

The *mens rea* of criminal attempt in the law of New Zealand

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Chapter I: Introduction

This dissertation is about the *mens rea* requirement of attempt liability. The impetus for analysing this topic is provided by two recent judicial decisions, one in the United Kingdom, and the other in New Zealand, both of which concern the issue of which form of *mens rea* is required with regards to the circumstance elements of an offence. Circumstance elements can be understood (roughly) as those parts of the *actus reus* of an offence which exist independent of the actions required for liability, but which nonetheless must be present for a particular offence to be completed. These parts of the *actus reus* can be contrasted with conduct elements (which are directed toward the actions which a defendant performs) and consequence elements (which are directed towards the outcomes caused by such actions). The traditional understanding is that a *mens rea* state of intention is required as to every element of the full offence.¹

The New Zealand Supreme Court has departed from this traditional stance where circumstance elements are concerned. *Ab-Chong v R* confirmed that a lesser *mens rea* than intention is acceptable with regards to circumstance elements,² affirming the Court's earlier decision of *L v R*.³ In the Court of Appeal of England and Wales, *R v Pace and Rogers* reached the opposite conclusion and held, contrary to prior case-law (namely *R v Khan*),⁴ that a defendant must *intend* such circumstances to be liable for an attempt.⁵

Why dwell on this narrow area of conflict in the *mens rea* of attempt law? The fact that *Pace* endorses an approach so at odds with the New Zealand stance, and that this divergence, and the relative value of each position, has not been analysed by New Zealand commentators in any real depth in recent times, is itself something which merits giving this topic our attention.

However, the main reason that this is a topic worth discussing is that a careful consideration of the opposing positions (*L v R* as against *Pace*) leads to an important

¹ *R v Mohan* [1976] QB 1, [1975] All E R 193 at 11.

² *Ab-Chong v R* [2015] NZSC 83, [2006] 3 NZLR 291 [*Ab-Chong*].

³ *L v R* [2006] NZSC 18, [2006] 3 NZLR 291.

⁴ *R v Khan* [1990] 2 All ER 783, [1990] 1 WLR 813 [*Khan*].

⁵ *R v Pace and Rogers* [2014] EWCA Crim 186, [2014] 1 Cr App R 34 [*Pace*].

insight: that the current approach in New Zealand represents a *shift* to a new paradigm of attempt law, a shift which is difficult to square with the approach to the *actus reus* element which prevails in this country.

This insight requires some unpacking. Whereas, on the traditional understanding, only those who *intentionally* created a risk of harm (namely the harm instantiated in the full offence) fell within the ambit of the law of attempt, the current approach to the *mens rea* required for circumstance elements is more consistent with an *endangerment* paradigm of liability,⁶ a paradigm which is concerned with criminalising conduct which merely (unintentionally) *risks* the causing of harm. But the leading case on the *actus reus* element of attempt liability in New Zealand, *Harpur*,⁷ which allows “strong evidence” of intention to bolster a weaker *actus reus*,⁸ seems to support an *attack* paradigm of liability,⁹ a paradigm which emphasises the intentional nature of a defendant’s action.

Thus, the conception of attempt liability which underpins the *mens rea* element of attempt law is different (and inconsistent with) the conception of attempt liability which underpins the *actus reus* element of attempt law. This is concerning, because the conjunction of these two distinct conceptions of attempt liability serves to extend the reach of the law of attempt further than has ever been the case.

This insight gives rise to several general questions: Is the law of attempt the right mechanism for giving effect to concerns about individuals who merely risk the causing of harm? Or does an effort to accommodate this issue distort attempt law, render it unprincipled, and lead to concerns of over-criminalisation? The focus of this dissertation is to probe these broad questions through the narrow avenue of the debate about the *mens rea* required for circumstance elements.

To this end, Chapter II traces the developments which have led to the current position in New Zealand and analyses the merits of *Pace* as compared to the approach in New Zealand. Chapter III then considers whether the current approach to attempt liability

⁶ R A Duff “Criminalising Endangerment” in R A Duff and Stuart Green (eds) *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, Oxford, 2005) 43 at 43-44.

⁷ *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909 [*Harpur*].

⁸ At [36] and [38].

⁹ Duff, above n 6 at 43-45.

in New Zealand has led to over-criminalisation. A key factor in reaching a conclusion on this matter will be to determine what the broad rationales which underpin attempt liability are.

In Chapter IV 'A', the focus is narrowed to consider a seemingly powerful objection to *Pace*, namely the claim that circumstance elements are not capable of being intended; and a seemingly telling objection to *Khan*, namely that it is not possible to distinguish circumstance elements from consequence elements.

Chapter IV 'B' discusses which approach to the *mens rea* of circumstance elements is preferable. The conclusion reached is that, alone, neither approach is satisfactory: retaining the *Khan* approach leads to the tension described above, and to concerns about over-criminalisation; whilst simply endorsing *Pace* may lead to concerns of *under*-criminalisation in this country. Finally, Chapter V briefly considers several solutions as to how these problems can be addressed.

Chapter II: The *mens rea* of attempt liability

This chapter traces developments in the law leading to the current position in this country and the United Kingdom, before discussing *Pace* and the status of that case. The merits of each approach to the *mens rea* of attempt liability are briefly considered.

A The status quo

The common law has long recognised that conduct which does not, by itself, amount to a substantive criminal offence, may, nonetheless, justify the imposition of criminal liability.¹⁰ In most jurisdictions, including New Zealand (Crimes Act 1961, s 72), and the United Kingdom (Criminal Attempts Act 1981, s 1), such a recognition has now been enshrined in statute, in a general provision of attempt liability. Coupled with any substantive offence susceptible to attempt liability,¹¹ these provisions provide the elements required for the attempt offence. For *mens rea* purposes, the key phrase in s 72 is “having an intent to commit an offence...”.¹² The equivalent wording of the United Kingdom provision is to the same effect.¹³

In both New Zealand and the United Kingdom, the general *mens rea* rule of attempt liability has been essentially settled since the introduction of the general doctrine. The general rule is this: that “intent to commit an offence”¹⁴ is understood as requiring “a decision to bring about, in so far as it lies within the accused’s power, the commission of the offence”.¹⁵ Thus, a defendant must intend all the elements of the full offence.

¹⁰ See Albert Kiralfy “Taking the Will for the Deed: the Mediaeval Criminal Attempt” (1992) *The Journal of Legal History* 95; Francis Sayre “Criminal Attempts” (1928) 41(7) *Harv L Rev* 821 at 858. However, the general law of attempt as we currently know it did not take shape until the late 18th Century in *R v Scofield* [1784] *Cald* 397. Any early examples of attempt liability were rather isolated incidents of punishment for attempts at serious offences.

¹¹ It is generally accepted that some offences cannot be attempted. One example is manslaughter, due to the fact that the offence is defined as a non-intentional causing of death: David Omerod and Karl Laird *Smith and Hogan’s Criminal Law* (14th ed, Oxford University Press, Oxford, 2015) at 481. Nor can there be an attempt to conspire, or an attempt of a secondary liability offence: AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thompson Reuters, Wellington, 2012) at 281 **FIND** and 209. It is commonly thought that offences of ulterior intent also cannot be attempted, i.e, those which require an act with intent to commit a substantive offence: Omerod and Laird at 481.

¹² Crimes Act 1961 (NZ), s 72(1).

¹³ Criminal Attempts Act 1981 (UK), s 1(1) reads in relevant part: “if with intent to commit an offence...”.

¹⁴ Crimes Act 1961 (NZ), s 72(1); Criminal Attempts Act 1981 (UK), s 1(1).

¹⁵ *R v Mohan* above n 1 at 11.

Of course, as Duff notes, the idea of intending a *mens rea* state is “otiose or nonsense”.¹⁶ For example, for the offence of attempted wilful damage in s 11(1)(a) of the Summary Offences Act 1981 (NZ), which provides “[e]very person is liable...who intentionally damages any property”, one cannot intend to *intentionally* damage. Thus, intention is only required as to the *actus reus* elements of an offence; the conduct and the consequences listed in the definition of the full offence.¹⁷ To be liable for attempted wilful damage then, a defendant must intend to do an act, and intend thereby to cause damage to property.

This rule applies in a straightforward manner to most offences, which, like the offence of wilful damage, are cast so as to simply require a defendant to perform an act (the *actus reus*), accompanied by some *mens rea* state. The great majority of offences take this form. Many of these will also require that the *actus reus* cause a prohibited result.

The general rule applies even where the full offence allows an alternative, lesser form of *mens rea*. So, for example, on a charge of attempted murder in New Zealand, only an intention to kill or cause death under s 167(a) of the Crimes Act will found liability for the attempt, even though other lower levels of *mens rea*, such as an intention to cause grievous bodily harm, while being reckless as to whether death results, under s 167(b), are available to prove the full offence.¹⁸

However, the general rule is more difficult to apply to complex offences, offences which require an additional fact or ‘circumstance’ for the complete offence to be fulfilled, and often require the defendant to have a *mens rea* state in relation to this circumstance.¹⁹ An example is the New Zealand offence of accessing a computer system without authorisation. The offence provision provides that:²⁰

¹⁶ RA Duff *Criminal Attempts* (Oxford University Press, New York, 1996) at 6. See also Bebbin Donnelly-Lazarov *A Philosophy of Criminal Attempts: The Subjective Approach* (Cambridge University Press, Cambridge, 2015) at 196 where “a *mens rea* of a *mens rea*” is declared impossible.

¹⁷ Indeed, Duff claims that this has always simply been taken for granted in English law: see Duff, above n 16 at 5.

¹⁸ *R v Murphy* [1969] NZLR 959 (CA). The approach is the same in England: see *R v Whybrow* (1951) 35 Cr App R 141; *R v Millard & Vernon* [1897] Crim L R 393.

¹⁹ As will become clear in Chapter IV, although the language of ‘consequences’ and ‘conduct’ vs ‘circumstances’ is used for explanatory purposes, this dissertation does not endorse this distinction as a valid analytical tool.

²⁰ Crimes Act, s 252.

“Every one is liable...who intentionally accesses...any computer system without authorisation, knowing that he or she is not authorised to access that computer system, or being reckless as to whether or not he or she is authorised to access that computer system.”

The circumstance element of this offence is the defendant’s lack of authorisation. For the full offence, either knowledge or recklessness as to this element is sufficient. But, on an attempt charge, does the general rule hold: is it still the case that *all* elements of the offence must be intended? In other words, must intention also be proved as to this circumstantial element?

(i) **Mens rea as to circumstance elements in the United Kingdom**

This question was finally addressed by the English Court of Appeal in *R v Khan*, in the context of attempted rape.²¹ At the time, the full offence required unlawful sexual intercourse, and either knowledge or recklessness on the part of the defendant as to whether the victim consented.²² The Court rejected the suggestion that the words “with intent to commit an offence” in s 1(1) of the Criminal Attempts Act meant that a defendant must intend the victim’s lack of consent and held that the *mens rea* requirement of attempt, when applied to the full offence, meant “intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent”.²³ Therefore, the same *mens rea* was acceptable for the attempt as for the full offence.

In thus concluding, the Court of Appeal relied upon a distinction between consequence (and conduct) and circumstance elements of the *actus reus*.²⁴ This distinction (and whether it is indeed workable) will be discussed in more detail in Chapter IV, but, for explanatory purposes, a working definition, as suggested by Duff,

²¹ *R v Khan*, above n 4. Prior to *Khan*, in *R v Breckenridge* [1984] Cr App R 244 and *R v Pigg* [1982] 2 All ER 591, [1982] 1 WLR 762 it had simply been assumed that recklessness as to the circumstance was sufficient for attempted rape.

²² Sexual Offences (Amendment) Act 1976 (UK), s 1, prior to the enactment of the Sexual Offences Act 2003 (UK), which provides a definition on all fours with our own, for which, see discussion related to fn 33; fn 34.

²³ *Khan*, above n 4 at 819.

²⁴ As originally suggested in John Smith “Two Problems in Criminal Attempts” (1957) 70 Harv L Rev 422 and recognised in *R v Millard and Vernon*, above n 18, quoted from in *Khan*, above n 4 at 817-818.

will suffice.²⁵ Consequence elements are those which occur because of a defendant's action, i.e. such elements are the outcomes of conduct. In the offence of rape, the requirement of penetration is, according to this definition, a consequence element. Circumstance elements, by contrast, are any elements of the *actus reus* which exist independent of a defendant's actions, but must be present for the offence to be completed. In the offence of rape, the victim's non-consent is therefore a circumstance element.

Thus, *Khan* held that, with regards to consequence elements, intention is required, but with regards to circumstance elements, if the full offence allows for recklessness, then this will suffice for the attempt also. For simplicity, this approach will be referred to as the 'intended consequences' model.²⁶

A broadly similar analysis was adopted in the later English Court of Appeal case of *Attorney-General's Reference (No 3 of 1992)*, which concerned attempted aggravated arson.²⁷ Commentators have since levelled cogent criticism at the reasoning in this case. This is partly due to the 'missing element' test introduced by the Court, which may well extend further than the approach in *Khan* and mean that a defendant who was reckless as to consequence elements may also be liable.²⁸ The case is seen by commentators as questionable - indeed, the English Law Commission recently suggested the case should be ignored -²⁹ and thus it will only appear at the periphery of this dissertation's analysis.

(ii) The New Zealand approach

In New Zealand, prior to 2006, there was little judicial analysis on the question of whether intention as to circumstances was required for attempt liability. In the case of *R v Shepherd*, on a charge of attempted sexual violation, it was held in a pre-trial ruling

²⁵ Duff, above n 16 at 12.

²⁶ This term and its companion, the 'full intention' model, are taken from Matt Dyson "Intended Consequences, Suspected Circumstances and the Criminal Law: Pace and Rogers [2014] EWCA Crim 186" unpublished Social Science Research Network, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400071>.

²⁷ *Attorney General's Reference (No 3 of 1992)* (1994) 98 Cr App R 383, [1994] 1 WLR 409 [*Attorney General's Reference*]. Further criticisms of the case are discussed in Chapter IV.

²⁸ See Omerod and Laird, above n 11 at 466; Graham Virgo "Criminal Attempts: The Law of Unintended Circumstances" (2014) 73 (2) CLJ 244 at 245.

²⁹ See English Law Commission *Conspiracy and Attempts* (UKLC CP183, 2007) at 196.

that New Zealand would take a ‘full intention’ approach.³⁰ But there was no real analysis of this issue. The judge merely stated that because s 72 requires intention as to every element, it followed “as a matter of logic”, that the prosecution must prove that a defendant intended the victim’s lack of consent.³¹

However, *Shepherd* was subsequently overruled by the New Zealand Supreme Court in *L v R*, which endorsed the reasoning in *Khan*. The context of *L v R* was also sexual offending; a charge of attempted sexual violation.³²

Sexual violation under s 128 requires “(i) intentional penetration of genitalia by the penis; (ii) without consent of the complainant; and (ii) without the accused believing on reasonable grounds that the complainant is consenting”.³³ The Court found that there was a “conceptual analogy” between this last requirement and the English criterion of recklessness, and applied the “essence” of the *Khan* analysis to our provision.³⁴ Thus, it was held that a defendant attempted sexual violation where penetration of genitalia is intended, the complainant did not consent to such activity and the accused did not believe on reasonable grounds that the complainant consented to the penetration.

So, *L v R* finally settled the position with regards to the nexus between attempts, *mens rea*, and circumstance elements in New Zealand: to satisfy the *mens rea* requirements of attempt, a defendant must intend to perform the conduct and consequence elements of an offence but where a circumstance is required, whatever culpability is stipulated in the full offence will be sufficient.³⁵

³⁰ *Shepherd v R* (HC Auckland, T 192/91, 20 February 1992, Anderson J).

³¹ At 3-4.

³² Crimes Act, s 129. Although attempted sexual violation is an offence in its own right, s 129 does not define the elements of the offence, thus, as the Court in *L v R*, above n 3 states at [6]-[8], s 72 and s 128, which defines sexual violation, are relevant.

³³ *L v R*, above n 3 at [6] per Tipping J.

³⁴ At [17] and [21] per Tipping J; Crimes Act, s 128: “Sexual violation is the act of a person who (a) rapes another person; or (b) has unlawful sexual connection with another person. (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B’s genitalia by person A’s penis, (a) without person B’s consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection. (3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B (a) without person B’s consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection....”.

³⁵ In the UK, it has not been decided whether the limit is recklessness, or simply whatever *mens rea* is required for the full offence. See Omerod and Laird, above n 11 at 462 where it is suggested that the latter is “a more radical approach” than *Khan* presents. Compare Smith, above n 25 at 434, who holds

The recent New Zealand Supreme Court case of *R v Ab-Chong*, which related to a charge of assault with intent to commit sexual violation, affirmed the result in *L v R*.³⁶ Although not a truly inchoate offence, as the Supreme Court noted, this offence has similar features to an attempt offence due to the requirement that a defendant have an “intent to commit sexual violation”.³⁷ The majority saw no reason to depart from the approach in *L v R*, and, applying that approach to this offence, confirmed that an intention to commit sexual violation involved an intention to have sexual intercourse and lack of belief in consent on reasonable grounds.³⁸

The Court in *Ab-Chong* discussed the recent decision of *Pace* in the Court of Appeal of England and Wales, but chose not to follow it, instead referring to comments by academics in the United Kingdom which suggested that the *Khan* approach would apply to the new wording of the offence of rape, which is now broadly the same as New Zealand’s version of the same offence.³⁹

Thus, it is perhaps fair to say that the Court did not really address the merits of *Pace*, nor did it turn its mind to the desirability (or otherwise) of the intended consequences model based on *Khan*. Rather, it simply took the matter as settled by *L v R*.⁴⁰ This is perhaps understandable, because *Pace* does not appear to have been relied upon in submissions by the appellant.⁴¹ But, as this dissertation argues, in side-stepping the deeper issues which *Pace* raises, the Court may well have missed an opportunity to return to first principles in the law of attempt.

the opinion that whatever “will suffice for the substantive crime...will suffice also for the attempt”. However, in New Zealand, it is clear that the “consequence/circumstance [approach] is...capable of being used in a variety of situations”, not just offences where the *mens rea* is stated to be knowledge or recklessness: Kevin Dawkins and Margaret Briggs “The Mental Element in Attempt” [2007] N Z L Rev 161.

³⁶ Crimes Act, s 129(2).

³⁷ *Ab-Chong*, above n 2 at [32] and [36] per Arnold J. Elias CJ’s judgment was on all fours with the majority on this point. The offence under s 129 requires an assault and what is required for “intent to commit sexual violation” is equivalent to the requirements set out above at fn 34 for the attempt offence in *L v R*, above n 3.

³⁸ *Ab-Chong*, above n 2 at [77]-[78] per Arnold J.

³⁹ At [85], such as Peter Rook and Robert Ward *Rook and Ward on Sexual Offences: Law and Practice* (4th ed, Sweet & Maxwell, London, 2010) at [1.256] and Findlay Stark “The *Mens Rea* of Criminal Attempt” [2014] 3 Arch Rev 7 at 7. However, it has been suggested elsewhere that this may not be so, as *Khan* can be read as limiting the *mens rea* for a circumstance element to recklessness: English Law Commission *Conspiracy and Attempts*, above n 29 at 59.

⁴⁰ At [84]: the Court confirmed that “as far as New Zealand is concerned, the issue has been settled by *L v R* in respect of attempt to commit sexual violation by rape”.

⁴¹ *Ab-Chong v R* [2015] NZSC Trans 5 (18 February 2015).

B *R v Pace and Rogers*: The intended consequences model destabilised?

The recent case of *R v Pace and Rogers* in the Court of Appeal of England and Wales has cast doubt on whether the intended consequences model is sound, an issue which was thought to have been settled by *Khan*. Of course, whilst it may undermine the authority of *Khan*, upon which *L v R* and *Ab-Chong* are based, it is unlikely that it has seriously threatened the status quo in New Zealand. With two recent decisions from the Supreme Court contrary to *Pace*, this dissertation recognises that any further developments in this area are likely to be legislative. However, although the New Zealand judicial approach to the issue is firmly established, it does not follow that this is the correct approach.

The charge at issue in *Pace* was one of attempting to conceal, disguise or convert criminal property.⁴² The defendants had been sold scrap metal by undercover police officers.⁴³ Under the definition of criminal property, the property in question must be property constituting or representing benefit from criminal conduct and further, the defendant must know or suspect that this property constitutes or represents benefit from criminal conduct.⁴⁴ As the full offence could not be committed, given that the scrap metal was not stolen, being the property of the police,⁴⁵ the defendants were charged with the attempt. Attempt is defined in the Criminal Attempts Act so that the fact that commission of the full offence would have been impossible is no barrier to securing a conviction.⁴⁶

In reliance on *Khan*, the trial judge directed the jury that, as suspicion was enough to satisfy the full offence, it would also do for an attempt.⁴⁷ However, the Court of Appeal

⁴² Proceeds of Crime Act 2002 (UK), s 327: “A person commits an offence if he (a) conceals criminal property; (b) disguises criminal property; (c) converts criminal property...”.

⁴³ *Pace*, above n 5 at [13]. The defendants had nicknamed these officers “Dodgy and Dodgier”.

⁴⁴ Proceeds of Crime Act, s 340(3): “Property is criminal property if (a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.”.

⁴⁵ *Pace*, above n 5 at [14].

⁴⁶ See Criminal Attempts Act, s 1(2): “A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible” and (3): “In any case where (a) apart from this subsection a person’s intention would not be regarded as having amounted to an intent to commit an offence; but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.”

⁴⁷ *Pace*, above n 5 at [3].

disagreed and, in a unanimous judgment delivered by Davis LJ, stated simply that “‘intent to commit an offence’ connotes an intent to commit all elements of the offence”.⁴⁸ A person could only be liable for attempting to conceal, disguise or convert criminal property if they intended that the property involved constituted or represented someone else’s benefit from criminal conduct.

The result in *Pace* seemed to be an unexpected rejection of the status quo as represented by *Khan*. As commentators have noted, with some alarm, the three cases of *Khan*, *Attorney General’s Reference* and *Pace* all emanate from the Court of Appeal, thus it is unclear what the current state of the law is.⁴⁹ Although a question of law of general public importance was certified by the Court of Appeal in *Pace*, leave was refused and there was no application to the Supreme Court.⁵⁰

(i) The status of *Pace* in the United Kingdom

A few commentators, eager to pour oil on troubled waters, have suggested that *Pace* and *Khan* are not necessarily contradictory and can possibly co-exist.⁵¹ Whilst *Pace* may not be “flattering of” *Khan* and *Attorney General’s Reference*, it has been noted that the Court does not explicitly overrule these previous authorities.⁵² In *Pace*, Davis LJ pointed out that the Court in *Khan* recognised that its “reasoning [could not] apply to all offences and all attempts”.⁵³ His Honour used this statement as a springboard from which to draw attention to features which distinguished the case before him from *Khan*, and to argue that the ratio of *Khan* thus did not apply. But the quote from *Khan* which Davis LJ was relying on was followed by two examples which illustrated the sorts of offences the ratio in *Khan* could not apply to: those of reckless driving and reckless arson. These are offences where “no other state of mind than recklessness is involved

⁴⁸ At [62].

⁴⁹ Nick McBride “R v Pace and Rogers [2014] EWCA Crim 186” (2014) mcbridesguides at 2, <https://mcbridesguides.files.wordpress.com/2014/09/r-v-pace-and-rogers1.pdf>.

⁵⁰ Omerod and Laird, above n 11 at 462. The author also notes that *Pace* has been referred to subsequently in *R v Smith* [2014] EWCA Crim 1941, arising out of same operation- and in fact heard by the same trial judge- and *R v Wheeler* [2014] EWCA Crim 2706, involving a different undercover operation. The defendants’ convictions were quashed in light of the result in *Pace*.

⁵¹ Dyson, above n 26, citing Findlay Stark, unpublished note. J. J Child and A. Hunt suggest this is one way to deal with the case, but quickly dismiss this approach in “Pace and Rogers and the *Mens Rea* of Criminal Attempt: Khan on the Scrapheap?” (2014) 78 J Crim L 220 at 222-223.

⁵² Dyson, above n 26 at 9.

⁵³ *Pace*, above n 5 at [52] quoting from *Khan*, above n 4 at 819.

in the offence” and thus there can be no attempt to commit them.⁵⁴ Therefore, there is no suggestion that the Court in *Khan* did not intend to create a rule of general application to attempts involving proof of a circumstance, at least where recklessness was the state of mind required for the full offence.⁵⁵

Regardless, Davis LJ (dubiously) employed this statement to support the proposition that the facts before him could be distinguished from *Khan* on the grounds that (a) unlike in *Khan*, in *Pace* the commission of the full offence would have been impossible;⁵⁶ and (b) that the provision in *Khan* involved recklessness as opposed to suspicion (the implication being that it would be odd if suspicion was an adequate *mens rea* for an attempt).⁵⁷

However, these are not principled reasons for distinguishing *Khan*.⁵⁸ As JJ Child and Adrian Hunt conclude, allowing *Khan* to continue to exist alongside *Pace* would be “incoherent”.⁵⁹ They stress that each case puts forward an approach of general application, each based upon a different view of the rationale for attempt liability. In *Khan*, Russell LJ stated that “attempt does not require any different intention...from that of the full offence”.⁶⁰ Davis LJ in *Pace* prefaced his support of the ‘full intention’ model with the words, “as a matter of ordinary language and in accordance with principle”, suggesting that this, too, was intended to be a test of general application.⁶¹

⁵⁴ The Court was merely recognising the long-standing principle that offences that can only be committed recklessly, such as manslaughter, cannot be the subject of attempt charges: see Omerod and Laird, above n 11 at 460.

⁵⁵ See fn 35; fn 39.

⁵⁶ *Pace*, above n 5 at [52].

⁵⁷ At [52] and [64]. See also P Mirfield “Intention and Criminal Attempts”, [2015] Crim L R 140 at 146. Although the position that recklessness should be the lowest acceptable form of *mens rea* for attempt is well supported in the literature, as Mirfield notes, there is no proper doctrinal basis for this view; if something less than intention is allowed, there is no principled reason to draw the line at recklessness. Findlay Stark has argued that these comments should take precedence over later statements which appear to suggest that *Pace* is of general application, and thus confine the ambit of *Pace* to either one, or both of these areas: Stark, above n 51.

⁵⁸ Simester notes that the House of Lords in *R v Shivpuri* [1987] A C 1, (1986) 83 Cr App R 178 had already drawn together possible and impossible attempts, thus this “distinction without a difference” is not sustainable: A Simester “The *mens rea* of criminal attempts” (2015) 131 LQR 169 at 170. Further, the Court in *Pace* recognised that, in this particular case, as the full offence was impossible, *belief* would have been a sufficient level of *mens rea*, due to s 1(3) of the Criminal Attempts Act, which provides that, where an offence is impossible, the facts of the case should be considered as D *believed* them to be. Thus, belief would have sufficed here, had the Crown put the case on that basis. As they had not, the case had to be assessed under s 1(1). Davis LJ was emphasising that intention was required generally under that section: see *Pace*, above n 5 at [61]-[62]. For the New Zealand approach to issues of impossibility see: *R v Donnelly* [1971] NZLR 980.

⁵⁹ Child and Hunt, above n 51 at 223.

⁶⁰ At 223, quoting from *Khan*, above n 4 at 819.

⁶¹ At 223, quoting from *Pace*, above n 5 at [62].

Child and Hunt's analysis is persuasive: *Khan* and *Pace* cannot both stand. In fact, this dissertation argues that there is a deeper inconsistency at play here. Whilst the intended consequences model endorsed by *Khan* rests on a view of attempt law as inclusive of an endangerment paradigm, in contrast, *Pace* understands attempt law as having a narrower ambit, namely, the apprehension of only those who *intentionally* risk the causation of harm. Thus, it is clear that, despite the "obvious attraction" of trying to allow the two cases to co-exist, a choice must be made between them.⁶²

Naturally, as a long-accepted approach, *Khan* has many fervent defenders.⁶³ Indeed, the English Law Commission recently recommended that the approach in *Khan* be codified across all attempts.⁶⁴ As Matthew Dyson states, *Khan* has the advantages of "practical justice and jury expediency".⁶⁵ Juries will not be "burdened with different directions...dependent on whether" the full offence is achieved or not.⁶⁶ Moreover, *Khan* is more prosecution friendly. If the approach in *Pace* were to apply to the offence of attempted rape, requiring a defendant to intend that the victim will not be consenting, the defendants in *Khan* would be acquitted. This is a commonly raised argument with much moral strength.⁶⁷ It is an open question, however, whether this focus on sexual offences tends to obscure principled discussion and results in 'top down' as opposed to 'bottom up' reasoning.⁶⁸

However, *Pace* is not without its own supporters- there are those who welcome the case as a "return to first principles".⁶⁹ As the Court in *Pace* itself noted, the 'full

⁶² Child and Hunt, above n 51 at 223.

⁶³ See Virgo, above n 28 who suggests *Pace* should simply be "ignored as *per incuriam*" at 246; Jonathan Herring *Great Debates in Criminal Law* (3rd ed, Palgrave Macmillan, London, 2015) at 177-178; Omerod and Laird, above n 11 at 465.

⁶⁴ English Law Commission *Conspiracy and Attempts* (UKLC R318, 2009), although suggesting that recklessness ought to be the lowest form of *mens rea* allowable.

⁶⁵ Matthew Dyson "Scrapping Khan" [2014] Crim LR 445 at 445.

⁶⁶ *R v Khan*, above n 4 at 819.

⁶⁷ See Stark, above n 39 at 8, Virgo, above n 28 at 245, Bebhinn Donnelly-Lazarov, above n 16 at 207.

⁶⁸ This is suggested by Mirfield, above n 57 at 147. He notes that "good policy" does seem to indicate that the defendants in *Khan* be found guilty, but if this is "put to one side", an assessment of the issues can be made starting from first principles. For an example of this 'top down' reasoning, see Duff who states "this intuition about attempted rape helps to motivate the wider doctrine that attempts should only require...recklessness as to" circumstances: above n 16 at 10. It is an open question whether letting this strong moral intuition affect the whole law of attempt leads to the distortion of attempt law.

⁶⁹ Child and Hunt, above n 51 at 220. See also Mirfield, above n 57; A Simester, above n 58.

intention’ model is the only one that stays true to the statutory language,⁷⁰ a consideration which has previously been “pushed to the sidelines” in the United Kingdom (as it has in New Zealand, we might add).⁷¹ This adherence to the statutory language is important given the fact that the language of intention gives effect to the principle that is understood to underpin attempt law; namely that attempt law is designed to penalise those who *intentionally* risk causing harm.⁷²

Commentators have echoed this, arguing forcefully that the policy arguments that attend *Khan* should not be allowed to displace the “clear and unequivocal terms of” s 1(1) of the Criminal Attempts Act.⁷³ As Mirfield argues, two important constitutional policies point in favour of the ‘full intention’ model that *Pace* presents: that judges ought to give effect to the language of statutes enacted by a sovereign Parliament; and that criminal provisions, where there are two tenable interpretations, ought to be interpreted in the way that most favours the defendant.⁷⁴

Further, a second-order point in favour of the ‘full intention’ model is that it promotes consistency throughout the criminal law, in that it aligns the law of attempt with that of conspiracy.⁷⁵

C Conclusion

Although the New Zealand Supreme Court has signalled that it is not in favour of the approach in *Pace*, this does not mean that we should conclude that that approach is wholly without worth. The Court did not have the benefit of oral argument on the case and conducted a fairly perfunctory enquiry into its merits. Given that the decision

⁷⁰ *Pace*, above n 5 at [62].

⁷¹ Mirfield, above n 57 at 146.

⁷² Simester and Brookbanks, above n 11 at 8.2: “the mental element in an attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted. Anything less would be to create a very different inchoate offence from attempt, in which the marque of criminality was not supplied by D’s *seeking through his or her actions* to commit a crime, but by the fact that his conduct merely ran the risk of being wrongful”. See also William Wilson *Central Issues in Criminal Theory* (Hart Publishing, Oxford, 2002) at 232: “the wrongdoing struck at [by the offence of attempt] are people who act in furtherance of an intention”. This idea is discussed in more depth in Chapter III.

⁷³ Simester, above n 58 at 172.

⁷⁴ Mirfield, above n 57 at 147. The case of *Sweet v Parsley* [1970] AC 132, [1969] 2 WLR 470 is commonly cited in support of this proposition.

⁷⁵ *Pace*, above n 5 at [61]-[62]. In the House of Lords in *Saiki* [2006] UKHL 18, [2007] 1 AC 18 it was held that intention or knowledge was required as to every element of the full offence under s 1(1) of the Criminal Law Act 1977 (UK). For NZ, see *R v Gemmell* [1985] 2 NZLR 740, in which the same was held in relation to the offence under s 310 of the Crimes Act.

between the approach in *Pace* and the status quo involves issues of constitutional importance (as discussed by Mirfield),⁷⁶ and raises complicated issues about the principles that underpin the criminal law, namely whether the law of attempt ought also to give effect to endangerment concerns, the Supreme Court's rejection of the full intention model should be closely scrutinised. Such scrutiny is undertaken in the following sections of this dissertation.

⁷⁶ Above n 57; fn 75.

Chapter III: The background: principle, over-criminalisation and inchoate liability

Pace, and the issues it raises, cannot be considered in a vacuum: the wider context must be borne in mind. One aspect of this wider context is the issue of over-criminalisation, which has been much discussed in recent times. Another aspect is, of course, the justifications and rationales that underpin attempt law generally. And these two aspects are linked, being that over-criminalisation occurs when the reach of an offence extends beyond the boundaries of its underlying principles. The key issue in this context is: is the offence of attempt, as has traditionally been thought, restricted to criminalising those who *intentionally* risk the causing of harm, or does its ambit legitimately extend to an endangerment paradigm? A consideration of these matters can inform an answer to the question at the centre of *Pace*: does ‘intent to commit an offence’ mean that a defendant must also intend ‘circumstance’ elements?

A Over-criminalisation in New Zealand attempt law

The issues that attend a decision between *Pace* and the intended consequences model can be considered against a backdrop of concerns about the problem of over-criminalisation. Whilst much of the literature on over-criminalisation is concerned with the scope of the body of rules and prohibitions that make up the criminal law as a whole, a number of commentators have specifically discussed the issue in relation to inchoate offending.⁷⁷

In *Ab-Chong*, the Court made it clear that it was alive to issues of over-criminalisation. Arnold J specifically recognised the “potential for over-reach” that is inherent in inchoate offences.⁷⁸ This is due to the fact that criminal liability attaches to conduct which may not be criminal of its nature, but is nonetheless held to justify punishment because it is intended to bring about a full offence. However, his Honour was of the view that concerns of over-criminalisation are adequately addressed by the requirement

⁷⁷ See generally R A Duff, L Farmer, S E Marshall, M Renzo and V Tadros *The Boundaries of the Criminal Law* (Oxford University Press, Oxford, 2010); Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, New York, 2008). Specific to inchoate or attempt liability, see Donnelly-Lazarov, above n 16 at chapter 9; Margaret Briggs, “The conduct requirement in the law of attempt: A New Zealand perspective” (2015) 44(2) CLWR 145 at 158.

⁷⁸ *Ab-Chong*, above n 2 at [7].

in s 72(2) and (3) of the Crimes Act that a defendant's *actus reus* must be both 'more than merely preparatory' and 'immediately or proximately' connected with the intended offence to found liability for an attempt.⁷⁹ This section considers whether his Honour's view on this front is realistic and whether the potential for over-reach inherent in inchoate offences is, in fact, being realised in the law of attempt.

Does the proximity requirement truly act as a safeguard to prevent criminal over-reach? *Johnston v R* suggests that, in New Zealand, the answer is 'no'.⁸⁰ In that case, the defendant, charged with attempted sexual violation, was found crouching in a backyard near a sleep-out where a 16 year old girl was sleeping. He had claimed his intention was to burgle the dwelling, not to enter for the purpose of committing rape. The Court of Appeal held that his acts were sufficiently proximate due to strong evidence of his intention to commit a sexual offence. This strong evidence consisted of a mix of propensity evidence, including several previous convictions for rape, and a consideration of the defendant's actions before his apprehension, which arguably did not clearly evince an intention to commit a sexual offence.⁸¹

Intuitively, this result seems questionable. Is this an example of criminal over-reach? The defendant's actions, whilst perhaps not objectively innocent, are not particularly proximate to commission of the full offence of sexual violation. The result in *Johnston* throws into sharp relief the radical nature of the recently adopted New Zealand approach to the *actus reus* of attempt law.

In recent years, the landscape of attempt law in New Zealand has experienced something of an upheaval. The decision of *R v Harpur* in the New Zealand Court of Appeal signalled a dramatic departure from the approach to the *actus reus* requirement in s 72 that had held sway for several decades.⁸² Under the previous interpretation, derived from two Court of Appeal cases - *R v Wylie* and *R v Wilcox* - something in the

⁷⁹ At [31] and [69]. See also [113] per Elias CJ; Crimes Act, s 72(2): "The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law" and (3) "An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence".

⁸⁰ *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19.

⁸¹ At [8]-[10]; [30].

⁸² *R v Harpur*, above n 7.

nature of a “real and practical step” or a “commencement of execution” was needed to satisfy the proximity test.⁸³ This approach was broadly similar to that taken in the leading United Kingdom cases.⁸⁴ Taking this approach to the *actus reus* requirements meant that conduct that was seen to be too remote from the commission of the full offence could not attract liability, and thus, under the *Wylie/Wilcox* approach, questions of over-reach in the law of attempt did not seem to be a live issue. A defendant like that in *Johnston* would, quite possibly, not have been liable under the old approach.⁸⁵

However, the Court in *Harpur* over-ruled both *Wylie* and *Wilcox*. *Harpur* endorsed a global approach to the question of proximity, one in which a defendant’s *mens rea* and *actus reus* must be considered together.⁸⁶ Thus, “strong evidence” of a clear intention can be used to bolster a less proximate or weaker *actus reus*.⁸⁷ So, after *Harpur*, conduct that was seen as no more than preparation under the *Wylie/Wilcox* test is now eligible to satisfy the *actus reus* requirements of an attempt, if proof can be brought of a clear *mens rea*. As noted by Margaret Briggs, the *Harpur* approach “effectively dispenses with” the proximity requirements, and “extends criminal liability back into the hinterland of preparatory conduct”.⁸⁸

It appears that the proximity requirement of the *actus reus* is no longer a control mechanism which limits the ambit of the law of attempt. Accordingly, criminal liability has been extended to encompass conduct “beyond the bounds set by traditional inchoate offences”.⁸⁹ It is thus arguable that the *Harpur* approach may well result in one species of over-criminalisation, namely, that which is caused by a “heavily stigmatic

⁸³ *Police v Wylie* [1976] 2 NZLR 167 (CA) at 170 and *R v Wilcox* [1982] 1 NZLR 191 (CA) at 195, citing *Henderson v R* (1948) 91 CCC 97 per Tascherau J.

⁸⁴ Which were applying the “more than merely preparatory” test in s 1(1) of the Criminal Attempts Act. See *R v Campbell* (1991) 93 Cr App R 350, [1991] Crim LR 268 (CA) and *R v Geddes* (1996) 160 JP 679, [1996] Crim LR 894. The law on this point has remained relatively unchanged in the United Kingdom since these cases: see A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (5th ed, Hart Publishing, Portland, 2013 at 342. Margaret Briggs suggests that perhaps one reason why the approach in the United Kingdom is so much more restrictive is that the maximum penalty for attempt is the same as for the full offence, as per Criminal Attempts Act, s 4: above n 77.

⁸⁵ See Briggs, above n 77.

⁸⁶ *R v Harpur*, above n 7 at [36] and [38].

⁸⁷ At [36] and [38].

⁸⁸ Briggs, above n 77 at 159. This article provides a full examination and analysis of the aforesaid developments and issues.

⁸⁹ Ashworth “Conceptions of Overcriminalization” (2007-2008) 5 Ohio St J Crim L 407 at 415. Although Ashworth makes this comment in relation to substantive offences defined in inchoate mode, the discussion is comparable.

offence-label [being] applied to conduct that [does] not justify such a degree of censure”.⁹⁰

This is a legitimate concern. However, as Ashworth notes, “in order to determine whether one has too much of a certain thing, it is necessary to decide what is the right amount”.⁹¹ Although the bounds of traditional inchoate liability may have been extended, this does not inexorably lead to the conclusion that this results in over-criminalisation.

Deciding whether the current approach is going too far requires us to determine what the proper bounds of the law of attempt are. This, in turn, requires us to consider the underlying rationales and justifications for proscribing unsuccessful attempts to commit offences.

B Rationales for criminalisation in general: harm plus culpability

It is universally recognised that, in democratic societies, the use of State power in censuring and punishing individuals through the criminalisation of certain conduct requires convincing justification.⁹² However, it appears that there is no “single master principle” which alone can provide such justification; rather the basis for criminalisation is a “piecemeal” affair, involving several general principles.⁹³

What is clear is that the central instance of an individual deserving of criminalisation in the liberal tradition, is one who causes harm, and is morally culpable in so doing.⁹⁴ This paradigm is divisible into two key ideas. The first is the oft mentioned ‘harm principle’, which provides that conduct which causes harm to others is legitimately

⁹⁰ At 410.

⁹¹ At 423.

⁹² Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 22.

⁹³ R A Duff *Answering for Crime* (Hart Publishing, Oxford, 2007) at 142-143. This is doubtless due to the development of criminal law as a creature of the common law. As Ashworth notes in “Is the Criminal Law a Lost Cause?” (2000) 116 LQR 225 at 226, “the contours of...criminal law are historically contingent”. The historical developments that have led to the modern criminal law may not have consciously attempted to follow any principles.

⁹⁴ Dennis J Baker *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate Publishing Ltd, Surrey, 2011) at 1.

proscribed.⁹⁵ A widely approved of (though by no mean uncontroversial) modern articulation of the harm principle is Joel Feinberg's, which defines harm as "setbacks to interest[s]", meaning that an interest is in worse condition than it would have been, but for the interference with it.⁹⁶

This definition of harm is broad, encompassing both individual and collective interests.⁹⁷ Unlike J S Mill, who famously declared that the prevention of harm was the *only* purpose for which power could be exercised over an individual against his will,⁹⁸ Feinberg refines the harm principle by stating that if criminalising conduct would probably result in prevention of harm to others, this is "always a good reason" for doing so.⁹⁹ If we, as Feinberg and many others do, conceive of harm as a generally necessary but not sufficient reason for criminalisation, we are able to also recognise other, additional reasons legitimising criminalisation, whilst still regarding harm as the paradigm approach.¹⁰⁰

The other main concept is that of wrongfulness or culpability, also recognised by Feinberg.¹⁰¹ For him, wrongfulness acts as a limit on the harm principle. Criminalisation is not justified merely because an act causes harm; moral wrongdoing is also needed.¹⁰² Thus, it is generally accepted that criminalisation requires both harm and culpability: "it is not the causing of harm that alone justifies criminalisation, but the wrongful causing of harm".¹⁰³

⁹⁵ Original articulation attributed to J S Mill: see Shlomit Wallerstein "Criminalising Remote harm" (2006-2007) 28 Cardozo L Rev 2697 at 2699.

⁹⁶ Joel Feinberg *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, New York, 1984) at 34-36. Approved of by Baker, above n 94 at 38, AP Simester, JR Spencer, GR Sullivan and GJ Virgo, above n 84 at 644-651.

⁹⁷ Some argue Feinberg's conception of harm is value laden and thus too broad, allowing for an insensibly wide range of effects to be classified as 'harm' as collective values develop to a point where a far wider range of outcomes are viewed as 'harmful'. See Bernard E Harcourt "Collapse of the Harm Principle", (1999-2000) 90 Journal of Criminal Law and Criminology 109; R A Duff "Harms and Wrongs (The Moral Limits of the Criminal Law)" (2001) 5 Buff Crim L R 13.

⁹⁸ J S Mill "On Liberty" in J Gray (ed), *On Liberty and Other Essays* (Oxford, Oxford University Press, 1991).

⁹⁹ Feinberg, above n 96 at 26.

¹⁰⁰ AP Simester and Andreas von Hirsch *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) at 35. Note that under this view, harm is not *always* a necessary condition for criminalisation.

¹⁰¹ Feinberg, above n 96 at 105. In his works, Feinberg conceives of wrongfulness as unjustifiable, inexcusable, culpable right violation.

¹⁰² At 215.

¹⁰³ Ashworth and Horder, above n 92 at 29.

(i) Does the culpable harm paradigm fit with attempt law?

It is unclear whether attempt law fits into this paradigm. Some argue that an attempt itself is still a harm, despite the fact that the ultimate harm of the full offence is not realised. This may be so where harm of perhaps a lesser or different kind than that caused by the full offence occurs; for example where injury is caused in the context of attempted murder.¹⁰⁴ However, it is not always the case that actual harm results from an attempt.¹⁰⁵ Because the incidence of wrongful harm is seen as a key requirement for holding someone criminally responsible for their actions, imposing criminal liability on a defendant, where no objective harm is caused by the acts that form the basis of their liability for an attempt, must amount to either an exception to - or an (at least minimal) extension of - the culpable harm principle.¹⁰⁶

If liability for attempt is viewed as an exception to the criminal paradigm, then in order to justify criminalisation, other special reasons, equally as compelling as the 'harm principle' are required.¹⁰⁷ Prevention of crime, in the sense of punishment administered "*pour encourager les autres*" is often suggested as a possible rationale.¹⁰⁸ However, such a consequentialist, systemic aim, 'for the greater good' is not commonly accepted as sufficient to justify criminalisation of an individual defendant.¹⁰⁹ The desirability of dissuading the individual defendant from continuing their conduct, or from trying again in the event of failure, whilst allowing law enforcement agents to intervene before the full offence is completed, are perhaps stronger justifications.¹¹⁰

¹⁰⁴ For example see *R v Hoenderdos* (No 4) HC Christchurch T31/92, 23 October 1992, where the defendant was charged with attempted murder. His conduct would have amounted to assault or burglary given he had broken into the victim's house and was in the process of smothering and sedating her when she made her escape.

¹⁰⁵ For example, in *Johnston*, the defendant was apprehended before any objective harm had been caused.

¹⁰⁶ John Child and Adrian Hunt "Risk, Pre-emption and the Limits of the Criminal Law" in Katherine Doolan, John Child, John Raine, Anthony Beech (eds) *Whose Criminal Justice? State or Community* (Waterside Press, Hampshire, 2011) 51 at 56.

¹⁰⁷ Baker, above n 94 at 38.

¹⁰⁸ Wilson, above n 72 at 47.

¹⁰⁹ Baker, above n 94 at 21. See also George Fletcher *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) at 172 who notes that such systemic goals ought not influence the outcome of individual cases.

¹¹⁰ Child and Hunt, above n 106 at 56. As the authors mention, these justifications are employed by the English Law Commission in defending the advantages of inchoate forms of liability and indeed, their very existence, see: English Law Commission, above n 29.

It is, however, arguable that inchoate liability is not an exception to the general requirement of harm plus culpability. For some, liability for attempt is justified on the basis that the conduct criminalised has an “appropriate causal relationship” with the ultimate harm which may result.¹¹¹ Thus, extending the paradigm to allow for criminalisation where harm has yet to be caused is legitimate, due to the fact that the closer the offender comes to the commission of the full offence, especially where the commission of that offence is their aim, the greater is the risk that the harm feared will eventuate. As Duff notes, if the law censured behaviour which caused harm, but did not recognise or deal with attempts to cause it, it “would speak with a strange moral voice”.¹¹²

(ii) Addressing the absence of harm: subjectivism and objectivism

The concern that no harm necessarily results from the conduct that forms an attempt and the resulting issue of how to justify attempt liability has provoked opposing responses from subjective and objective theorists. Both subjectivists and objectivists recognise the necessity of an act (or omission), which is linked in some way to potential or consummate harm, accompanied by culpability.¹¹³ However, beyond this point, the two theories part ways.¹¹⁴ Theorists in each camp have provided different responses to the question of how to justify the imposition of criminal liability for attempts in the absence of the occurrence of harm.

Objectivist theory emphasises the requirement of an objectively and publicly observable harm or risk of harm. Only acts closer to the commission of an offence will attract liability for attempt, as such acts clearly show that the actor is ‘aiming for’ the offence which results in the harm feared.¹¹⁵ This is a minimalist approach to attempt liability. Conduct that will attract liability is limited to acts that can be considered to represent the “last effective point of intervention”, due to the fact that harm is imminent.¹¹⁶ Acts which are neither clearly dangerous, nor pose an objectively observable risk of harm, will fail to cross the threshold from ‘mere preparation’, to

¹¹¹ Duff, above n 16 at 132-133.

¹¹² At 134.

¹¹³ E Meehan and JH Currie *The Law of Criminal Attempt* (2nd ed, Carswell Thomson Professional Publishing, Ontario, 2000) at 48-52.

¹¹⁴ Fletcher, above n 109 at 157.

¹¹⁵ At 138-139.

¹¹⁶ Wallerstein, above n 95 at 2714-2715.

attempt. This approach preserves the ability of a defendant to change their mind and desist from the attempt.

In contrast, a subjective stance, while requiring a defendant to take some steps towards achieving his intention, focuses primarily on the intention of the defendant, on her moral blameworthiness. It is this intention which ultimately renders the acts of an accused culpable, in some cases despite the fact that these acts, when viewed in isolation from the defendant's mental state, look relatively innocuous. For the subjectivist, the act of attempting is not a "distinct dimension of attempt liability" as any *actus reus* is coloured by the intention that is considered alongside it.¹¹⁷ Thus, subjectivists take a maximalist approach to liability.¹¹⁸ Conduct which is remote from the commission of a full offence and objectively harmless, may nonetheless attract liability where an intention to commit the full offence is present.

In theory, each position is susceptible to extremes. An extreme application of objectivism to the law of attempt results in only the 'last act' before the commission of the offence being sufficiently close to justify liability.¹¹⁹ The extreme limit of a subjectivist position would be punishing people for wicked thoughts, or wicked thoughts and a 'first act'.¹²⁰ Generally, however, academic commentators and modern legal systems eschew both extremes, and merely lean towards being either objectivist or subjectivist.

What is suggested here is that each approach recognises, albeit in slightly different ways (and to slightly different degrees), that because no actual harm need be caused, the *mens rea* element takes on increased importance in attempt law. Although the objectivist theory requires proximate acts because these acts have a sufficiently strong causal link to the ultimate harm,¹²¹ some form of *mens rea* state directed towards that harm is also

¹¹⁷ Fletcher, above n 109 at 166.

¹¹⁸ At 166.

¹¹⁹ An example of extreme objectivism is the old 'equivocality approach' in New Zealand, introduced by Salmond J in *R v Barker* [1924] NZLR 865 (CA) that required an act which, on its face, unequivocally evinced the defendant's intention to carry out the full offence. See Fletcher, above n 109 at 142-144 for discussion and criticism of this approach. Subjectivism is the dominant stance in Western legal theory: see Fletcher, above n 109 at 166. The current approach in New Zealand shows strong subjectivist tendencies.

¹²⁰ Meehan and Currie suggest that it is highly unlikely anyone would adopt an extreme form of subjectivism due to practical and theoretical issues with such an approach: see above n 113 at 26.

¹²¹ At 21.

required. Proximate acts provide evidence of the defendant's intention, which is what led him to engage in this conduct.¹²² For subjectivists, the focus on strong evidence of *mens rea* is justified due to the fact that, if left unchecked, a defendant with a strong commitment to a course of conduct is most likely to complete their aim and thus cause the ultimate harm.¹²³

This is the classic understanding of attempt liability. The important point is that because satisfying the *actus reus* of an attempt is unlikely to cause any harm, the *mens rea* element of attempt is of increased significance: as Omerod and Laird say, in the law of attempt “the mental element assumes paramount importance”.¹²⁴ Despite the difference in emphasis between the two approaches; it is clear that, for both subjective and objective approaches, intention has the best fit, because it is the mental state which a defendant must possess in order to be most likely to go on to commit the full offence, and thus cause the harm associated with that offence.

(iii) Intention best captures the moral culpability of attempt

Both subjective and objective approaches require a defendant's mental state to be directed toward the harm that the full offence proscribes (as well as an act that comes close to commission of the full offence). For the great majority of offences defined in the ‘normal mode’, it is the consequence element that makes the offence harmful. For murder, the harm of the offence stems from the prohibited consequence of the victim's death.¹²⁵ However, taking the offence of rape as an example, the consequence of penetration or sexual intercourse is neither *prima facie* wrongful or harmful.¹²⁶ Indeed, the law does not prohibit sexual intercourse in and of itself; it is the lack of consent to the sexual activity that renders “otherwise normal and habitual” conduct a criminal offence.¹²⁷ As John Gardner notes, the wrongfulness of rape and the harm of that offence both stem from the requirement of lack of consent. This is not merely because lack of consent is what “turn[s] sexual penetration into a crime at law”, but

¹²² At 21.

¹²³ At 24.

¹²⁴ Omerod and Laird, above n 11 at 459.

¹²⁵ Crimes Act, s 167.

¹²⁶ The requirements of the offence are discussed above at fn 33; fn 34.

¹²⁷ Graham Pankhurst “Consent in Rape: An Elusive Concept”, in Bruce Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers Ltd, Wellington, 2004) 182 at 182.

because it amounts to a violation of sexual autonomy, a ‘use’ of the victim.¹²⁸ This is the wrong and the harm that the law wishes to prevent by criminalising rape.

In offences where a circumstance element is required, existence of that circumstance may be what turns otherwise non-criminal conduct into behaviour that justifies the imposition of a criminal sanction, as it does with rape. Given this insight, and because attempt liability appears to be parasitic on the harm associated with the full offence, this dissertation suggests that it is at least arguable that a prosecutor ought to be required to show that a defendant harboured an intention in relation to the circumstance element for that defendant to be liable for an attempt. As Lord Goddard CJ has put it, when it comes to attempts “the intent is the essence of the crime”,¹²⁹ and it is arguable that, in principle, this intent should extend to circumstance elements.

C Conclusion

The upshot from our look back at first principles is this: that intention is the *mens rea* state which best comports with the underlying rationales which justify proscribing attempts to commit full offences. This is because an attempt itself is unlikely to be an action which causes any harm, and thus the harm principle cannot be directly relied upon to justify the existence of attempt liability. Rather, the harm principle can only be relied on indirectly; ultimately we proscribe attempts because *if* such attempts successfully led a defendant to the commission of a full offence they would occasion harm. In other words, the justification for the existence of attempt liability is parasitic on the harms caused by full offences. This being the case, the most fitting mental state for the law of attempt is the mental state which, if possessed by a defendant, is most likely to lead that defendant to go on to commit the full offence. That mental state, it has been argued, is ‘intention’.

Returning to considerations of over-criminalisation, if the *actus reus* is no longer an effective control mechanism for attempt liability, it makes sense to question, as Arnold J and Ashworth have done, whether the *mens rea* of attempt law can, in certain

¹²⁸ See John Gardner and Stephen Shute “The Wrongness of Rape” in John Gardner *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, Oxford, 2007) 1 at 29.

¹²⁹ *R v Whybrow*, above n 18 at 146-147.

circumstances, fill the breach.¹³⁰ In other words, if the current approach to attempt law is going too far, there are grounds for arguing that committing to a higher threshold for the *mens rea* requirement of attempt liability, as the English Court of Appeal did in *Pace*, could well represent a timely response to the trend of over-criminalisation of inchoate acts. This is because, if intention was required as to *every element* of the offence (as per *Pace*), then, in order for *mens rea* to bolster a preparatory *actus reus* in offences which contain a circumstance element, a “strong evidence” of intention would have to be proved in relation to that circumstance element.¹³¹ This may balance out the effects of the more radical approach represented by *Harpur*, although in an admittedly small number of cases.

The potential for over-criminalisation when the approach in *Harpur* is employed in conjunction with the intended consequences model where the *actus reus* of an offence involves a circumstance element was explicitly recognised by William Young J in *Ab-Chong*. His Honour discussed the hypothetical case of an obsessed man “lying in wait” for his ex-partner, intending to have sexual intercourse with her. Our protagonist is not violent and does not intend to pursue the amorous encounter if he becomes aware that his ex-partner does not desire it. But if he is apprehended at this point, whilst lying in wait, and his ex-partner would not have consented to intercourse, there is a strong possibility that he would be liable for attempted rape, even though his conduct may be merely preparatory.

It is tentatively concluded that an examination of the underlying rationales for attempt liability and a recognition that culpability (or the *mens rea* element) is of paramount importance supports the conclusion that the approach in *Pace* is a better fit for New Zealand’s attempt law than the current approach of *L v R* and *Ab-Chong*. Concerns of over-criminalisation re-enforce this provisional conclusion. But, of course, this does not settle the matter. Other important issues must be canvassed. For instance, is the approach in *Pace* workable? That is, is it even possible for a defendant to harbour an intention in relation to a circumstance element, particularly where that element is beyond the defendant’s control? The following sections address this, and other related matters.

¹³⁰ *Ab-Chong*, above n 2 at [69]; Ashworth, above n 89 at 414.

¹³¹ *Harpur*, above n 7 at [38].

Chapter IV:

‘A’: Preliminary objections to each approach

This chapter narrows the focus to address some practical concerns surrounding the workability of the full intention model and the intended consequence model.

A The workability of *Pace*: can one ‘intend’ circumstances?

An obvious rejoinder to *Pace* and the full intention model centres on whether this approach is actually practically viable. As has been discussed, *Pace* requires a defendant to intend every element of the *actus reus*. But, is this even possible? Some commentators¹³² raise the argument that the idea of an intention in relation to circumstance elements is unintelligible. For instance, Virgo claims that intention does not extend naturally to circumstance elements, given that these are generally things that a defendant has no control over.¹³³

(i) The ‘ordinary’ meaning

Commentators have argued that the way concepts such as ‘attempt’ and ‘intention’ are interpreted should align with their ordinary meanings.¹³⁴ Intention, understood in the way it is used in everyday parlance, is not readily applicable to circumstance elements. For only results and circumstances that an agent has *the ability to control* are capable of being the objects of that agent’s intention.¹³⁵ Many analytic philosophers have made this point. An individual has an intention, or purpose, where he intends “on the basis of a given situation, to bring about some further situation which for some reason or another he conceives to be desirable”.¹³⁶

¹³² Who follow Duff’s characterisation of circumstances as those states of affairs which exist independent of an action. See Duff, above n 16 at 12. This is the approach roughly followed in New Zealand. This characterisation will be discussed further below. See discussion related to fn 168.

¹³³ Virgo, above n 28 at 244.

¹³⁴ Richard Buxton “Simple Thoughts on Intention” (1988) Crim L R 484 at 485.

¹³⁵ J W Meiland *The Nature of Intention* (Methuen & Co Ltd, London, 1970) at 35-51.

¹³⁶ Kai Nielsen “Linguistic Philosophy and “The Meaning of Life”” in E D Klemke (ed) *The Meaning of Life* (Oxford University Press, Oxford, 1981) 177 at 181.

Thus, a person who has heard that Marilyn Monroe will be passing by does not set up a camera on the balcony with the *intention* that she shall pass by.¹³⁷ Nor can one *intend* that a volcano not erupt,¹³⁸ or that the sun will rise tomorrow,¹³⁹ or that Arsenal will win the cup.¹⁴⁰ These things are not susceptible to being intended because the individual in each case cannot act such as to influence the aforementioned events.¹⁴¹ More importantly, they do not *believe* they can act such as to influence those events.¹⁴² Any state of mind in relation to these things is merely a hope, or a wish.

It follows from this (common sense) understanding of intention, that an agent can intend circumstances such as the actions of others or states of affairs only where he has an ability to control the occurrence of these things. An agent can only intend such things where he *intends* to perform some action himself, which he believes will effect those circumstances.¹⁴³ A person setting up the camera in order to film the passing by of Marilyn Munroe can *intend* that she pass by if he is in fact her chauffeur and intends to shortly set off to drive her there. In such a case, he intends to perform an action which he believes will lead to Marilyn Munroe passing by.

Therefore, in the ordinary sense of the word ‘intention’, only *actions* can truly be the objects of intentions; either actions in relation to a result or actions that are taken in order to bring about a state of affairs or a circumstance. One cannot passively intend that X (a circumstance), without intending to take steps (or deliberately omitting to take certain steps) that one believes will ensure, or at least go towards making it more likely, that X comes about.

If we accept this ordinary meaning of intention, this may be a defeater to the *Pace* approach. If it is not possible to intend circumstance elements, then we cannot accept an approach which requires this. However, whilst the ordinary meaning of intention

¹³⁷ G E M Anscombe *Intention* (2nd ed, Basil Blackwell, Oxford, 1963) at 35.

¹³⁸ J W Meiland, above n 135 at 38.

¹³⁹ Donnelly-Lazarov, above n 16 at 196.

¹⁴⁰ Buxton, above n 134 at 493.

¹⁴¹ This is of course assuming that they are not an Arsenal player or manager, and that they have no influence over Marilyn Munroe.

¹⁴² Meiland, above n 135 at 38.

¹⁴³ At 37-39. See specifically at 37: “a necessary condition of an agent’s having an intention directed towards an object that is not one of his own actions is that he also have an intention which is directed towards one or more of his own actions and this action...be [intended and believed] by the agent to have a certain relation to that other object of intention”.

arguably precludes an application of *Pace*, this is not the end of the story. For the way that terms like intention are interpreted in the law often differs from their everyday meaning.

(ii) The legal meaning

Intention, in the law, has a generally undisputed ‘core meaning’¹⁴⁴ which essentially aligns with an ordinary understanding of the term. As defined by Lord Asquith in *Cunliffe v Goodman*, intention “connotes a state of affairs which the party “intending”...does more than merely contemplate: it connotes a state of affairs which...he decides, so far as in him lies, to bring about”.¹⁴⁵

However, it is clear that the meaning of intention in legal contexts is not constrained by the way that lay people understand the term. In fact, ‘intention’ has been seen by judges as a “flexible friend”, able to be stretched and extended where desired.¹⁴⁶ Legal realists argue that sometimes the definition of intention is stretched by judges in order to “mask retrospective rationalisations of value judgments”.¹⁴⁷ One example of how the ordinary meaning of intention has been stretched is where its legal meaning encompasses what is called oblique intention. In a departure from (or extension of) the ordinary meaning of the term, under the notion of oblique intention, a defendant is held to have intended results that, although not what they were trying to bring about, they foresee as the virtually certain consequences of their acts.¹⁴⁸

Furthermore, in relation to substantive offences, although the ordinary meaning seems to preclude it, commentators have long accepted that intention is applicable to circumstances. For instance, Simester and Brookbanks allow for two possibilities to satisfy intention in relation to circumstances. The first is the “plain case”, where a defendant *hopes* that the circumstance is present. The second, and more common

¹⁴⁴ See HLA Hart “Positivism and the separation of law and morals” (1958) 71 Harv L Rev 593 at 607.

¹⁴⁵ *Cunliffe v Goodman* [1950] 2 KB 237 at 253.

¹⁴⁶ Wilson, above n 72 at 158.

¹⁴⁷ Nicola Lacey “A Clear Concept of Intention: Illusive or Illusory?” (1993) 56(5) The Modern Law Review 621 at 622.

¹⁴⁸ In England, foresight of consequences to a degree of virtual certainty is generally understood to be evidence from which intention can be inferred: see *R v Mohan*, above n 1 at 10-11; A P Simester, J R Spencer, G R Sullivan and G J Virgo, above n 84 at 130-136, although compare *R v Woolin* [1999] 1 AC 82 (HL). In New Zealand, such foresight is seen *as* intention: *R v Wentworth* [1993] 2 NZLR 450; Simester and Brookbanks, above n 11 at 105-110.

situation, is where the defendant *believes* that the circumstance is present.¹⁴⁹ As they stress, belief and knowledge are near synonyms, the difference between the two concepts being that a belief can be incorrect, whereas one cannot have ‘incorrect’ knowledge.¹⁵⁰

A similar approach to intention can be seen in the American Model Penal Code. The equivalent *mens rea* state to intention in the Model Penal Code, ‘purpose’, is defined in three separate ways, so as to apply to circumstances, consequences and conduct elements of offences. The circumstance specific definition is that a defendant “is aware of such circumstances or hopes that they exist”.¹⁵¹ Similarly, the Crimes Act of Victoria specifically defines attempt so as to require that a defendant “intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place”.¹⁵² Indeed, the English Law Commission recommended the adoption of a similar definition of intention in relation to circumstances in s 18 of their Draft Bill of 1989, which defined key fault terms.¹⁵³

In addition, this same approach to circumstance elements is adopted in both New Zealand and England in the law of conspiracy. The *mens rea* requirement for that offence is an intention to agree to commit a substantive offence, and intention in relation to each element of that offence.¹⁵⁴ A defendant must either intend (in the sense of taking steps to bring it about) or know of any circumstance necessary for the commission of the full offence to be liable for conspiracy.¹⁵⁵

¹⁴⁹ Simester and Brookbanks, above n 11 at 110.

¹⁵⁰ At 111. This follows from knowledge being taken to mean a ‘true belief’.

¹⁵¹ American Law Institute *Model Penal Code Proposed Official Draft* (Philadelphia: American Law Institute, 1962) art 2.02(2)(a)(ii). The definition in art 2.02(a)(i) for consequence elements is; “it is his conscious object...to cause such a result” and for conduct; “it is his conscious object to engage in conduct of that nature”. See Paul H Robinson and Jane A Grall “Element Analysis in Defining Criminal Liability: The Model Penal Code and beyond” (1983) 35(4) *Stan L Rev* 681 at 697 for a helpful table.

¹⁵² Crimes Act 1958 (Vic), s 321N(2)(b).

¹⁵³ English Law Commission *A Criminal Code for England and Wales: Volume 1 Report and Draft Criminal Code Bill* (UKLC, R177, 1989), “s 18(b)(i) A person acts intentionally with respect to a circumstance when he hopes or knows that it exists or will exist”.

¹⁵⁴ The *actus reus* being the agreement itself. Note it is generally recognised that there is no offence of attempted conspiracy, nor of conspiracy to attempt.

¹⁵⁵ For New Zealand, see Crimes Act, s 310; *R v Gemmell* above n 75. For the position in the United Kingdom, see Criminal Law Act 1977 (UK), s 1(2); *R v Saik*, above n 75 at [11] and [38]. In Canada, the position is the same: see Morris Manning and Peter Sankoff *Manning, Mewett and Sankoff: Criminal Law* (4th ed, Lexis Nexis Canada Inc, Ontario, 2009) at 313-314.

It has sometimes been argued that intention in relation to circumstances is appropriate in the law of conspiracy, but inappropriate in the law of attempt due to the fact that conspiracy is more remote from the commission of the full offence.¹⁵⁶ However, although this argument has some preliminary attraction, when one considers it further, especially in the New Zealand context, with the *Harpur* approach allowing for less proximate acts to found liability for attempt, it is not clear that conspiracy is so much more remote as to make this a telling point. As the Court in *Pace* noted (even factoring in the narrower conception of proximity which prevails in the United Kingdom)¹⁵⁷ it is not difficult to envisage scenarios where what might be charged as an attempt would be capable of being charged as a conspiracy.¹⁵⁸

Thus, the full intention model is workable if we read intention as requiring pure intention as to consequences (in the sense that a defendant can control these matters) and requiring belief or hope when applied to circumstance elements. Further, that this is not an obviously warped interpretation of intention is evident from the fact that commentators, law commissions, and legislatures have endorsed such an interpretation, and from the fact such an interpretation already prevails in the offence of conspiracy.

B Consequence/Circumstances

The section considers the validity of the consequences/circumstances distinction. This is important because the intended consequences approach in *Khan* implicitly relies upon the validity of this distinction and, as is evident from the earlier analysis, the full intention model *also* tacitly requires the validity of the consequences/circumstances dichotomy. The full intention model can be said to rely on the circumstances/consequences distinction because, in order to determine which conception of intention is required for each element of the *actus reus*, it must be determined whether it is a consequence (thus attracting a simple understanding of the meaning of intention), or a circumstance (requiring intention to be construed as hope or belief/knowledge).

¹⁵⁶ Virgo, above n 28 at 247.

¹⁵⁷ See discussion related to fn 84.

¹⁵⁸ *R v Pace*, above n 5 at 66.

The idea that an *actus reus* can be separated out into consequence and circumstance elements is often presented “as if it were in some way inherent in the nature of the definition” of an offence.¹⁵⁹ The concept is often attributed to J C Smith,¹⁶⁰ but it made its first appearance in England in a 1973 report of a Law Commission Working Party.¹⁶¹ Ever since the Working Party’s proposal that the consequences/circumstances distinction should be incorporated into attempt law, it has been subject to significant criticism, and prevailing opinion in England has seesawed between accepting and rejecting it.¹⁶² The main criticism of the distinction centres on its workability, namely, that it is not clear that it is even possible to accurately dissect the *actus reus* of an offence into consequence and circumstance elements.

The English Law Commission originally rejected the distinction as impracticable, involving a “difficult and artificial” classification of elements as either circumstances or consequences.¹⁶³ The Commission and commentators alike suggested that assignation of an element to either category was merely “a matter of taste”.¹⁶⁴ Similarly, in New Zealand, the Crimes Consultative Committee expressed concern that a provision in the Crimes Bill of 1989 which allowed recklessness as to circumstances was introducing “unnecessary complication” into attempt law.¹⁶⁵

Despite these views, the position in England and New Zealand has progressed to a state of affairs where this distinction, although being criticised by some commentators in both countries as ‘crude’, ‘artificial’ and ‘complicated’, is now embedded in attempt law.¹⁶⁶ It has been accepted as a sufficiently “workable solution”, despite the difficulties

¹⁵⁹ Richard Buxton “The Working Paper on Inchoate Offences: (1) Incitement and Attempt”, [1973] Crim L R 656 at 662.

¹⁶⁰ Smith, above n 24.

¹⁶¹ English Law Commission *Inchoate Offences: Conspiracy, Attempt and Incitement* (UKLC WP50, 1973) at [88]-[89].

¹⁶² See discussion below at fn 163; fn 167. See also English Law Commission *Codification of the Criminal Law: Report and Draft Criminal Code Bill* (UKLC R143, 1985), which supported the full intention model, followed by the English Law Commission *A Criminal Code for England and Wales: Vol 1, Report and Draft Criminal Code Bill; Vol 2, Commentary* (UKLC R177, 1989), which did not.

¹⁶³ English Law Commission *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (UKLC R102, 1980) at 2.11-14.

¹⁶⁴ Buxton, above n 159 at 663.

¹⁶⁵ Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991) at 35.

¹⁶⁶ In New Zealand, the position is established by the cases *L v R*, above n 3 and *Ab-Chong*, above n 2. The English Law Commission is now strongly supportive of the distinction, employed in the law of both attempt and conspiracy: see English Law Commission, above n 29; English Law Commission, above n 64.

which are inherent in its application.¹⁶⁷ In fact, the aforementioned formulation suggested by Duff appears to provide a clear method for distinguishing between the two: consequences can be defined as events which are caused by an action, and circumstances as those states of affairs existing independent of that action.¹⁶⁸

This formulation, however, is deceptively (and speciously) simple. In reality, much depends on how an offence is described.¹⁶⁹ An example which demonstrates this is the offence discussed above, of accessing a computer system without authorisation.¹⁷⁰ What are the consequence and circumstance elements of this offence? Is the consequence best described as access of a computer system? Or is it best described as *unauthorised* access of a computer system? After all, it is the latter description that best captures the mischief that Parliament wished to prevent in proscribing this offence. Access of a computer system in and of itself is not criminal.

This reasoning can equally be applied to the offence of sexual violation in New Zealand.¹⁷¹ Is the consequence of this offence best described as sexual connection? Or is the consequence *non-consensual* sexual connection?¹⁷² Clearly, the law does not prohibit sexual intercourse simpliciter; it is the lack of consent to sexual activity that renders “otherwise normal and habitual” conduct a criminal offence.¹⁷³

As can be seen from these examples, everything turns on how offences are described; on whether conditions for liability are “attached to or divorced from what a defendant [must] set out to do”.¹⁷⁴ In other words, the classification of particular parts of the *actus reus* as either consequences or as circumstances is not a purely descriptive process, one which involves merely pointing to inherent distinctions in the way the *actus reus* is set out in an offence. Rather, belying the classification of certain elements as consequence elements and certain elements as circumstance elements is a value judgment: perhaps that a certain aspect of the *actus reus* ought to be considered a

¹⁶⁷ Dawkins and Briggs, above n 35 at 165.

¹⁶⁸ Duff, above n 16 at 12.

¹⁶⁹ Donnelly-Lazarov, above n 16 at 209.

¹⁷⁰ See discussion related to fn 20 for the full provision.

¹⁷¹ See fn 33; fn 34 for the requirements of that offence.

¹⁷² See R A Duff “The Circumstances of an Attempt” (1991) 50(1) CLJ 100 at 105.

¹⁷³ Pankhurst, above n(x) at 182. Compare M Demsey and J Herring “Why Sexual Penetration Requires Justification” (2007) 27 OJLS 467 for an argument that penetration is *prima facie* wrong.

¹⁷⁴ Donnelly-Lazarov, above n 16 at 209.

consequence element because that may extend the ambit of the attempt liability associated with that offence, which is considered desirable. But, of course, to admit that a value-judgment motivates the circumstances/consequences distinction is to admit that this distinction is conceptually unsound.¹⁷⁵ The upshot is that both accounts of what the circumstance element is, in the offences above, are defensible. Which account we opt for turns on how we choose to portray the offence, a choice which is informed by our values, by what we think the ambit of attempt liability ought to be for the specific offence.

A clear example of the difficulty of applying the consequence/circumstance distinction is *Attorney-General's Reference*, a case in which the defendants were charged with attempted aggravated arson. The full offence provided that an individual is liable who damages property, intending or being reckless as to whether any property is damaged and intending by such destruction or damage to endanger life, or being reckless as to whether life would be endangered.¹⁷⁶ The Court of Appeal held that the requirement that life be endangered was a circumstance element. This has been cogently questioned by many commentators, who argue that it is rather, a non-essential consequence.¹⁷⁷

As Buxton notes, where an approach requires recourse to a concept that creates “uncertainty of this order”, suspicion is a natural and justified reaction.¹⁷⁸ This is of concern for supporters of both *Pace* and *Khan*, as each approach relies on this consequences/circumstances distinction.

C Another possibility?

In *Ab-Chong*, William Young J, in dissent, suggests that a full intention model is desirable. He states that, in relation to the offence of attempted rape, “because absence

¹⁷⁵ This calls to mind Lon Fuller’s criticism of analytical philosophers. Fuller reportedly “inveighed repeatedly in the classroom against deifying abstractions, which is what he thought the analytical philosophers were doing. They would parse things out, analyse [sic] them into a lot of separate pieces and then say, “Now look, there is reality,” as if it were an autopsy... Fuller’s comment was, “Well, that is analysis, but it is not reality, because when you get into reality all those things interact together and blur, and there go those clear distinctions such as distinctions between ‘fact’ and ‘value’”: Robert C L Moffatt “Lon Fuller: Natural Lawyer After All!” (1981) 26(1) *Am J Juris* 190 at 194.

¹⁷⁶ *Attorney-General's Reference*, above n 27. Criminal Damage Act 1971 (UK), s1(2).

¹⁷⁷ See Mirfield, above n 57; J J Child and Hunt “Mens rea and the general inchoate offences: *another* new culpability framework” (2012) 63 *NILQ* 247 at 250; D W Elliot “Endangering Life by Damaging or Destroying Property” [1997] *Crim LR* 382.

¹⁷⁸ Buxton, above n 159 at 663.

of consent is part of the *actus reus* of rape, this requires proof of an intention to have non-consensual intercourse”.¹⁷⁹

His Honour’s interpretation of intention in relation to the element of non-consent was that a defendant would be guilty of attempted rape if he intended to engage in sexual intercourse, *irrespective* of whether his sexual partner consented.¹⁸⁰ This understanding of intention shares strong similarities with that suggested by Glanville Williams in his article “Intents in the Alternative”. There, Williams argued that the result in *Khan* could be justified because, on a true understanding, there was intention as to all elements of the *actus reus*. This is because, where a man sets out to have sexual intercourse “willy-nilly”, or to have sex with a woman who is consenting, or who is not consenting “as matters may turn out”, he can be said to have an intention to commit rape.¹⁸¹ The fact that he holds an intention to have non-consensual intercourse is not erased by his alternative lawful intention to have consensual intercourse.

However, as G R Sullivan notes, this understanding of intention “readily collapses into recklessness, or at least conduct so cognate with recklessness as to be in substance indistinguishable”.¹⁸² This is because “it is over-inclusive in that it can designate an agent's conduct intentional as to a particular outcome even though the agent was not acting in order to achieve the outcome and thought the likelihood of the outcome to be low”.¹⁸³

This tendency to conflate recklessness with intention is evident in William Young J’s judgment where, his Honour, having explained the desirability of his approach in according with the requirement of ‘intention’ in s 72(1), lapses back into characterising it within a ‘recklessness’ framework.¹⁸⁴

Recklessness and intention should not be conflated in this manner, because they are conceptually separate.¹⁸⁵ The key difference between the two mental states is that

¹⁷⁹ *Ab-Chong*, above n 2 at [192].

¹⁸⁰ At [193].

¹⁸¹ Glanville Williams “Intents in the Alternative” (1990) 50(1) CLJ 120 at 121-122.

¹⁸² G R Sullivan “Intent, Subjective Recklessness and Culpability” (1992) 12(3) OJLS 380 at 385.

¹⁸³ At 388.

¹⁸⁴ *Ab-Chong*, above n 2 at [196]: “in other words, by showing that the defendant was reckless in the sense I have discussed”.

¹⁸⁵ Omerod and Laird, above n 11 at 116.

whereas recklessness imports a value judgment, being the conscious running of an *unjustified* risk, intention, by contrast, is morally neutral.¹⁸⁶

Therefore, it is suggested that his Honour's approach, in so far as it accords with William's alternative intents stance, ought not be followed it.

D Conclusion

Given that there is a valid interpretation of intention which would allow the full intention approach in *Pace* to work in the law of attempt, arguments that the approach in *Pace* simply is not workable, and on this basis ought not to be accepted, are not persuasive. The circumstances/consequences distinction has been shown to be dubious, but this is a knock against the persuasiveness of both *Pace* and *Khan*. Thus, intended consequences and full intention approaches have been shown to be equally workable. On the other hand, the fact that the full intention approach in *Pace* is workable is not itself grounds for accepting that approach either. Rather, the implication from the discussion in this section is that, given that *Pace* is workable, and given the fundamental principle that where a criminal law statute is ambiguous, that statute ought to be interpreted in the manner most favourable to the defendant, the onus in this debate about the appropriate *mens rea* in the law attempt shifts to those who are not in favour of *Pace*. The next section considers whether opponents of *Pace* can discharge that onus.

¹⁸⁶ At 151.

‘B’: *Pace* or *Khan*?

This dissertation has now arrived at a position from which it is possible to decide which of the two approaches to the *mens rea* requirement of attempt law that have been considered is most persuasive. It has been established that the full intention model is just as workable as the current intended circumstances approach, and moreover, has much to recommend it in terms of principle. However, it has also been recognised that the intended consequences model is not without merit. This section will consider the advantages and failings of each position, in order to conclude whether the status quo should be disrupted or maintained. This dissertation concludes that neither approach, by itself, is an ideal solution.

A The current approach vs *Pace*

It has been forcefully argued that the full intention model is more congruent with principle because it aligns with the statutory wording, whilst the intended consequences approach does not.¹⁸⁷ Supporters of the intended consequences approach frequently dispute this claim, contending that the model in fact “respects the statutory language”, due to the fact that intention is still required for conduct and consequence elements.¹⁸⁸ This is not a robust claim; essentially it amounts to an assertion that, as long as a judicial approach to a provision does not diverge *too much* from the wording of the statute, then this is acceptable. But, characterised honestly, where circumstance elements are involved, the current approach disregards the statutory requirement of intention as to every element of the full offence.

Of course, inconsistency with principle is not a definitive blow to *Khan*, for the intended consequence model may have redemptive policy implications.¹⁸⁹ The cornerstone of the intended consequences model is a strong public policy- that those who engage in sexual intercourse without a reasonable belief in their partner’s consent should be liable for the substantive offence of sexual violation. This policy was the driving force behind legislative amendments of the *mens rea* requirement of the

¹⁸⁷ Mirfield, above n 57.

¹⁸⁸ Virgo, above n 28 at 244.

¹⁸⁹ As Baker notes, in reality, policy, not principle is often what is definitive in the law, above n 94 at 6-7.

substantive offence of sexual violation (the first such amendment being the introduction of recklessness as a sufficient *mens rea* in relation to consent, followed by a lack of belief in consent on reasonable grounds being currently sufficient for the *mens rea* of sexual violation). These legislative developments were in step with general public opinion,¹⁹⁰ and thus the policy they are in accord with has democratic pedigree, and perhaps ought to be a weighty factor judges consider when they are developing the common law.

The important point for our purposes is that the intended consequences model can be seen as in step with this policy because, for instance, if we were to simply reject that model and endorse *Pace*, then (as many commentators have pointed out), the defendants in *Khan*, for instance, would not be liable for attempted rape.¹⁹¹ This appears to be a consequence out of step with the recent changes to the substantive offence of rape. Once this spectre of under-criminalisation in sexual offence cases is raised, any recourse to dispassionate principle in criticising the intended consequences approach appears callous and inhuman.

This dissertation recognises that risk. Such moral arguments cannot be dismissed lightly as mere moral arguments; it must always be borne in mind that behind the points of law conveyed by legal judgments, are real people, who, like the victim in *Khan*, may have undergone a traumatic and appalling ordeal. However, despite that risk, this dissertation takes the view that allowing such emotive arguments- valid though they are in relation to specific offences- to alter the *entire law* of attempt is misguided. Critics of the full intention model employ this kind of ‘top down’ reasoning almost as a matter of course; never do they consider less morally-loaded offences, such as that suggested above, of unauthorised access of a computer system, in order to assess whether the full intention model really does result in under-criminalisation.¹⁹² It is much less convincing to argue that the full intention model is contrary to justice because those who access a computer system whilst merely reckless as to whether they are authorised to do so will avoid liability. As Mirfield urges, it is necessary to step back

¹⁹⁰ See for example Criminal Law Reform Committee *The Decision in DPP v Morgan: Aspects of the Law of Rape* (Wellington, 1980).

¹⁹¹ Damien Bruneau and Aaron Taylor “In defence of Pace and Rogers” (2015) 8 Arch Rev 6 at 7.

¹⁹² See discussion related to fn 20.

from the narrow focus on sexual offending and consider general principles.¹⁹³ Only once we do this are we able to reason soundly to the appropriate conclusion.

This dissertation has argued that the factor of fundamental importance in favour of the *Pace* approach is that it stays true to the statutory wording, which requires ‘intention as to *every* element of the offence’. This is important, because the statutory wording is, in turn, consistent with the principle that is accepted as underpinning attempt law; namely that this branch of the criminal law is concerned with apprehending those who *intentionally* risk causing harm, not those who do so *unintentionally*.¹⁹⁴ This consistency with principle is what makes the full intention model in *Pace* more desirable than the intended consequences model adopted in *Khan*.

In other words, if we understand the wrong at the root of attempt liability as the *intentional* risking of causing harm, as the statutory words indeed suggest, then allowing for a lesser *mens rea* state than intention is unsuitable. This is not simply because such an approach does not fit with the wording of the attempt provision, but because it does violence to the principles and rationales that underpin the whole law of attempt. As Child and Hunt stress, the intended consequences model deviates from principle, whereas the full intention model in *Pace* targets the wrong which attempt law is acknowledged to be concerned with.¹⁹⁵

As has previously been discussed, some further attractions of the full intention model in *Pace* include the fact that it aligns attempt law with the “overlapping offence of conspiracy”.¹⁹⁶ Further, this model represents a slender¹⁹⁷ counter-current to the trend of over-criminalisation. Another strong argument in its favour is an appeal to the principle of beneficial interpretation; applying this principle, and given that the *Pace* interpretation of the attempt provision is clearly tenable, it perhaps ought to be accepted.

¹⁹³ Mirfield, above n 57 at 147.

¹⁹⁴ Child and Hunt, above n 51 at 225.

¹⁹⁵ At 225.

¹⁹⁶ At 223. See also discussion related to fn 75; fn 155.

¹⁹⁷ Slender, given the relatively small number of offences which have circumstance elements.

B

Conclusion

After considering the workability of the full intention model and the intended consequences model, and after analysing which model is more consistent with the principles which inform the law of attempt as a whole, this section has argued that the full intention model offers the best approach to the *mens rea* requirement for attempt liability. However, this conclusion is not the end of our discussion, for the (valid) concern that defendants like those in *Khan* would escape liability if *Pace* prevailed still remains. The next section considers whether that concern can be met in a principled way, along with other related matters.

Chapter V: The way forward

In light of the deficiencies in the law of attempt which this dissertation has highlighted, this section canvasses possible solutions for the future, either in lieu of or in addition to an acceptance of *Pace*.

A Is adopting *Pace* truly necessary? Other possibilities canvassed

One problem in the law of attempt that this dissertation has identified is that, as it stands, the law of attempt could lead to over-criminalisation. This is because, the intended consequences model, when coupled with the approach in *Harpur*, has the potential for criminal over-reach in offences where the *actus reus* involves a circumstance. When discussed above, this acknowledgement led to the tentative conclusion that the approach in *Pace* should be preferred.

However, another way to combat this issue, with more far-reaching effects than adopting the full intention model, would be to pull back from or overrule the *Harpur* approach. Some of the comments made by the Supreme Court in *Ab-Chong* could perhaps be construed as suggesting that a move of this nature may be on the horizon. Arnold J characterised the *Harpur* approach as involving “an expansive view of proximity”.¹⁹⁸ Elias CJ made it clear she did “not want to be taken to approve the approach...in *R v Harpur*...without hearing argument” in a relevant case.¹⁹⁹ William Young J (dissenting) mentioned *Johnston* but refrained from discussing that case in any depth, aware that it may yet come before the Supreme Court. However, his Honour’s subsequent discussion of *Harpur* left this reader in little doubt that he viewed the decision in *Johnston* as going too far.²⁰⁰

If the Supreme Court were to overrule *Harpur*, or at least draw back from the arguably extreme approach it espouses, the possibility of over-criminalisation both in cases where a circumstance is required, and in the more general law of attempt, would be reduced. Perhaps if this was done, the intended consequences model would be more acceptable. But even if *Harpur* were overruled this would not remove the impetus from

¹⁹⁸ *Ab-Chong*, above n 2 at fn63.

¹⁹⁹ At [121].

²⁰⁰ At [187]-[191]. Although note that William Young J supports a *Pace*-like approach.

claims that *Pace* should be adopted: for the intended circumstance model, premised as it is on an *endangerment* paradigm of liability, seems to be inconsistent with the principles which underlie the law of attempt, which is a telling knock against that model. So, *Pace* and the full intention model provide an appropriate base from which to proceed, and solutions based upon this model will now be assessed.

B *Pace*, as well as...?

(i) More sexual offences

The adoption of *Pace* is not problem-free. As recognised above, the full intention model still tacitly rests upon the value-laden consequences/circumstances distinction, which is but an imperfect tool. Further, and perhaps more importantly, as discussed, those who do not *intend* their sexual partner's lack of consent will not be liable for attempted sexual violation on the full intention model.

This concern, which gives rise to a high degree of consternation in the United Kingdom, is all the more potent in a New Zealand context. This is because, under the Sexual Offences Act 2003 (UK), where the UK equivalents of sexual violation- rape and assault by penetration-²⁰¹ do not apply, there are several other sexual offences with which a defendant can be charged. The offence of sexual assault proscribes any type of touching which is “sexual”,²⁰² not consented to, and undertaken without a reasonable belief in consent to that touching. If an intention to penetrate, required for attempted rape and attempted assault by penetration, cannot be established, then a charge of attempted sexual assault may be successful. Further, and more importantly, several substantive preparatory offences, defined in inchoate mode, are included in this statute, such as committing any offence with intent to commit a sexual offence or trespassing with intent to commit a sexual offence.²⁰³ Although it is generally assumed that the attempt provision cannot be applied to these preparatory offences,²⁰⁴ they

²⁰¹Sexual Offences Act 2003 (UK), ss 1 and 2.

²⁰² Section 3. “Sexual” is defined in s 78 as activity that is sexual of its nature, or *may* of its nature be sexual and is in fact sexual due to the circumstances or purpose of the person. This has been interpreted broadly: see Omerod and Laird, above n 11 at 845-847.

²⁰³ Sexual Offences Act 2003, ss 62 and 63.

²⁰⁴ Omerod and Laird, above n 11 at 481.

nonetheless draw the line of liability further back. The sexual offence that is the subject of these two preparatory offences could be sexual assault.

Perhaps this is one reason why the Court of Appeal in *Pace* so readily adopted the full intention model: the Court was aware that the statutory framework in the United Kingdom would enable a defendant to be convicted of another sexual offence, other than to the two main substantive sexual offences, where an intention to penetrate was too difficult to prove.

New Zealand, by contrast, has far fewer sexual offences than the United Kingdom. Aside from sexual violation and assault with intent to rape- which, as the court noted in *Ab-Chong*, are really overlapping offences (if anything, the latter is a narrower offence than the former given it specifically requires an assault)-²⁰⁵ the only other sexual offences in the Crimes Act are indecent assault,²⁰⁶ and several specific provisions directed at sexual conduct with those below the age of 16,²⁰⁷ dependant family members,²⁰⁸ or animals.²⁰⁹ Indecent assault seems to have been interpreted as broadly as sexual assault has been in the United Kingdom,²¹⁰ and thus attempted indecent assault is capable of providing an alternative to a charge of attempted sexual violation on facts where attempted sexual violation (or assault with intent to rape) cannot be made out. However, the maximum penalty would be much less than attempted sexual violation,²¹¹ and may fail to accurately label the conduct of a (potentially serious) sexual offender. In contrast, an individual found guilty of the offence of attempted sexual assault in the United Kingdom is susceptible to a 10 year maximum term of imprisonment.

One possibility is for the New Zealand legislature to follow the English example and increase the number and scope of sexual offences on the statute book, including adding

²⁰⁵ *Ab-Chong*, above n 2 at [71]-[75].

²⁰⁶ Crimes Act, s 135.

²⁰⁷ See Crimes Act, ss 131B, 132 and 134

²⁰⁸ Sections 131 and 131A.

²⁰⁹ Sections 142A, 143 and 144.

²¹⁰ *R v Aylwin* [2007] NZCA 458, (2008) 24 CRNZ 87 at [35].

²¹¹ As s 311 of the Crimes Act provides that half the maximum penalty for the full offence applies in an attempt and the maximum penalty provided in s 135 is 7 years imprisonment, the maximum would be only 3 and ½ years, as opposed to the 10 years provided for in s 129. In contrast, the offence of sexual assault in the United Kingdom has a maximum penalty of 10 years: Sexual Offences Act, s 3(4)(b); Criminal Attempts Act, s 4.

some offences which are more preparatory in nature. This would allow the conviction of individuals whose less proximate conduct is deemed worthy of criminalisation, enabling appropriate labelling of their conduct and appropriate penalties to be imposed, without distorting the general law of attempt. Both preparatory offences in the United Kingdom discussed above have a maximum penalty of 10 years. Thus, under the United Kingdom system the defendant's conduct in *Johnston* may have been more appropriately characterised as a trespass with intent to commit a sexual offence (perhaps of a low level sexual assault).

Of course, any such moves to add further sexual offences may well attract criticisms of over-criminalisation. These sort of preparatory offences in the United Kingdom have provoked strong criticism from commentators whose ears are pricked for hints of possible criminal over-reach.²¹² Such concerns are clearly legitimate. Nevertheless, the proposals mentioned above would doubtless be robustly debated in Parliament and whether or not such proposals are adopted would be informed by the views of the wider community – which is not the case when the boundaries of the criminal law are extended by the judiciary, as has been the case in the law of attempt in New Zealand in recent times.

(ii) A new offence of attempted sexual violation

The s 128 *mens rea* requirement of absence of belief in consent on reasonable grounds, as a positive and express element of the offence, is found only in this section of the Crimes Act. Its companion, the existence of a belief on reasonable grounds is far more common, appearing in the guise of a justification or defence, either generally,²¹³ or to specific conduct.²¹⁴ The rarity of this *mens rea* requirement, and the fact that it may well have been chosen due to its value-laden nature (allowing a moral judgment to be passed

²¹² Child and Hunt, above n 106 at 65-67.

²¹³ See for example Crimes Act, s 41, which provides: "Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence".

²¹⁴ See for example Crimes Act, s 134A, which provides a defence to the offence of sexual conduct with a young person under 16 where: "(1) the person charged proves that, (a) before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and (b) at the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and (c) the young person consented".

on the defendant's conduct)²¹⁵ mean that it is arguable that the policy underlying the full offence ought to extend attempts to commit sexual violation. As has been discussed, the current intended circumstances approach gives effect to these concerns (because it enables convictions to be achieved in cases where a defendant does not intend the victim's lack of consent), but in an unprincipled way. An alternative approach, which does not distort the law of attempt, would be to legislate so as to allow for a similar result to the intended consequence model to be reached, whilst preserving a general law of attempt in line with the *Pace* approach.

The offence of attempted sexual violation is already contained in a substantive provision, s 129(1).²¹⁶ A subsequent section could be added which defines attempted sexual violation (and perhaps what intent to commit sexual violation in s129(2) requires), which affirms the current approach in *L v R* and *Ab-Chong*. The attempted sexual violation provision could read as follows:²¹⁷

S129AA Attempted sexual violation defined

- (1) Attempted sexual violation is the act of a person who—
 - (a) attempts to rape another person; or
 - (b) attempts to have unlawful sexual connection with another person.
- (2) Person A attempts to rape person B if person A intends to have sexual connection with person B, where such intentional sexual connection would have been effected by the penetration of person B's genitalia by person A's penis, and that sexual connection would have occurred—
 - (a) without person B's consent to the connection; and
 - (b) without person A believing on reasonable grounds that person B consents to the connection
- (3) Person A attempts to have unlawful sexual connection with person B if person A intends to have sexual connection with person B where such sexual connection would have occurred—
 - (a) without person B's consent to the connection; and
 - (b) without person A believing on reasonable grounds that person B consents to the connection.

²¹⁵ See fn 185; fn 186.

²¹⁶ This, in and of itself, is perhaps a signal from Parliament that this sort of attempt is serious and deserving of special treatment. Other offences which have their own attempt provisions, and thus often higher penalties than the general maximum penalty of half of the maximum for the full offence, as provided in s 311, are also more serious: see for example Crimes Act, s 74 Punishment for treason or attempted treason; s 95 Attempt to commit piracy; s 173 Attempt to murder.

²¹⁷ This draft provision is an adapted version of s 128, which defines the substantive offence of sexual violation.

It is arguable that the high value society places on the right to sexual autonomy²¹⁸ justifies this slight alteration of the general law. Were charges on other attempt offences involving circumstance elements to arise in future, in which it was thought that adherence to *Pace* did not provide the appropriate result, further specific attempt provisions could be added, according with the substantive offence.

Donnelly-Lazarov suggests a similar approach to resolve issues in the current approach to attempt liability. She proposes specific inchoate offences related to their substantive counterparts that spell out exactly what is required by way of *mens rea* in relation to each part of the full offence, in a way which avoids reliance on the consequences/circumstances distinction.²¹⁹

However, although this may seem to be a desirable approach, resolving some of the issues that have been discussed, this dissertation argues that such a piecemeal solution does not squarely address the tension which lies at the heart of the current law of attempt. This dissertation therefore advocates for an approach which recognises the two motivations that underpin the current law of attempt, and gives effect to these in a transparent and principled manner.

C Splitting the law of attempt?

It has been noted that attempt law has traditionally been understood as targeting those who *intentionally* risk the causation of harm. But an honest assessment of the current approach to the *mens rea* requirement highlights another strain in the law of attempt, namely the concern to criminalise those who merely risk causing harm. This is not openly acknowledged. Indeed, courts and many commentators continue to claim that attempt liability is designed solely to apprehend those who *intentionally* create a risk of harm. For example, the English Law Commission states that it “goes almost without saying” that attempt law is only concerned with those who try or *intend* to commit an offence.²²⁰

²¹⁸ See Shute and Gardner, above n 128.

²¹⁹ Donnelly-Lazarov, above n 16 at 216.

²²⁰ English Law Commission, above 29 at 209.

On this traditional understanding, Duff would characterise the law of attempt as being concerned with “attacks” - the most culpable form of offending. Attacks occur where an individual performs an action (or omission) by which he intends to harm “some value or interest”.²²¹ However, what is clear, is that an endangerment paradigm is also being given effect to in the current law of attempt. Duff characterises endangerment as (unintentionally) creating a significant risk that another will suffer harm.²²² So an additional motivation of attempt liability has been added to the attack paradigm; that is, the apprehension and punishment of those who merely *risk* the causing of harm without intending to do so, be it recklessly- or perhaps with no *mens rea* state at all.²²³ Child and Hunt note that allowing such an endangerment paradigm to be employed, whilst claiming that attempt law is only concerned with intentional risking of harm, is incoherent.²²⁴

This incoherence was recognised by the Irish Law Commission, which suggested, in response, that for attempt, the *mens rea* requirement for every element should match that of the substantive offence.²²⁵ This is a radical approach, but it at least has the advantage of being honest about, and consistent with what the underlying motivations of the current law in that country are.

The first step for New Zealand is to recognise that the current approach to attempt law is in fact driven by these two separate motivations; criminalising conduct which risks harm and is done *intentionally* and criminalising conduct which risks harm, but is *unintentional*. Once this is conceded, it can be agreed that this tension results in incoherence in attempt law. Once we recognise this incoherence, it must be decided whether criminalisation of this sort of conduct is in fact desirable. Is endangerment always serious enough to merit the attention of the criminal law?²²⁶ It may be that recognition of the latent motivation of criminalising those who unintentionally risk harm provokes discussion which results in the conclusion that criminalising this sort of conduct is an example of over-reach.

²²¹ Duff, above n 6 at 44.

²²² At 46.

²²³ If we follow the NZ approach to its logical conclusion, where no *mens rea* is required for a full offence, nor is any for attempt. See fn 35.

²²⁴ Child and Hunt, above n 177 at 265.

²²⁵ Irish Law Reform Commission *Report: Inchoate Offences* (ILRC, R99, 2010) at [2.123].

²²⁶ Duff, above n 6 at 58.

That may be so. However, if it is determined that it is desirable to criminalise such conduct, then a new approach to inchoate liability is needed, which is transparent about the motivations that underpin criminalisation and avoids distorting the law of attempt. A less radical option than that proposed by the Irish Law Commission, which still provides this advantage, is suggested here. Instead of distorting the law of attempt by seeking to pursue two aims- intentional and non-intentional risking of harm- under one offence, a possible way forward, which gives effect to both aims, is to split the current law of attempts into two separate, general inchoate offences.

The first, which would retain the label of attempt, would require intention to be proved as to every element of the full offence, as per *Pave* (along with a sufficiently proximate *actus reus*). The statutory definition of attempt could essentially remain the same, perhaps with an amendment to make it clear that this interpretation is to be taken.²²⁷

The second general inchoate offence would be one of endangerment. Such a general endangerment offence has been suggested by Duff as a possibility. He notes that, although an attack requires *mens rea*, criminal liability for endangerment only really needs an *actus reus*; conduct can create the risk of harm whether or not its agent is aware of this risk.²²⁸ Paul Robinson suggests an offence of this kind in his Draft Code of Conduct designed for Anglo-American systems of law. His proposed offence of creating a prohibited risk reads: “[y]ou may not act in a way that creates a substantial and unjustified risk of causing a result made criminal by this Code”.²²⁹

However, if an offence of endangerment is to fall within the criminal law paradigm of culpable harm, then a fault element is desirable. An endangerment offence without a *mens rea* requirement would surely extend the bounds of liability too far. As Child and Hunt argue, imposing a form of strict liability for conduct which risks the occurrence of harm would be a disproportionate response to the aim of avoiding harm, and given that the criminal law is a mechanism designed to balance priorities and rights, would

²²⁷ See fn 152 above which sets out a provision from the Crimes Act of Victoria performing this function.

²²⁸ Duff, above n 6 at 46.

²²⁹ Paul H Robinson *Structure and Function in Criminal Law* (Oxford University Press, Oxford, 1997) at 218.

thus be unprincipled.²³⁰ This dissertation suggests that any general endangerment offence therefore ought to include a *mens rea* requirement.

The most natural *mens rea* state for an endangerment offence is recklessness; showing that one does not care for the interests of others as one should, by being willing to risk the causing of harm to them.²³¹ Although it was recognised above that there is no principled reason for restricting the *mens rea* for circumstance elements to recklessness,²³² there is a justification in the case of endangerment offences for placing the lower limit at recklessness, because anything lower would remove the offence from the paradigm of culpable (risking of) harm. The foregoing discussion in relation to the special nature of sexual offences may also be thought justify the creation of a specific sexual violation endangerment offence. But such an offence would, perhaps, be unnecessary: there would be no real benefit in doing so because little would turn on whether ‘recklessness’, or a ‘lack of belief on reasonable grounds as to consent’ were required, given that the practical difference between these two elements is negligible.

This suggestion bears similarity to a proposal of the United Kingdom Law Commission made in 2007.²³³ The report of the Law Commission suggested that attempt be divided into two new offences; attempt and preparation. The same mental state would be required for each; the focus was on extending the breadth of conduct that could be caught from just those doing last acts, to those preparing themselves “on the brink of committing ‘last acts’”.²³⁴ The proposal met with very little support- the main issue was that the two offences would have the same maximum penalty and it was argued that prosecutors would invariably opt for the easier of proof preparation, making attempt redundant.

The suggestion put forward here is different. The issue with an offence of preparation is that it is essentially of the same nature as attempt, targeting a similar sort of wrong, and thus does not add much colour to the palette of available offences. Under the approach suggested here, different *mens rea* would be required for each type of offence. Thus, as discussed above, the wrongs targeted by each offence are fundamentally

²³⁰ Child and Hunt, above n 177 at 256.

²³¹ Robinson, above n 229 at 46-47.

²³² See fn 57.

²³³ English Law Commission, above n 29.

²³⁴ At 210.

different. Attempt, as an offence which requires an attack is morally different to an endangerment. Attacks, as Duff notes are intrinsically or essentially harmful, endangerments, by contrast are only potentially harmful.²³⁵ To recognise this distinction, a maximum penalty of a quarter the maximum allowable for the full offence could be stipulated,²³⁶ thus also avoiding the possibility that where attacks also constitute endangerments, prosecutors will choose the lower level of offence as easier to prove. This suggestion has the advantage of being honest about the underlying motivations of inchoate liability.

The benefits of a general offence of endangerment would be the added deterrent effect. As Duff notes, dissuading individuals from engaging in conduct that is dangerous means that harmful conduct is less likely to occur.²³⁷ Early intervention would be facilitated. Further, such a general offence avoids the risk that piecemeal, possibly ill-drafted legislative developments will be pursued to deal with instances where behaviour seen as “worryingly dangerous” is thought deserving of criminalisation.²³⁸

However, it must be recognised that a general offence of endangerment would also give rise to a number of issues. One would be in determining the appropriate *actus reus* requirement. As with attempt, it could only be stipulated with a degree of imprecision. This would have the effect of duplicating the problems that come with trying to decide where the lower limit of attempt law is. This would no longer be such a concern for attempt, as endangerment could be charged where attempt was unsuccessful, but if endangerment was the lower limit of inchoate liability, the problems would be transferred here.

A further problem with a general endangerment offence is the undesirable overlapping with existing specific offences of endangerment that would occur.²³⁹ In Australia,

²³⁵ Duff, above n 6 at 58.

²³⁶ Margaret Briggs suggests that such a penalty discount would be appropriate if New Zealand were to enact a general offence of preparation, given that attempt law already allows for a penalty discount, thus this would be in line with current law: above n 77 at 158. This point is also applicable to a general endangerment offence.

²³⁷ Duff, above n 6 at 58.

²³⁸ At 58.

²³⁹ CMV Clarkson “General Endangerment Offences: The Way Forward?” (2004-2005) 32 UWAL Rev 131 at 137.

several jurisdictions have general endangerment offences. However, these are directed toward endangering life or creating a risk of harm to the person.²⁴⁰ The jurisdictions do not include general offences of risking the causing of any harm whatsoever. Perhaps these type of offences would be good to emulate. However, even with more limited endangerment offences, criticisms have arisen of over-criminalisation and an unacceptable degree of over-lap because specific endangerment offences can be charged alongside the general offence.²⁴¹

Further, Duff claims that an issue inherent in any general endangerment offence is that it would be likely to be enforced very selectively. Official law enforcement resources are always concentrated on kinds of harm perceived as more serious.²⁴² Essentially, this amounts to an argument that a general offence of endangerment is likely to only be employed in cases like *Johnston* and in other serious areas of potential offending, perhaps where conduct risks the causing of murder, or serious wounding offences. Thus Duff suggests that the creation of a general offence of endangerment would be a disproportionate response to the desire to accommodate a few areas of concern.

The scope of this project does not allow for a more extensive examination of the merits and failings of these possible solutions. However, it is hoped that raising some suggestions will provoke discussion about what the proper motivations of attempt liability should be, and allow any future approach to deal with these honestly.

D Conclusion

Several possible solutions to the issues raised in this dissertation have been discussed. Some relative merits and potential failings of each have also been considered. None of these suggestions are ideal. However, the true value in considering such possibilities

²⁴⁰ See for example Crimes Act 1958 (Vic), s 22: “A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence”, s23: A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence. The general endangerment offence in Western Australia is different in that it requires an *unlawful* endangering act: Criminal Code Act 1913 (WA), s 304(1): “If a person omits to do any act that it is the person's duty to do, or unlawfully does any act, as a result of which: (a) bodily harm is caused to any person; or (b) the life, health or safety of any person is or is likely to be endangered, the person is guilty of a crime and is liable to imprisonment for 5 years”.

²⁴¹ Clarkson, above n 239 at 137.

²⁴² At 137.

for reform is that it brings the underlying rationales of attempt law to the surface, so that principled discussion can occur about whether criminalising those who unintentionally risk the causing of harm is a legitimate aim of the law of attempt, and the criminal law generally.

VI: Conclusion

This dissertation has considered recent case law from the United Kingdom and New Zealand about the *mens rea* element of attempt liability. The two approaches to the *mens rea* requirement for circumstance elements, the intended consequences model, which prevails in New Zealand, and the full intention approach, which now prevails in the United Kingdom, have been examined to assess which provides the better way of dealing with this issue.

I have argued that neither approach is perfect. The intended consequences model appears to be unprincipled: in not requiring intention as to circumstances it is unfaithful to the words of the statute, and appears to extend the proper bounds of attempt liability to include conduct which is, in fact, properly characterised as endangerment. By contrast, although the full intention model may be more principled, it can lead to unsavoury outcomes, notably in the context of attempted rape.

The key issue which has emerged in the course of this analysis is the issue of over-criminalisation. This concern arises not just as a result of the shift towards the endangerment paradigm for the *mens rea* element which *L v R* has effected (and which *Ab-Chong* has confirmed), but also as a result of the Court of Appeal's decision in *Harpur*, which extended the actus reus of attempt liability into conduct traditionally considered 'preparatory', and thus beyond the reach of the criminal law. The main conclusion this dissertation has reached is that if it is thought proper to proscribe conduct which merely endangers others, then this should be effect by the legislature rather than by the courts. This would have the virtue of exposing the shift in rationale for attempt liability to criticism from the community, and give democratic pedigree to the policy preferences which the courts, in developing the law, have been tacitly relying on.

To this end, this dissertation has canvassed possible solutions for the future, which may provide more principled approaches to inchoate liability than the current position. This dissertation suggests that the most principled way to give effect to endangerment concerns is to enact a separate general offence of endangerment. Whilst this solution

is in no way perfect, it at least has the advantage of accomplishing what the law currently does in a more transparent manner.

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