing the line into attempt.

Legal Test

An attempt requires conduct that goes beyond mere preparation and constitutes a sufficiently proximate step toward commission of the completed offence. The preparation-attempt distinction is qualitative and must be determined through common-sense judgment having regard to the nature of the offence, the acts performed, their relative proximity to completion, and what remained for the accused to do.

Legal Principle

There is no universal “last act” or fixed proximity test for attempt. Conduct that appears preparatory when viewed in isolation may amount to an attempt when its nature and proximity are assessed in relation to the particular completed offence.

Takeaway

Deutsch is the leading authority on the actus reus boundary:

Preparation: not punishable as attempt.

Conduct sufficiently proximate to the completed offence: attempt.

The dividing line is qualitative and contextual, not mechanical.

No Fixed Proximity Formula

Deutsch makes clear that there is no single mechanical test capable of separating preparation from attempt in every case. The proximity inquiry is flexible because offences differ significantly. For attempted theft, placing one's hand into another person's pocket intending to steal may be sufficiently proximate even though the pocket turns out to be empty. For attempted murder by poisoning, merely purchasing poison may remain preparation, while deliberately placing what the accused believes to be poison into the intended victim's drink may constitute an attempt. For an attempted break and enter, simply planning the offence and purchasing tools may remain preparation, while arriving at the targeted property and beginning to force the door may constitute an attempt. The analysis depends upon the nature of the target offence, what the accused has already done and what remains to be done.

Impossibility Is Not a Defence

Section 24 expressly states that a person may be guilty of an attempt “whether or not it was possible under the circumstances to commit the offence.”

Accordingly, factual impossibility does not prevent attempt liability.

For example, A reaches into B's pocket intending to steal B's wallet, but the pocket is empty. If A's conduct has gone beyond preparation, A may still be guilty of attempted theft.

Similarly, A intends to kill B and fires into B's bed believing that B is sleeping there, but B is not present. The factual impossibility of killing B at that moment does not by itself prevent attempted murder.

If A administers a harmless substance genuinely believing it is lethal poison and intending to kill B, the fact that the substance could not actually cause death does not necessarily prevent attempt liability.

The important distinction is between impossibility of completing a real offence and conduct that would not be criminal even if everything occurred exactly as the accused believed. Section 24 requires an intent to commit an offence. A person cannot be guilty of attempting conduct that would not constitute a crime at all.

Attempt and the Completed Offence

An attempt is distinct from the completed substantive offence.

If the Crown proves all elements of the completed offence, the accused will ordinarily be convicted of that offence rather than merely the attempt.

Section 660 nevertheless provides an important procedural rule. Where an accused is charged with the completed offence but the evidence does not establish completion and does establish an attempt, the accused may be convicted of the attempt.

For example, an accused charged with theft may be convicted of attempted theft where the Crown proves the required intention and sufficiently proximate conduct but cannot establish that property was actually taken.

Section 463 governs punishment for attempts unless legislation expressly provides otherwise. The available punishment depends upon the classification and maximum punishment of the substantive offence.

The NCA syllabus directs attention to ss. 463 and 660 as part of the law of attempts.

Attempts and Other Incomplete Offences

Attempt must be distinguished from other forms of incomplete criminal liability.

Counselling an offence that is not committed is expressly criminalized by s. 464.

Conspiracy under s. 465 is complete when the required criminal agreement is formed. The substantive offence that the conspirators intend to commit need not itself occur.

Attempt under s. 24 requires an intention to commit the target offence together with conduct sufficiently beyond preparation toward carrying out that intention.

These doctrines cannot simply be stacked together whenever conduct falls short of completion. *R. v. Déry*, 2006 SCC 53 illustrates the limit.

R. v. Déry, 2006 SCC 53, [2006] 2 S.C.R. 669

Facts

Déry and another man were charged with conspiring to commit theft and conspiring to possess stolen liquor. Their discussions concerned the possibility of stealing shipments of liquor.

The trial judge found that the Crown had not proved that the discussions had matured into an actual agreement. The accused therefore could not be convicted of conspiracy.

Nevertheless, the trial judge concluded that their conduct had gone beyond mere preparation toward forming a conspiracy and convicted them of attempting to conspire. A majority of the Quebec Court of Appeal upheld the convictions.

Issue

Does Canadian criminal law recognize an offence of attempting to conspire to commit a substantive offence?

Held

No. The Supreme Court allowed Déry's appeal, set aside the convictions and entered acquittals. Attempting to conspire to commit a substantive offence is not an offence known to Canadian criminal law.

Reasoning

Conspiracy is itself an inchoate offence. Its actus reus is the agreement to pursue an unlawful object, and the offence is complete once the required agreement is formed even though the contemplated substantive crime is never attempted or completed. Recognizing "attempted conspiracy" would extend criminal liability one stage further backward. It would punish conduct directed merely toward forming an agreement to commit an offence, even though:

- No conspiratorial agreement was ever reached;
- The substantive offence was never committed; and
- The substantive offence was not itself attempted.

The law of attempt does not automatically attach to every incomplete form of criminal liability merely because s. 24 generally criminalizes attempts.

Fruitless discussions or negotiations concerning a possible crime do not become criminal merely because the participants contemplated criminal conduct. Where those discussions never mature into a conspiratorial agreement and no attempt is made to commit the substantive offence, criminal liability for attempted conspiracy does not arise.

Legal Principle

There is no offence of attempted conspiracy in Canadian criminal law. Déry demonstrates a limit on combining or "piggy-backing" inchoate offences. Section 24 does not mean that every incomplete inchoate offence can itself become the subject of an attempt charge.

Takeaway

Conspiracy requires an agreement. If the agreement is reached, conspiracy is complete. If no agreement is reached, there is no conspiracy and no offence of attempted conspiracy. However, if the parties independently proceed far enough toward committing the substantive offence itself, ordinary attempt liability may arise in relation to that substantive offence.

Overall Approach to Attempt

The analysis should begin with the target offence. The court must identify precisely what crime the accused allegedly intended to commit.

The Crown must then establish beyond a reasonable doubt that the accused actually possessed the intention required by s. 24. For attempted murder, Ancio requires the specific intention to kill.

The court must next determine whether the accused's conduct remained preparatory or crossed the line into attempt. Deutsch requires a qualitative assessment of the relationship between the conduct and the completed offence, including relative proximity in time, location and acts remaining to be performed.

Impossibility does not provide a defence where the accused intended a genuine criminal offence and proceeded sufficiently far toward committing it.

Finally, Déry limits the use of attempt where the prosecution seeks to layer one incomplete form of liability upon another. The law punishes a sufficiently developed criminal attempt, not merely bad thoughts, plans or preliminary discussions.