

Table of Contents

<i>Table of Cases</i>	xiii
Chapter 1 INTRODUCTION	1
1. Prefatory Remarks	1
2. An Attempt to Commit an Offence is an Offence in its Own Right ...	3
3. Definitional Elements	3
4. Introductory Comments on the General Attempt Provision in the Canadian <i>Criminal Code</i>	4
5. Importance and Difficulty	7
Chapter 2 HISTORICAL ASPECTS	9
1. Introduction	9
2. Roman Law	10
3. Scandinavia	10
4. Continental Europe	10
5. The Common Law — and Scotland	11
6. Conclusion	12
Chapter 3 WHY PUNISH ATTEMPT?	15
1. Introduction	15
2. Objective and Subjective — The Two Major Approaches	20
(a) Objective — Social Danger, Functional	21
(b) Subjective — Personal Intent, Conceptual	24

3.	The Conventional Criteria of Punishment as Applied to Attempts	28
	(a) Deterrence	29
	(b) Retribution	32
	(c) Rehabilitation	34
	(d) Law Enforcement and Intervention	36
	(e) Harm	39
	(f) Policy	42
4.	Conclusion	43
Chapter 4 THE MENTAL REQUIREMENT — <i>MENS REA</i>		45
1.	Introduction	45
	(a) Terminology	45
	(b) <i>Mens Rea Per Se</i> is not Criminal	47
	(c) An Exception to the “ <i>Mens Rea Per Se</i> is not Criminal” Principle: Treason	55
2.	The <i>Mens Rea</i> of Attempt: Only a “Direct” Intent will Suffice	57
3.	An Exception for the <i>Mens Rea</i> of Attempt	62
4.	Recklessness as the <i>Mens Rea</i> for Attempt	79
	(a) No Substantial Doubt	81
	(b) A “Virtual Certainty”	83
	(c) Trends toward Objective <i>Mens Rea</i> in Canada	86
5.	Intent as to Consequences; Recklessness as to Circumstances?	99
6.	Negligence as <i>Mens Rea</i> for Attempt?	102
7.	Strict Liability?	107
8.	Conditional Intent	111
9.	Transferred Intent	117
10.	Conclusion	119
Chapter 5 THE FACTUAL REQUIREMENT — <i>ACTUS REUS</i>		121
1.	Introduction	121
	(a) Prefatory Remarks	121
	(b) Functions of the Judge and Jury vis-à-vis the <i>Actus Reus</i>	131
	(c) “It Depends on the Particular Facts”	137
	(d) Attempt Committed by Omission	139
2.	Proximity Test	142
3.	First Stage Theories	155
4.	Commencement of the Execution Test	161
5.	Final Stage Theories	165
	(a) Last Act Test	165
	(b) Penultimate Act Test	170
	(c) Possibility of Intervention Theory	172
	(d) Probability of Desistance Theory	172

6.	Dangerousness Test	176
7.	Equivocality Test	184
8.	Substantial Step Test	196
9.	Control Approach and Indispensable Element Approach	208
10.	Causation Theory	210
11.	“Culpability Otherwise Required for the Commission of the Crime Attempted” Test	211
12.	The “Common Sense” Test	212
13.	“Discretion of the Courts” Test	213
14.	“Likely to End in Consummation” Test	214
15.	Commitment Test	215
16.	Abnormal Step (Probability of Desistance) Theory	216
17.	The “Commission of Another Crime Constitutes by itself an Attempt” Theory	216
18.	Professor Stuart: A Subjective Test, being Alternatively the Proximity Test or Probability of Desistance Theory	217
19.	Indeterminate Tests	218
20.	Guidelines	218
21.	Conclusion	220
 Chapter 6 IMPOSSIBILITY		223
1.	Introduction	223
	(a) Preface	223
	(b) Impossibility or Statutory Interpretation?	224
	(c) The Legal Impossibility and Factual Impossibility Distinction	229
2.	Categories of Impossibility	232
	(a) Non-existence of Something in the External World	232
	(i) The Empty Pocket	232
	(ii) The Vacuous Womb	238
	(iii) The Absent Ambush Victim	242
	(iv) The Trying Tree Stump	245
	(v) The Ubiquitous Umbrella	247
	(vi) The Non-Existent Narcotics	249
	(b) Lack of an Essential Quality	250
	(i) The Poisoning Posers	250
	(ii) The Bungled Bullet	252
	(iii) Attempted Fraud and False Pretences, Extortion, and Corruption	256
	(iv) Lady Eldon’s Lace	259
	(v) Magical Mysteries	261
	(c) Personal Incapacity	263
	(i) Age	263

x THE LAW OF CRIMINAL ATTEMPT

(ii)	Incapable Rapist	268
(d)	The Receiver, the Launderer, the Fence — Three Bags Full ...	269
3.	Are there any Offences which cannot be Attempted?	286
(a)	Attempt Contemplated in Substantive Offences	287
(b)	Attempting Omission Crimes	289
(c)	Substantive Offences of Recklessness and other Lesser <i>Mens Rea</i>	290
(d)	Attempts to Extort, Purger, Riot, and Libel	291
(e)	Attempting Attempt, Conspiracy, and Other Inchoate Offences	292
4.	Conspiracy to do the Impossible	298
5.	Three Possible Solutions to Impossibility	301
(a)	Reasonable Person	301
(b)	The English Law Commission, the <i>Criminal Attempts Act 1981</i> , the House of Lords, and the Supreme Court of Canada	303
(c)	The American Model Penal Code	304
6.	Conclusion	307
Chapter 7 ABANDONMENT OF THE ATTEMPT		311
1.	Introduction	311
2.	Anglo-Canadian Position	312
3.	Australia	317
4.	South Africa	319
5.	United States	320
6.	Considerations for and against the Defence of Abandonment	323
(a)	For the Defence	323
(b)	Against the Defence	326
7.	Conclusion	328
Chapter 8 SUCCESSFUL ATTEMPTS AND MERGER		331
Chapter 9 EVIDENTIAL AND PROCEDURAL CONSIDERATIONS		347
1.	Introduction	347
2.	Drafting the Information and Indictment	347
3.	Accomplices and Attempt	351
(a)	Aiding and Abetting; Accomplices (Section 21)	351
(b)	Counselling (Section 22)	354
(c)	Accessory After the Fact (Section 23)	355
4.	Provocation	357

5.	Self Defence	362
6.	Attempting Indictable Offences	362
7.	Attempting Summary Offences	363
8.	Attempting Hybrid Offences	365
9.	Similar Fact Evidence	365
10.	Verdict	366
11.	Attempted Offences by Corporations	367
Chapter 10	SENTENCING	371
Chapter 11	GENERAL ATTEMPT PROVISIONS	377
Chapter 12	SPECIFIC ATTEMPT PROVISIONS	383
1.	Specific Attempt in Federal Legislation	383
2.	Specific Attempt, or “Preliminary” Offences, as an Answer to the Inadequacies of General Attempt Provisions?	386
Chapter 13	RECOMMENDATIONS FOR LEGISLATIVE REFORM	391
1.	Introduction	391
2.	The Mental Requirement — <i>Mens Rea</i>	392
3.	The Factual Requirement — <i>Actus Reus</i>	394
4.	Impossibility	396
5.	Abandonment of the Attempt	397
6.	Successful Attempts and Merger	398
7.	Evidential and Procedural Considerations	399
8.	Sentencing	400
9.	Conclusion	400
<i>Index</i>		401