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 Code and most criminal statutes elsewhere:

- Attempting to commit an offence: Penal Code s 28. Any offence can be attempted. The maximum punishment is the same as for the complete offence: s 28(4). However, the fact that the harm was not committed can be treated as a mitigating factor in sentencing.
- Conspiring with another person or persons to commit an offence: s 29. This is punishable 'only where expressly provided by any provision of law': s 29(4). An example would be conspiracy 'to obstruct, prevent, pervert, or defeat the course of justice' under s 79, which carries liability to seven years' imprisonment.
- Inciting or soliciting the commission of an offence, whether or not it is committed: s 35. No limitation is prescribed for the kinds of offences that may be incited or solicited. Penal liability is not expressly mentioned. However, it is said that the person 'may be charged and convicted as a principal offender, so presumably the penalty is the same as for the complete offence.

13.2 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: the intended result need not occur. The intended result is therefore an ulterior intent. For example, theft requires an intent to deprive the owner but not actual deprivation: see **8.16**. 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, **13.33-13.34**) were applied to an offence of assault with intent to rape.

13.3 A person charged with committing an offence may be convicted of attempting to commit that offence if the complete offence is not proved: Criminal Procedure Code s 110. However, other forms of inchoate liability need to be specifically charged.

Attempt

13.4 The Code provides a definition of an attempt in s 28 which broadly reflects the common law. The elements of an attempt are specified in s 28(1) and (3):

> (1) An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such act or omission is a step towards the commission of that crime which is immediately connected with it, or would have been had the facts been as the offender supposed them to be.
> …
> (3) Acts committed in mere preparation of an offence shall not constitute an offence.

There are two elements to this definition:

1. an intention to commit an offence;
2. an act reflecting this intention that is a step towards committing the offence: the act must be 'immediately connected' with the offence and more than merely preparatory.

13.5 It is immaterial that it is impossible in fact to complete the offence: s 28(2). Questions about the significance of impossibility of completion can arise in relation to any form of inchoate or ulterior liability. Impossibility is discussed in **13.32–13.33**.

13.6 Voluntary withdrawal from an attempt is immaterial to liability, although it will diminish responsibility: s 28(5). It will therefore require a reduction of sentence by virtue of the Code s 24.

The mental element in an attempt

13.7 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.

13.8 The Code s 28(1) requires 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 **4.9** on the concept of intention.

13.9 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 rape requires an intention to have sexual intercourse without consent, even though a mistaken belief in consent only provides a defence under s 12 to the complete offence if the mistake was reasonable: see the observations about attempted rape in Western Australia in *Attorney-General's Reference No 1 of 1977* [1978] WAR 45. In addition, attempted assault causing physical damage always requires intention to cause physical damage, even though an mere intention to assault is sufficient for the complete offence of assault causing physical damage.

13.10 Some concern has been expressed about the consequences of insisting on intention rather than recognising recklessness for 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. However, this approach does not fit easily with the express reference to intention in the Code. Applying it to the Code 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: see **4.14** on the concept of conditional intent. 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 that is consistent with the language of the Codes.

Attempts and preparatory acts

13.11 The Penal Code follows the common law in drawing a distinction between attempts, which attract criminal liability, and mere preparatory acts, which do not. Section 28(3) states:

> Acts committed in mere preparation of an offence shall not constitute an offence.

This is reinforced by the requirement in s 28(1) that an attempt be 'immediately connected' with commission of the complete offence.

13.12 Various tests have been proposed for distinguishing attempts from preparatory acts at common law. None has gathered widespread support. They are either too restrictive or too vague. Some tests focus on how much progress has been made in the steps towards completion of the offence. Other tests focus on how much remains to be done. 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.

13.13 Nevertheless, under the Vanuatu Penal Code, the line between mere preparation and an attempt must be drawn by reference to proximity to completion of the offence. This follows from the requirement in s 28(1) that an attempt be 'immediately connected' to commission of the offence. There are, however, several possible interpretations of this proximity test, depending on how narrowly the 'immediacy' condition is interpreted.

- The '*proximity*' test — this vague test simply requires an act which is close to the completed offence. This would leave the decision for the judge to make in light of the nature of the particular offence in issue.
- The '*last step*' test — this requires the accused to have taken his or her last step towards the commission of the offence: for example, pulling the trigger in an attempted homicide by shooting or throwing a lighted match in an attempted arson. This test was used in some older decisions in other jurisdictions. However, it has now been rejected everywhere on the ground that it is too restrictive.
- 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 generally considered too restrictive.
- The '*on the job*' test — this requires the accused to be at the scene of the completed offence. This test has also been criticised as being too restrictive. For some offences, a person could be executing the final stages of the criminal design without yet having arriving at the place where the offence is to be committed.

13.14 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.

Conspiracy

13.15 Most jurisdictions criminalise conspiracy to commit any offence. In Vanuatu, however, s 28(4) provides:

> A conspiracy to commit a criminal offence shall be punishable only where expressly provided by any provision of law.

The only examples in the Penal Code are seditious conspiracy under s 64 and conspiracy to obstruct, prevent, pervert or defeat the course of justice under s 79.

13.16 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 substantive offence. Yet, there is an obvious risk of prejudice even though the trial judge will consider what evidence is admissible on each charge. Courts in many jurisdictions have therefore 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.

13.17 Concerns about inappropriate uses of conspiracy charges have led to checks on prosecutorial decisions in many jurisdictions, including Vanuatu. In Vanuatu, no person can be prosecuted for a conspiracy offence without the consent in writing of the Public Prosecutor: s 29(5). In the case of sedition offences, this requirement applies not only to seditions conspiracy but also offences related to seditious statements and publications: s 67. The aim is presumably to ensure that prosecutions are not used for political purposes that would violate the freedoms of expression, assembly and association which are guaranteed by the Vanuatu Constitution s 5.

Elements of conspiracy

13.18 The term 'conspiracy' is defined in the Code s 29(1):

> Conspiracy is an agreement, express or implied, between two or more persons to do an act which, if done, even by one person, would constitute a criminal offence.

The law of conspiracy pushes inchoate liability back towards what would usually be regarded as a mere preparatory act in the law of attempts.

13.19 The essence of a conspiracy has been said to be an agreement between two or more persons to achieve a common objective: *Mulcahy v R* (1868) LR 3 HL 306. 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. However, this is not essential.

13.20 Voluntary withdrawal from a conspiracy is immaterial to liability, although it will diminish responsibility: s 29(3). It will therefore require a reduction of sentence by virtue of the Code s 24. This is the same rule as for voluntary withdrawal from an attempt: see **13.6**.

13.21 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.

13.22 The fault element in conspiracy is intention to commit a criminal offence *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 an 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.

13.23 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 **4.9** 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

13.24 An agreement necessarily requires at least two parties. There can be no conspiracy if only one person intends to execute an agreement: *R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17 at [63]. For example, there is no conspiracy if one person is merely pretending to agree before informing the police. 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'. The Vanuatu Court of appeal has also doubted that a charge of attempting to conspire exists: *Pipite v Public Prosecutor* [2019] VUCA 53 at [13].

13.25 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.

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

- The Code s 29(2) provides that there can be no conspiracy between husband and wife.
- 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 from other jurisdictions 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).

Incitement and soliciting

13.27 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 Code s 30: see **14.20**-**14.25**.
- a person soliciting or inciting an offence, whether or not that offence is committed, may commit a separate inchoate offence under the Code s 35.

The present discussion is confined to soliciting or inciting under s 35. 'Counselling', 'soliciting' and 'inciting' may be regarded as synonyms for encouraging. 'Procuring' has the additional element of causing an event that would otherwise not occur.

13.28 A person who encourages the commission of an offence commits the conduct element of the inchoate offence under s 35. Expressions such as 'inciting' and 'soliciting' 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: **13.4**-**13.14**. It is, however, unclear whether 'doubling-up' of inchoate liability is permitted: see above, **13.23**.

13.29 No fault element is expressed in s 35. 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].

13.30 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.

13.31 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 **14.15**. 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 **4.14**, **13.10** on the concept of conditional intent. See *R v Zhan Yu*

Zhong (2003) 139 A Crim R 220; [2003] VSCA 56, on offences of incitement;

Defences to inchoate liability

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

- Desistance or withdrawal 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. It is immaterial to liability even if the offender desisted of his or her own motion.
- The question of *conspiracy* is not settled but withdrawal from an agreement may be a defence as long as the defendant communicated withdrawal to co-conspirators and took all reasonable steps to prevent the commission of the offence, thereby cancelling any effect of the agreement. This is the position in relation to common purpose liability: see **14.36**. Depending on the circumstances, all reasonable steps might involve communication to the to the police as well as co-conspirators.
- Desistance or withdrawal is not a defence to *incitement*, either at common law or under the Code. 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.

Even where desistance or withdrawal does not provide a defence, it is a factor which can diminish responsibility, thereby requiring a reduction of sentence by virtue of s 24. In cases of voluntary withdrawal, diminished responsibility is expressly conferred for an attempt by s 28(5) and for conspiracy by s 29(3). There is no such provision for inciting or soliciting but voluntary withdrawal could be raised as a mitigating factor in sentencing

13.33 Persons may attempt, incite or conspire to do something that is impossible to achieve. Impossibility is not a defence as long as the objective is an offence:

- For attempts, s 28(2) expressly provides:

  > An attempt shall be committed notwithstanding that the complete commission of the offence was impossible by reason of a circumstance unkown to the offender.

- 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, however, for attempting or conspiring to achieve a lawful object

under the misapprehension that it is an offence. 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.

13.34 The wording of s 28(2) appears to bypass a long-standing controversy about impossibility 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. The outcome would be the same under the Code s 28(2).

13.35 General defences that would be available for other offences are also available for offences of inchoate liability: for example, self-defence and reasonable mistake of fact.