THE IMPOSSIBILITY OF PERFORMANCE IN CRIMINAL LAW: ENGLISH AND AUSTRALIAN EFFORTS TO TACKLE THE PROBLEM

D.P.P. v. *NOCK*
THE QUEEN v. *COLLINGRIDGE*

Introduction

The House of Lords' decision in *Haughton* v. *Smith*[1] is one of the most influential pronounced by their Lordships over the last decade in the sphere of criminal law.

It had been accepted for the preceding eighty years, following the famous "empty pocket" case of *Ring*,[2] that the non-existence of the subject matter of a proposed theft provided no defence to a charge of attempted larceny. The judgments in *Haughton* v. *Smith*, however, unanimously asserted that whereas the accused can be guilty of attempting the impossible where the impossibility in fact resides merely in the means he has chosen, a conviction for attempt will *not* lie where the accused could not have committed the substantive offence. The substantive offence cannot be completed where particular legal impediments render the offence in question impossible to perform or where, because of certain physical circumstances, the accused's aim is thwarted from the outset and is subsequently impossible of performance.

D.P.P. v. *Nock*,[3] the most recent House of Lords' decision dealing with the concept of impossibility, confirms the views expressed in *Haughton* v. *Smith* and carries the views expressed therein to their logical conclusion in relation to the offence of conspiracy.

Nock's Case is unsatisfactory in many respects. Whilst there is little doubt that on the facts, both *Haughton* v. *Smith* and *D.P.P.* v. *Nock* were correctly decided, there are certain internal inconsistencies in the former case which were not explained or elaborated upon in the latter; the all-important distinction between legal and physical impossibility was not carefully drawn by any of their Lordships in *Nock's Case;* furthermore, certain remarks by Lord Diplock as to the framing of indictments warrant careful scrutiny. In short, the decision does little to clarify *Haughton* v. *Smith*.

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[1] [1975] A.C. 476.
[2] [1892] 17 Cox C.C. 491.
[3] [1978] 2 All E.R. 654.

The South Australian Court of Criminal Appeal has provided an Antipodean response to the logic of recent decisions on the problem of impossibility. In *The Queen* v. *Collingridge,*[4] Bright, J. strongly applied the "proximity" test as the central determinant of liability and confirmed the conviction for attempted murder.

It is this writer's submission that the views embraced by the Court in *The Queen* v. *Collingridge* will be preferred in Australia to the invincible logic but unsatisfactory result flowing from the *Haughton* v. *Smith* line of reasoning.

Prelude to the Problem: *Haughton* v. *Smith*

The Facts

Stolen property in a van was intercepted by the police who knew that it was intended for a receiver. The police hid in the van which was allowed to proceed to its destination. The would-be receiver was subsequently apprehended by the police after he had collected the goods. The prosecution relied on s. 22 of the English Theft Act, 1968 which makes it an offence to handle stolen property.

The Verdict

Section 24(3) of the Theft Act provides that where stolen goods have been restored to lawful custody, they are no longer to be regarded as stolen. The reasoning of the House of Lords is based upon the premise that the property in question had in fact been deemed by law to be no longer stolen, so that Smith had not committed the offence of handling stolen property. This was a classic case of what is referred to as "legal impossibility".

The Reasoning of the Court

Adopting the same line of reasoning as in *Withers,*[5] the House of Lords claimed that it was not in a position to "manufacture" a new criminal offence not authorized by the legislature. The Court, led by Lord Hailsham, made it quite clear that it was not the purpose of the criminal law to punish merely for a guilty "intention".[6] It is respectfully submitted, however, that in relation to any charge of attempt, it is quite incorrect to speak of the Court's fear of punishing for a "mere" intention, the fundamental notions of "attempt" being couched in terms which of necessity transcend the realms of mere intention. The gist of any charge of attempt or conspiracy is certainly more than the holding of a mere intention; certain overt acts of the accused are required before the offence of attempt becomes complete, whereas in the case of conspiracy the phenomenon of agreement is needed to crystalize the offence. When in the process of performing a particular physical activity, one must certainly go beyond the

[4] (1976) 16 S.A.S.R. 117.
[5] [1974] 3 W.L.R. 751.
[6] *Supra* n. 1 *per* Lord Hailsham.

possession of a mere intention and be actively progressing towards a certain goal, albeit impossible of attainment in the particular circumstances; the overt acts undertaken by the accused do, of course, provide the physical manifestation of the requisite guilty intention to sustain the *mens rea* component of the charge. In short, the formation of an "intention" is an exclusively mental process, whereas an "attempt" requires physical action in order to complete the actus reus component of the charge, without which no conviction could ensue.

In his analysis of attempt, Lord Hailsham quoted a sixfold classification of ways in which a man who sets out to commit a crime may in the event fall short of the complete commission of that crime, which had been adopted by Turner, J. in the New Zealand case of R. v. *Donnelly*,[7] and used that categorization as a springboard for further discussion. For our purposes, Turner, J.'s most important categories were:

(a) where the accused fails to complete the crime through ineptitude, inefficiency or insufficient means;
(b) where the accused's aim is physically impossible to complete, no matter what means he adopts.[8]

All in all, eight hypothetical situations were examined by the House of Lords in a bid to formulate some coherent doctrine of impossibility. These hypothetical examples are worth a brief consideration, particularly when one considers that they highlight the difficulties incumbent upon any interpretation of what is or is not deemed impossible of performance in the eyes of the criminal law:

1. The *"handling stolen goods" example*[9] where, as in *Haughton* v. *Smith* itself, the goods are no longer "stolen". This is a case of "legal impossibility" and a conviction is precluded.
2. The *"stealing one's own property" example*:[10] when one takes an umbrella believing it to be another's, and it is in reality one's own, this cannot constitute an offence.
3. The *"stealing from an empty pocket" example*:[11] Lords Hailsham, Reid and Dilhorne felt this could not constitute an attempt in law, the lack of the relevant subject matter rendering any offence impossible of completion. This was seen as analogous to the case where a burglar enters a house to steal specific jewels which are in fact not there.[12]
4. The *"killing a corpse" example*:[13] Lords Hailsham and Morris

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[7] [1970] N.Z.L.R. 1980.
[8] These two categories will assume greater significance in the later discussion of Legal and Physical Impossibility.
[9] *Supra* n. 1 *passim*.
[10] *Id. per* Lord Hailsham at 496.
[11] *Id. per* Lord Hailsham at 490, Lord Reid at 498, Viscount Dilhorne at 4.
[12] *Id. per* Lord Hailsham at 494.
[13] *Id. per* Lord Hailsham at 495.

maintained that one cannot attempt to murder an already dead body. Similarly, firing at a wax effigy of an intended victim, as exemplified in the classic Sherlock Holmes saga with Colonel Moran, cannot amount to an attempt. This is illustrative of an approach which considers that there can be no attempt where the sequence of intended acts when completed would constitute no substantive offence.

5. The *"shot in the dark" example*:[14] Lord Hailsham tentatively assumed that in a situation where the accused fired into an empty room wrongly believing it to contain an intended victim, or where the accused fired at a peephole in a roof believing it to be used by a watching policeman who was in fact a few yards away, he would not be guilty of attempt.
6. The *"poisoning" example*:[15] The accused is not guilty of an attempt to murder where water is administered to a victim in mistake for cyanide with the intention of killing. Conversely *White's Case*,[16] in which the defendant had put a small quantity of cyanide in a wine glass, too small to kill, was distinguished as falling within the "insufficiency of means" category proposed by Turner, J.
7. The *"unlawful carnal knowledge" example*:[17] Lord Hailsham proposed a two-limbed example of impossibility of performance where a charge of unlawful carnal knowledge was in question. According to his Lordship, whether it was the male who was by reason of age incapable in law of committing the offence, or alternatively where the female who was in law incapable by reason of her age of having it committed against her, the male could not properly be indicted for attempt, even if he falsely believed that the victim was under age.
8. The *"bigamy" example*:[18] Lord Reid claimed that where a man married an unmarried woman, believing her to have a married status, he could not properly be convicted of attempted bigamy. This example must be seen as being analogous to the second limb of Lord Hailsham's hypothetical carnal knowledge situation.

In light of the abovementioned examples, the Court asserted that attempts were not to be judged on the facts as known to, or believed by the accused, but on the *objective facts* as determined by the Court. Such "objectivity" is the unifying element in the examples cited by their Lordships, but their reluctance to convict the accused in such instances, while superficially reasonable in most cases, warrants close scrutiny.

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[14] *Ibid.*
[15] *Ibid.*
[16] [1910] 2 K.B. 24.
[17] *Supra* n. 1 *per* Lord Hailsham at 496.
[18] *Id. per* Lord Reid at 500.

The Acceptance of the Doctrine: *Partington* v. *Williams*[19] and *R.* v. *Green*[20]

In *Partington* v. *Williams,* a woman took a wallet from her employer's office drawer and looked into it to see if it contained any money, intending to steal anything found therein. The wallet was empty. She was convicted of attempting to steal at common law, the justices being of the opinion that an attempt impossible in fact was still an offence punishable by the criminal law. On appeal, the Divisional Court held that on the facts the defendant could not be convicted of the attempted theft of money because the commission of the substantive offence was in the circumstances impossible. Accordingly, the conviction of attempting to steal money was quashed, much reliance being placed on the decision in *Haughton* v. *Smith.* The decision was thus an unequivocal confirmation of the principle that an accused cannot be convicted of attempted theft of money where he puts his hand into another person's pocket, the pocket not being proved to be otherwise than empty.

The most important remarks of May, J. were those in which he warned that the rigid classifications adopted by Turner, J. in *R.* v. *Donnelly* were of limited assistance:

> Each case must of course be decided upon its own facts in accordance with the basic principles laid down in *Haughton* v. *Smith* [where] both Lords Reid and Morris doubted whether it was possible, or indeed desirable, to set out any complete classification or to give any exhaustive definition of what amounts to an attempt to commit a crime.[21]

Before the ramifications of the decision in *Partington* v. *Williams* could be properly assessed and evaluated, the problem of impossibility in the criminal law yet again confronted the English Courts in the case of *R.* v. *Green.* Ormrod, L.J., delivering the judgment of the Court of Appeal, appears to have adopted a narrower interpretation of physical impossibility. According to his Lordship, only where the substantive offence cannot be proved because its essential constituents do not exist can there be no liability for attempt on the ground of impossibility. This approach is consistent with his citation of two hypothetical situations from *Haughton* v. *Smith* which both have essential elements of the *actus reus* of the substantive offence missing; in the "handling stolen goods" example, the items were in fact not stolen (within the narrow legal definition of that term) at the time of the alleged offence and in the "killing the corpse" example, the intended victim was already dead. Thus, according to the Court of Appeal, impossibility is to affect liability *only* where it results in the

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19 (1975) 65 Crim.A.R. 220.
20 [1976] 1 Q.B. 985.
21 *Supra* n. 19 *per* May, J. at 224.

absence of an essential constituent of the *actus reus* of the substantive offence: in accordance with this analysis, a murder victim bereft of life cannot be "killed" at law.

Extension of the Doctrine: *D.P.P.* v. *Nock*.[22]

Facts

The appellants were convicted of conspiracy to produce a "controlled drug" (cocaine), contrary to s. 4 of the English Misuse of Drugs Act, 1971. Unknown to them, it was impossible to produce cocaine from the ingredients in their possession. The Court of Appeal[23] maintained that the reasoning in *Haughton* v. *Smith* did not apply to conspiracy, which was distinguishable from an attempt by the factor of agreement. The case was referred to the House of Lords as involving a point of law of general public importance.

The House of Lords

Lord Scarman, delivering the leading judgment, while agreeing that in the case of conspiracy the agreement itself constituted the offence, stated that the Court of Appeal had nonetheless fallen into error by not applying the *Haughton* v. *Smith* principle to conspiracy and by considering an attempt as being exclusively a "preliminary" or "inchoate" crime:

> Logic and justice would seem to require that the question as to the effect of the impossibility of the substantive offence should be answered in the same way, whether the crime charged be conspiracy or attempt.[24]

In doing so, Lord Scarman adopted the reasoning of Lord Tucker in *Board of Trade* v. *Owen*[25] who had accepted Holdsworth's comment that [it] was inevitable that conspiracy should come to be regarded as a form of attempt to commit a wrong.

In *R.* v. *Green*,[27] Ormrod, L.J. had suggested that impossibility does not affect liability for conspiracy. He noted the fact that, in *Haughton* v. *Smith*, Lord Hailsham had commented that he was unable to understand why the prosecution, upon its failure to sustain the charge of attempt, had not proceeded on the second charge of conspiracy[28]. From this observation, Ormrod, L.J. somewhat surprisingly concluded that his Lordship did not think that his views on attempts were applicable to conspiracy.[29] The Court of Appeal in *Nock's Case* adopted a similar posture to that espoused in *Green's*

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[22] *Supra* n. 3.
[23] *R.* v. *Nock*, Court of Appeal (U.K.), *The Times*, 1st February, 1978.
[24] *Supra* n. 3 *per* Scarman, L.J. at 661.
[25] [1957] 1 All E.R. 411.
[26] [Footnote 26 has been deleted from text.]
[27] [1976] 1 Q.B. 985.
[28] *Supra* n. 1 *per* Lord Hailsham at 489-490.
[29] *Supra* n. 27 *per* Ormrod, L.J. at 993.

Case by Ormrod, L.J., citing the latter's *dicta* to the effect that it was difficult to apply the reasoning in *Haughton* v. *Smith* to conspiracy.[30] Accordingly, the Court of Appeal in *Nock* felt that it was enough that the prosecuton prove an agreement to do an act forbidden by s. 4 of the English Misuse of Drugs Act, the fact that the unlawful agreement was incapable of being carried out being irrelevant.

Whilst the Court of Appeal in *Nock's Case* was undoubtedly influenced by Ormrod, L.J.'s deductions in *R.* v. *Green,* Lord Scarman's judgment in the House of Lords clearly explained the fallacy of such reasoning. According to his Lordship, it was of crucial importance in *Haughton* v. *Smith* that "the conspiracy charged in the second count must have ante-dated the police seizure of the van and the return of the goods to lawful custody".[31]

When Lord Scarman explained that "Smith must have agreed to help in the disposal of the goods at a time when they were stolen goods and the agreement could be performed",[32] he in effect held that the offence of conspiracy would not be established where it is impossible to commit the substantive offence at the time of agreement or at any time thereafter, which he felt to be Lord Hailsham's true contention. In his own words, the facts in *Nock* amounted to a "case not of an agreement to commit a crime capable of being committed in the way agreed upon, but frustrated by a supervening event making its completion impossible . . . but of an agreement upon a course of conduct which could not in any circumstances result in the statutory offence alleged",[33] and as such, could not attract any criminal liability.

An element of inconsistency is introduced into the wider analysis of conspiracy by Lords Hailsham and Scarman (in *Haughton* v. *Smith* and *D.P.P.* v. *Nock* respectively) in their tests of liability where the issue of a conspiracy to do the impossible is raised. Jennifer Temkin points out that their Lordships "considered it irrelevant that conspiracy is a continuing offence, and thought that impossibility should be assessed at no time other than the time of the formation of the agreement. Any supervening impossibility was to be discounted".[34]

Such an approach is clearly not consonant with the rationale of conspiracy formerly propounded in the case of *Doot,*[35] wherein the House of Lords analysed conspiracy as being a "continuing offence". The analyses of Lords Hailsham and Scarman render the notion of conspiracy as a continuing offence of absolutely no significance where the question of impossibility is at issue. As a consequence of their

[30] (1978) 2 *Crim. L.J.* 94.
[31] *Supra* n. 3 *per* Lord Scarman at 662-663.
[32] *Ibid.*
[33] *Ibid.*
[34] Jennifer Temkin, "When is Conspiracy Like an Attempt — and other Impossible Questions" (1978) *L.Q.R.* 543 at 554.
[35] [1973] A.C. 807.

Lordship's divergence from the decision in *Doot,* at least as regards impossibility, some unacceptable results may ensue. For their Lordships, criminal liability in a conspiracy charge would only be avoided if the offence were legally or physically impossible of completion *ab initio* and not as a result of some later supervening legal or physical circumstance which would render the actions of the accused non-criminal. The common weakness inherent in the views of Lords Hailsham and Scarman is that, in limiting liability in cases of conspiracy to do the impossible purely and simply to the original time of consensus, supervening events may render a state of affairs, previously (that is, at the time of the agreement) impossible of accomplishment, as being capable of attracting criminal liability; thus, their Lordships, by limiting the "continuing offence" nature of conspiracy advocated in *Doot,* may unwittingly provide an escape avenue for the would-be conspirator. With respect, the effect of their Lordships' decisions in circumscribing the notion of conspiracy as a "continuing offence" where the question of impossibility arises may prove counter-productive, allowing the accused to come within, or alternatively, escape the scope of liability as a result of the particular time which he sought to conspire. Both for policy and practical reasons, such a state of affairs cannot be seen as a welcome addition to the criminal law.

Throughout his judgment, Lord Scarman was at pains to emphasize that it is vital to determine the exact *scope* and *nature* of the enterprise being conducted by the accused. For instance, in *Nock* itself, the appellants agreed to prepare cocaine by a *particular* method; it can readily be inferred that, had the appellants embarked upon an experimental excursion to attempt to procure cocaine from an infinite number of compounds of varying chemical compositions, a conviction may have been apt; such an inference is based upon the assumption that cocaine can in *fact* be extracted from certain chemical compounds.

Lord Scarman said that the Court in *Partington* v. *Williams* erred in its interpretation of *Haughton* v. *Smith,*[36] and in this observation he was supported by the other Law Lords. However, a close examination of the judgment delivered by Lords Hailsham and Reid and by Viscount Dilhorne in respect of the "empty pocket" cases would suggest that *Partington* v. *Williams* was decided on precisely the terms enunciated by their Lordships in *Haughton* v. *Smith.*[37] It is submitted that *D.P.P.* v. *Nock* augures a conscious attempt by the House to contain the rather broad ambit of the guidelines laid down previously by its brethren in *Haughton* v. *Smith.*

Finally, while Lord Scarman correctly pointed out that *Haughton*

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[36] *Supra* n. 3 *per* Lord Scarman at 664.
[37] *Supra* n. 1 *per* Lord Hailsham at 495, Lord Reid at 499 and Viscount Dilhorne at 505-506 .

v. *Smith* [was] correct in principle,[38] he remained conspicuously silent on the most contentious of points, that of physical impossibility. His whole judgment seemed to be based upon the assumption that *Nock's Case* turned solely on the question of legal impossibility, and that further elaboration on the constituents of impossibility was unnecessary.

Although the application of the general concept of impossibility was integrated clearly into the law of conspiracy, regrettably the Court failed to clarify much of the authoritative *dicta* in *Haughton* v. *Smith,* nor did it seek to resolve and explain the difficult distinctions between the legally or physically impossible.

A Note on Incitement

There is no clear authority as to the role of impossibility in the common law offence of incitement, although it would appear that the decision in *McDonough's Case*[39] (given only a cursory mention by the House of Lords in *Nock* and not considered at all in *Haughton* v. *Smith*), where the defendant was found guilty of incitement in circumstances which clearly indicated a physical impossibility, still represents the law. If this is the case, it would seem anomalous that incitement should be treated as operating differently to either attempt or conspiracy.

It seems only logical that a uniform approach be adopted to deal with all inchoate offences with regard to impossibility. Attempt, conspiracy and incitement are all inextricably linked for both practical and policy reasons; the inchoate offences all take place prior to the accomplishment of a substantive offence, and have preventive orientations.

Nock's Case: Framing the Indictment, "Conditional Intent", and "Empty Pockets" — A Legal Labyrinth?

The Indictment

The object of an indictment is to give the defendant a clear and unequivocal statement of the criminal conduct with which he is charged. Smith and Hogan warn that it "is important to determine precisely what is the act which the Defendant is alleged to have attempted. Exactly the same conduct may be an attempt to commit one act and not an attempt to commit the other. This seems very obvious, but it can cause difficulty".[40]

In the light of the abovementioned comments, the rationale behind *McPherson's Case*,[41] wherein Crowder, J. stated that "when

[38] *Supra* n. 3 *per* Lord Scarman at 661.
[39] *R.* v. *McDonough* (1963) 47 Crim. A.R. 37.
[40] J. C. Smith and B. Hogan, *Criminal Law* (4th ed. 1978) at 259. See *Brown's Case* (1899) 63 J.P. 790 *per* Darling, J. for an examination of some of the interpretative intricacies involved in the framing of indictments.
[41] *R.* v. *McPherson* (1857) Dears & B. 198 at 201.

you charge larceny, you must specify some articles and prove that some one of those articles has been stolen" and the views expressed in both *Haughton* v. *Smith* and *Partington* v. *Williams,* some of Diplock, L.J.'s remarks in *D.P.P.* v. *Nock* seem particularly susceptible to criticism.

Amazingly, the learned Law Lord differentiates between the professional habits of the accomplished pickpocket, working with a confederate, and the pattern of the theft usually followed by a solitary pickpocket,[42] and goes on to claim that under an "indictment drafted in suitably broad terms",[43] both classes of pickpockets may be convicted. Such a tenuous and unwarranted distinction between the habits of different classes of pickpocket, as has been pointed out, has no place in the criminal law:

> The criminal law does not punish a man for what he is but for what he has done, neither does it punish him for his intentions alone. If the law concedes that what he has done does not amount to a crime, his intention to commit other crimes is without accompanying action, of no significance.[44]

Diplock, L.J.'s comments in effect propose to widen the scope of the Court's investigative power into the affairs of the accused with regard to the framing of an indictment suitably broad enough to sustain the particular charge of attempt in question; such an approach would most certainly amount to an indirect attempt to prosecute the accused for a "mere intention", which Lord Hailsham adamantly stated was *not* the role of the Court,[45] and would be invariably productive of great uncertainty *vis.* the form of the indictment.

Conditional Intent

The concept of "conditional intent" in larceny has assumed major significance in the criminal law since the famous case of *R.* v *Easom.*[46] Much of what was said in that case, and most recently, in *R.* v. *Hussein,*[47] has a potentially great bearing on the notion of impossibility of performance. In light of Diplock, L.J.'s *dicta*[48] in *Nock,* the logic flowing from the *Easom* line of reasoning assumes even greater significance.

The case of *Easom* illustrates the distinction made by the criminal law between an intent to steal and what is called a "provisional intent to steal; in this case, the prosecution, not having established a

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[42] *Supra* n. 3 *per* Diplock, L.J. at 656-657.
[43] *Ibid.*
[44] *Supra* n. 34 at 543.
[45] *Supra* n. 1 *per* Lord Hailsham at 490.
[46] [1971] 2 Q.B. 315.
[47] Court of Appeal (Criminal Division) December 8, 1977; reported [1978] Criminal L.R. 219.
[48] It is noteworthy that Diplock, L.J.'s supplementary observations were endorsed by both Lords Keith and Salmon, and as such, must be deemed to be highly authoritative.

intent to permanently deprive the owner of a specific item of property, failed to obtain a conviction for larceny. In larceny, "appropriation" is limited, for the purpose of creating criminal liability, by the requirement of the intent permanently to deprive of a *specific* object. Such a circumscription of the notion of intent is of course in accordance with what was later said in *Haughton* v. *Smith.*

The concept of "conditional intent" gives the "empty pocket" situation a new dimension; it seems as if the rule could apply to full pockets as well where the thief was selective as to what was to be stolen; a conviction for the substantive offence or for the attempt could be thwarted where the thief claimed that the articles in question were not on his "shopping list",[49] as it is flippantly put by Glanville Williams. Thus, the decision in *Easom,* whilst sound on legal principle, overlooked the necessity of deterring the morally culpable beneficiaries of such an approach, and created immeasurable problems for the prosecution in cases of larceny.

The Court of Appeal, containing Lord Scarman (then Lord Justice Scarman), recently dealt with the concept of "conditional intent" in the case of *Hussein.*[50] The Court adopted the *dicta* of Lord Edmund Davies in *Easom* as its *ratio decidendi,* holding that one who had in mind to steal only if what he found was worth stealing could not be said to have a present intention to steal. Thus, rather than limiting *Easom,* the Court of Appeal widened its scope.

The repercussions of the decision in *Hussein* could be very serious indeed. The reporter of the case claimed that *"Hussein* could be the burglars' charter"[51] and, most importantly, that "the implications of the decision could be very serious in other respects. If this sort of conditional intention is no 'intention' for the purposes of the law of attempts, is it a sufficient *mens rea* for the common law of conspiracy?"[52] If indeed conditional intent were to assume a position of importance in the sphere of criminal conspiracies it would almost certainly open up a veritable Pandora's box of legal unpleasantries.[53] In *Nock,* it was previously pointed out, Lord Scarman stressed the need for a determination of the scope and nature of the criminal enterprise; the decision in *Hussein* imposes an even heavier burden on the prosecution.

It is reasonable to conjecture therefore, that Lord Diplock's *ad hoc* suggestion of framing the indictment wide enough to ensnare the villain will not stand up to the two-pronged assault of "conditional intent", or the rigours of exactitude required by an indictment. There

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[49] Glanville Williams, *Textbook on Criminal Law* (1978).
[50] *R.* v. *Hussein supra* n. 47.
[51] *Id.* at 220.
[52] *Ibid.*
[53] Smith and Hogan, *op. cit. supra* n. 40 refer to the decision in *Hussein* as "both surprising and regrettable" at 256.

is a strong possibility that if the learned Law Lord's views are in fact accepted, the concept of conditional intent will be rendered obsolete, due to the ease with which it might then be circumvented by a widely drawn indictment. Despite the many unsatisfactory elements in the doctrine of conditional intent, it is suggested that this indirect means of getting around it may infringe the traditional rights of the accused in a criminal case — that of being made aware of *precisely* the act which he is to have attempted. In short, a careful balance of interests must be pursued.

The Australian Alternative: *The Queen* v. *Collingridge*[54]

Facts

C. attempted to kill his wife by throwing into the water of her bath the bared end of a wire plugged into the electricity supply which had been turned on. C. pulled out the cord after his wife had screamed. Scientific evidence indicated that had the wire come into contact with the wife she may have been killed, but that the wire's presence in the water *per se* would not have caused death.

The Court's Reasoning

The Court held that no impossibility of any sort existed and that the defendant, through ineptitude, inefficiency or insufficient means,[55] had been merely unsuccessful in his bid to kill his wife.[56] Bray, C.J. adopted the reasoning in *Haughton* v. *Smith* as the broad conceptual framework for his judgment but expressed misgivings that the *Haughton* v. *Smith* formulation might render it difficult to see any ethical distinction[57] between certain modes of attempt. Similarly, Zelling, J. accepted the decision in *Haughton* v. *Smith* to be correct, but stressed that many of Lord Hailsham's observations which had attracted criticism, were in fact *obiter*[58] Thus both Bray, C.J. and Zelling, J. manifested a somewhat qualified acceptance of *Haughton* v. *Smith* in *Collingridge*.

It is worth noting that Bray, C.J., in asserting that "it must now be taken . . . that the would-be pickpocket who puts his hand into an empty pocket has not thereby committed attempted larceny",[59] interpreted the nineteenth century "empty pocket" cases[60] in the same manner as the English Court of Appeal in *Partington* v. *Williams*, with reference to the broad rules laid down in *Haughton* v. *Smith*. Clearly, Bray, C.J. did not feel disposed, as was the House of Lords

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[54] *Supra* n. 4.
[55] *Id. per* Bray, C.J. at 123.
[56] It was seen as being analogous to the attempted murder by poisoning case of *White's Case* [1910] 2 K.B. 24.
[57] *Supra* n. 4 *per* Bray, C.J. at 121.
[58] *Id. per* Zelling, J. at 140.
[59] *Id. per* Bray, C.J. at 121.
[60] *R.* v. *Collins* (1864) 9 Cox C.C. 497, *R.* v. *Ring supra* n. 4.

in *Nock,* to analyse *Partington* v. *Williams* as a misapplication of the reasoning in *Haughton* v. *Smith.*

The most pertinent remarks in *Collingridge* must be attributed to Bright, J., from whose judgment it is worth quoting at length. The learned Justice is the first judge to set his mind systematically to the ambivalent nature of the term "physical impossibility". He said:

> I think that confusion has been caused by failure to separate juristic concepts from chances of achievement. To say that one cannot steal the contents of an empty pocket is to say that two essential elements in the crime are absent, viz. taking goods and carrying them away. That constitutes an impossibility in law. The impossibility is brought about by the absence of goods. In one sense that could be called a physical impossibility. But often the phrase "physical impossibility" is used in a different sense, to categorize an intention which cannot possibly be successfully carried out. In this sense it could have been argued until recently that it was impossible to steal something on the moon. It is no longer impossible to do so, merely most improbable. Chances of success can range from almost zero per cent to almost 100 per cent.[61]

The passage cited above clearly shows Bright, J.'s reluctance to entertain the notion of *degrees* of physical impossibility, and simultaneously suggests a diminution of the scope of what should be regarded as physically impossible. This approach is harmonious with the advice voiced in *Haughton* v. *Smith* that it would be desirable to avoid the nebulous notions of "casuistry",[62] when dealing with the concept of physical impossibility. In his judgment, Bright, J. deals with four key points which differ either in their nature or at least in degree to the central tenets of the English approach.

1. *The Use of the "Proximity" Test.*

According to Bright, J., the question to be asked of the jury where the issue of impossibility arises is:

> Did (the defendant) in fact, whatever he thought he was doing, move towards carrying out his intention?

rather than the question:

> Was it physically possible, in the circumstances of the case, for him to carry out his intention?[63]

In other words, a test of proximity was preferred to that of strict physical impossibility as advocated by the English Courts.

2. *The Subjective Approach*

In contrast to the House of Lords, which emphasized that impossi-

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[61] *Supra* n. 4 *per* Bright, J. at 128-129.
[62] *Supra* n. 1 *per* Lord Hailsham at 494.
[63] *Supra* n. 4 *per* Bright, J. at 129.

bility was to be viewed "objectively" by the Court, Bright, J., by his utilization of the proximity test, clearly supplanted it with a subjective test. The nature of the question posed to the jury suggests that the case is to be viewed on its particular merits, incorporating all the relevant surrounding circumstances:

> It is a misleading exercise in the present case to discuss intent in relation to the acts performed as distinct from intent in relation to the intended result of those acts . . . It must often happen that the acts done are to be looked at not in isolation but in the context of the intent with which they were done.[64]

Such an approach is diametrically opposed to that of the House of Lords in *Nock's Case,* which sought to analyse the acts of the accused in a vacuum of objectivity, divorced from the wider context of their operation.

3. *The Function of the Jury.*

Bright, J. believed that the question of whether or not the chosen method of conduct undertaken by the accused is dangerous should be a jury question. Indeed, a subjective test, encompassing all the relevant circumstances of the case, would require the jury to come to a decision on what his Honour calls "a broad approach".[65]

4. *The Rejection of the Classification in Donnelly's Case.*

Bright, J. seemed surprised at the reverence with which Lord Hailsham treated the rough-and-ready sixfold classification of attempts of Turner, J. in *Donnelly* and sought to challenge its approval. Such a stringent classificatory system, according to his Honour, could lead to a host of rather strained distinctions of dubious quality.[66]

The oft quoted passage in the decision of Turner, J. is even more remarkable when one considers that it imposes an objective test, whereas the legislation of New Zealand has specifically prescribed a subjective test for attempts.

Legally or Physically Impossible — What Demarcation?

It has been stressed that impossibility of performance in the criminal law arises in two broadly defined categories:

1. *Circumstantial Legal Impossibility.* This results where a legal ingredient of the offence is lacking, and renders the actions of the accused non-criminal.[67]

2. *Physical Impossibility.* This arises where the *actus reus* of the contemplated offence is factually impossible, independent of the actions of the accused.[68]

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[64] *Id. per* Bright, J. at 130.
[65] *Id. per* Bright, J. at 129.
[66] *Ibid.*
[67] See *Walters* v. *Lunt* [1951] 2 All E.R. 645.
[68] It is the last limb of the definition I have used to explain physical impossibility which is most prone to misinterpretation.

Whereas the categories of legal and physical impossibility seem in definition formally distinct, the difference between the two may in practice create grave difficulties. Both *Haughton* v. *Smith* and *D.P.P.* v. *Nock* were concerned with statutory offences and hence, the reliance upon legal impossibility seem not unexpected. However, no claim of legal impossibility on common law principles has yet been really put to the test in the English courts. Many situations may arise in which the chain of events may be equally well explained in terms of either legal or physical impossibility. In *D.P.P.* v. *Nock* for instance, it was physically impossible to extract cocaine from the particular substance in question; this physical impossibility was then translated into a legal impossibility by the House of Lords. The difficulty is related to the perennial debate as to the distinction between matters of fact and matters of law. The inherent problem of the legal/physical dichotomy was recognized in *Collingridge* by Bright, J., who viewed the "empty pocket" case as one involving legal impossibility but admitted that physical impossibility could also be utilized in reaching a correct decision.

The Law Lords' judgments in *D.P.P.* v. *Nock* are all conspicuous for the very absence of any purposeful attempt to arrive at a demarcation point between what is legally or physically impossible (despite their purporting to do so). Consequently, the designation of what is to be deemed physically impossible of accomplishment will inevitably be arbitrary, and hence uncertain. The hypothetical situations envisaged in *Haughton* v. *Smith* are open to a variety of interpretive rationales; for instance, the "stealing your own property" (No. 2), the stealing from an "empty pocket" (No. 3), the "killing the corpse" (No. 4), the "unlawful carnal knowledge" (No. 7) and the "bigamy" (No. 8) examples are all amenable to explanations on the grounds of either legal or physical impossibility.

Many of the results of the examples cited from *Haughton* v. *Smith* may be undermined by casting doubt as to whether or not certain situations considered impossible of performance are in fact physically impossible. No clear demarcation point is in fact drawn between physical impossibility *ab initio* and the physical ineptitude or faulty *modus operandi* of the defendant. The "wax effigy" (incorporated in No. 4), the "shot in the dark" (No. 5) and the "poisoning" (No. 6) examples would seem to reside almost exclusively in the realm of physical ineptitude of the accused: the reasoning of the Court to the contrary in *Haughton* v. *Smith* is open to doubt. The examples cited may be considered as illustrating merely an impossibility of *means* rather than *ends*. In these examples it is proposed that the villain, through his *own* ineptitude, and *not* the constraining forces of his immediate environment, has brought about the demise of his criminal endeavour.

Imagine a situation wherein the villain fires at his prospective victim who is 500 metres away, with a gun whose range is only 400 metres. On the stand taken by their Lordships in *Haughton* v. *Smith,* such a state of affairs could give rise to a defence of physical impossibility. However, it is more logical and reasonable to view the situation as an example of insufficiency of means — the villain's movement one hundred metres forward could alter his chances of success dramatically. Thus, the characterizations of many of the examples above as cases of physical impossibility are in this writer's view clearly wrong. Situations where the villain has the requisite control over his immediate physical environment or has the propensity to change the course of events in the future should *not* give rise to a defence of physical impossibility: any other proposition would offend common sense.

With respect to physical impossibility, the fallacious argument of the House of Lords is probably the result of what Bright, J. considered to be "(the) failure to separate juristic concepts from chances of achievement".[69] The reasoning of Bright, J. seems to be in accordance with the old South Australian Supreme Court decision in *Lindner.*[70] In that case the defendant was charged with supplying pills knowing them to be intended to be used to procure a miscarriage; the jury found that D. supplied the pills and knew of the purpose to which it was intended to put them, but also found that the pills were not noxious. It is significant that in its decision, the Court implied that *the quality of the pills was not determinative of the attempt issue.* The approach taken in *Lindner* appears correct in principle and it is thus respectfully submitted that the "poisoning" example (No. 6), propagated in *Haughton* v. *Smith* (wherein the defendant would escape liability), is possibly incorrect, since it is more akin to the personal ineptitude of the defendant than to any overwhelming physical phenomena. As Glanville Williams would point out,[71] the victim of the attempted pickpocket may have stealable things but not in the particular pocket in question, similarly, there may exist a "killable" victim, but not in the particular spot in which the accused has chosen to fire.

It is this writer's submission that, along the lines argued above, the "wax effigy" example is not commensurate with the "killing the corpse" example (as it was considered to be by Lords Hailsham and Morris in *Haughton* v. *Smith*), for in the former example there exists a "killable" victim, whereas in the latter example, the phenomenon of death has provided both a legal and a physical bar to conviction.

Towards a Solution

In England, Professor Glanville Williams suggests that legislation should be enacted reversing *Haughton* v. *Smith,* "(thus) enabling both

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[69] *Supra* n. 4 *per* Bright, J. at 128.
[70] *R.* v. *Lindner* [1938] S.A.S.R. 412.
[71] *Op. cit. supra* n. 50 at 400.

our hypothetical bandit and *Easom* to be convicted of attempt".[72] Similarly, Smith and Hogan suggest that proposals should be implemented which would confirm the rule that inadequacy of means is not a defence to a charge of attempt, but reverse the actual decisions in *Haughton* v. *Smith* and *Partington* v. *Williams,* as well as much of the *dicta* in the former case.[73] The United Kingdom Law Commission, in its Working Paper No. 50, advocated that all attempts should be rendered punishable where the intended victim or property aimed at does not exist or where a characteristic vital for the completion of the crime does not exist although the defendant believed he or it to possess it.

In Australia, Professor Colin Howard, in an approach consistent with the decision in *Collingridge,* suggests that the proximity test should be the sole criterion for determining liability.[74] The proximity test is not concerned with the reasons for incompleteness, only with the facts. It would follow that factual impossibility is irrelevant where the proximity test is applied to the law of attempt unless of course the impossibility is known to the accused, in which case the mental element in attempt is negated by definition.

Concluding Remarks

It is clear that the English criminal law on impossibility of performance has developed haphazardly. We are in the difficult position of being unable clearly to differentiate between legal and physical impossibility and between physical impossibility and a faulty *modus operandi* adopted by the accused.

It is frequently said in the cases that every situation is to be judged upon its individual merits and that the rigidities of the classificatory system utilized in *Donnelly* are to be avoided. An adoption of the proximity test enunciated by Bright, J. in *Collingridge* would have the advantage of avoiding the arbitrary, and at times strained decisions, which would flow from the employment of a strict classificatory approach. However, whereas the case-by-case approach has the distinct advantage of flexibility and allows the Court greater scope to punish the morally culpable who would otherwise escape prosecution as a result of legalistic technicalities, the fluidity of such an approach inevitably results in a lack of consistency in the law.

In *Collingridge,* Bray, C.J. was well aware of the conceptual difficulties which beset the notion of impossibility in the criminal law, and its haphazard evolution through the cases. The Chief Justice felt that an almost irresistible opening had been left for the Legislature to intervene and alleviate many of the problems which the cases have not come to grips with. However an all-encompassing legislative scenario establishing the parameters of the notion of impossibility would be

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[72] *Id.* at 633.
[73] Smith and Hogan *op. cit. supra* n. 40 at 264.
[74] Colin Howard, *Criminal Law* (3rd ed. 1977) at 319.

fraught with the same interpretative difficulties confronted in the case. In light of this, Bray, C.J. prudently warned that "No doubt Parliament will one day intervene in this sphere and end the perennial debate, possibly at the cost of creating a different one".[75]

Postscript

The concept of impossibility has assumed vital significance in a number of English cases decided between 1978-79 and the writing of this case-note. A brief review of these cases will hopefully elucidate some of the arguments raised previously in the body of this case-note.

In *Bennett's Case,*[76] the Court of Appeal held that the principle laid down in *Haughton* v. *Smith* in relation to attempts was also applicable to conspiracy. Although following *Nock's Case,* the Court held that it was nonetheless clearly distinguishable on its facts from the case in point. Browne, L.J., delivering the judgment of the Court, sought to narrow the scope of what should be considered as being impossible of performance in the criminal law. In a succinct statement of principle, the Lord Justice was at pains to point out:

> . . . there is a fundamental distinction between an agreement which, when made, could never, if carried out, result in the commission of the criminal offence alleged, because that result is legally or physically impossible . . . and an agreement which would, if carried out in accordance with the intention of the parties, result in the commission of the criminal offence alleged, but which cannot be carried out because some person not a party to the agreement is unwilling or unable to do something necessary for its performance — or because of the incompetence of the conspirators or the impregnable defences of the intended victim.[77]

In the case of *Kevin Arthur Harris*[78] the facts were reminiscent of, yet clearly distinguishable from, the facts in *D.P.P.* v. *Nock.* The defendant, Harris, attempted with four others to make the drug amphetamine. They had the correct chemical formula, but when they mixed the chemicals concerned in a pan on a stove, they failed to produce amphetamine; not only because one ingredient was wrong but also because they lacked knowledge of the proper process. Upon appeal, it was held that the conspiracy in question was *not* impossible of fulfilment and that accordingly, Harris had been rightly convicted. In a short judgment, Shaw, L.J. held that a distinction had to be drawn between an agreement to do something which is inherently impossible and could therefore never give rise to a criminal act, and, on the other hand, an agreement to do something which is not inherently impossible, although it might turn out to be impractical so far as its fulfilment was

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[75] *Supra* n. 4 *per* Bray, C.J. at 121.
[76] *William Anthony Bennett* (1979) 68 Crim.A.R. 168.
[77] *Id.* at 178.
[78] *R.* v. *Harris* (1979) 69 Crim.A.R. 122.

concerned by those involved in the agreement.[79] Unlike *Nock,* where it was a scientific impossibility to produce cocaine from the substances at the defendant's disposal, the case in point was one where the appellant and his co-defendants had acquainted themselves with the proper process to produce amphetamine. "In this case", said Shaw, L.J., "given the further information which was necessary and which could not be said to be inevitably out of (the defendants') reach, they could have gone on and carried out the agreement. Therefore, this was an agreement to do an unlawful act, which was inherently possible of consummation".[80]

Both the decisions of *Bennett* and *Harris* seem correct not only on their respective facts, but also in principle. These cases exhibit a conscious attempt to limit the scope of what acts the criminal law deems to be impossible of performance. Both the decisions in *Bennett* and *Harris* seek to explain situations which may *prima facie* appear to be physically impossible of performance as lying in the sphere of the accused's own incompetence, in his own acts or omissions towards a criminal goal.

In *Re Attorney-General's References* (Nos 1 and 2 of 1979),[81] the question was raised as to whether or not "conditional intent" could provide a successful defence to s. 9(1)(a) of the English Theft Act, 1968. Roskill, L.J., delivering the judgment of the Court of Appeal, held that where a person is charged with burglary contrary to s. 9(1)(a) the indictment does not require an intention to steal any specifically identified object. Roskill, L.J. felt, as had Geoffrey Lane, L.J., in almost identical circumstances in the recent decision of *R.* v. *Walkington,*[82] that the indictment drawn under s. 9(1)(a) of the Theft Act, referring to the accused's entry into a building with the intent "to steal therein", was wide enough to preclude the accused's reliance on the doctrine of conditional intent, as laid down in *Easom* and *Hussein*[83]. It is indisputable that his Lordship correctly maintained that conditional intent is of limited, if not of no consequence, with respect to a charge of burglary under s. 9(1)(a) of the English Theft Act.

With regard to the framing of indictments, Roskill, L.J. pointed out that where it is undesirable to frame an indictment of a theft-related offence by reference to the theft or attempted theft of specific objects, it is permissible to adopt "a more imprecise method of criminal pleading if the justice of the case requires it".[84] "The important thing," he said,

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[79] *Id.* at 124.
[80] *Ibid. per* Shaw, L.J.
[81] [1979] 3 All E.R. 143.
[82] [1979] 2 All E.R. 716.
[83] *Supra* n. 82 *per* Roskill, L.J. at 151. It is interesting to note that at p. 145 of the Report, Roskill, L.J. referred disparagingly to the concept of conditional intent as a "pseudo-philosophical or psychological (concept)". Could this be an indication that the Courts will attempt to get around *Easom* and *Hussein* at every available opportunity in the future?
[84] *Supra* n. 82 at 152.

"is that the indictment should correctly reflect that which it is alleged that the accused did, and that the accused should know with adequate detail what he is alleged to have done".[85]

What in fact amounts to the "justice" of the particular case may well turn out to be a highly contentious issue.

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[85] *Id.* at 153.