***Pace and Rogers* and the mens rea of criminal attempt: *Khan* on the scrapheap?**

**J.J. Child[[1]](#footnote-1)\* and Adrian Hunt[[2]](#footnote-2)\***

In *Pace and Rogers*[[3]](#footnote-3) the Court of Appeal provided a welcome return to first principles for the mens rea of criminal attempt. They begin with an analysis of the rationale of attempts as a separate form of liability (and as a separate wrong) from the principal offence attempted: stressing that there is nothing anomalous, and indeed there is often merit, in attempts requiring a narrower mens rea than the principal offence.[[4]](#footnote-4) From here, the court are then able to interpret the mens rea of attempt (section 1(1) of the Criminal Attempts Act 1981 (CAA)) unencumbered by considerations of mens rea as to other offences, Davis LJ stating simply that ‘“intent to commit an offence” connotes an intent to commit all elements of the offence.’[[5]](#footnote-5)

Pace and Rogers worked at a scrap-metal yard. They were approached by undercover police officers and asked if they were interested in buying stolen scrap metal. ‘Suspicious’ as to the criminal origin of the metal, the appellants nevertheless accepted the goods and were charged with attempting to conceal, disguise or convert criminal property.[[6]](#footnote-6) However, since Pace and Rogers acted without intention or knowledge as to every element of the offence, their appeal against conviction for attempted concealment was allowed.

In allowing the appeal the Court of Appeal rejected the decision of the court below which had relied on *Khan*. *Khan* is said to be authority for the proposition within criminal attempt liability that an “intention to commit an offence” does *not* mean an intention to commit *every* element of the principal offence. According to *Khan*, persons who act with a mens rea less than intention as to a circumstance element of the principal offence are potentially guilty of attempt so long as they intended the conduct and consequence elements. Applying *Khan*, the Crown Court had proceeded in *Pace and Rogers* to convict the defendants of attempting to conceal the property, even though they only “suspected” the property to be stolen (circumstance element), as this was sufficient mens rea for the principal offence. In reality, of course, the property was not stolen: this was an impossible attempt.

In this article we examine the options the Supreme Court may have if, as seems likely, it has to decide on an appeal against the Court of Appeal’s decision. They could disagree with the Court of Appeal and generalise the *Khan* approach to cover impossible attempt cases such as *Pace and Rogers*. Alternatively, they might approve of generalising the Court of Appeal’s approach in *Pace and Rogers* to cover possible attempts, thereby overruling *Khan*. Or they may simply decide that *Pace and Rogers* is distinguishable from *Khan*, allowing the co-existence of the two approaches. We argue below that in the absence of legislative reform, *Khan* should be overruled, and the simple, principled approach outlined by Davis J in *Pace and Rogers* should be preferred.

***Pace and Rogers* in historical context**

In debates leading to the creation of the CAA, two major policy considerations dominated discussions about mens rea: whether D could be liable for an impossible attempt; and whether attempt should ever be available where D did not intend or know certain offence elements (particularly offence ‘circumstances’). As discrete issues there appears to be merit in facilitating both. For example, if D tries (but fails) to sexually penetrate a non-consenting V, it is appealing to hold that D has attempted rape where he intends sexual penetration and is reckless as to non-consent (lacks intention as to the circumstance of non-consent).[[7]](#footnote-7) Equally, where D tries to shoot and kill V, it is surely right to convict D for attempted murder, even if (unknown to D) his gun does not contain bullets (his offence is impossible).[[8]](#footnote-8) However, when impossibility and mens rea less than intention are combined, the logic of liability is far less convincing. Williams provides a useful example regarding the old offence of obtaining property by deception.[[9]](#footnote-9) D offers property for sale, and makes a statement that he thinks might be untrue. The sale is completed, and D then discovers that the statement was true. If the statement had been untrue D may have been liable for obtaining money by deception, but surely he should not be liable for attempt on the facts: he did not intend his statement to be false (he was merely reckless as to the circumstance); and it was not false (his offence was impossible).[[10]](#footnote-10)

The potential combination of ‘mens rea less than intention’ and ‘impossibility’ was highlighted in scholarly work preceding the CAA, with the Law Commission and others switching inconsistently on the one hand, between a rejection of any mens rea less than intention on this basis,[[11]](#footnote-11) and, on the other, its acceptance in hope that prosecutions would avoid cases where there was a combination with impossibility.[[12]](#footnote-12) The CAA as enacted[[13]](#footnote-13) opted for the former approach: rejecting any mens rea less than intention in order to avoid its possible combination with impossibility.[[14]](#footnote-14) However, unlike with the drafting of conspiracy,[[15]](#footnote-15) the CAA does not expressly state that attempt liability requires intention or knowledge as to *every element* of a principal offence. Thus, as academic focus drifted away from the possible combination with impossibility, the debate changed to focus on the potential acceptance of mens rea less than intention alone (specifically the possibility of recklessness as to circumstances). This resulted in *Khan*, where the Court of Appeal (without discussing impossibility) accepted that the CAA could be interpreted to allow for recklessness as to circumstances. Perhaps more surprising, it has also resulted in the Law Commission recently recommending that the approach in *Khan* should be codified across the law of attempts and conspiracy (again, without explicit recognition of its potential combination with impossibility).[[16]](#footnote-16)

It is against this background that the Court of Appeal was confronted with *Pace and Rogers* and that is why the facts of the case make it especially noteworthy. The case combines the two categories whose potential combination gave rise to such debate, since the defendants were convicted on the basis of an impossible attempt (the metal not being stolen property in fact) *combined* with (following *Khan*) mere suspicion as to a circumstance element (the criminal origin of the goods).[[17]](#footnote-17) Therefore, in considering an appeal in this case, the Supreme Court will find itself retracing the ground which led to the very particular formulation set out in section 1 of the CAA, whilst at the same time grappling with the consequences of the subsequent development in *Khan*.

**Co-existence?**

The first option for the Supreme Court we consider is to accept the Court of Appeal decision in *Pace and Rogers*, without necessarily overruling *Khan*. This could be achieved, as noted by the Court of Appeal in *Pace and Rogers*,[[18]](#footnote-18) by distinguishing the approaches between possible and impossible attempt cases. Thus the relevant law would be that impossible attempts require intention/knowledge as to every element of the offence attempted (*Pace and Rogers*), but for possible attempts it would suffice for the mens rea as to circumstances to mirror that required for the principal offence (*Khan*). This approach has the obvious appeal that it does not require the Supreme Court to favour one decision over the other, whilst at the same time preventing the intersection of impossible attempts with a *Khan*-like approach to mens rea.

However, we believe that this route should be resisted. This is because, although notionally isolated to impossible attempts, requiring intention or knowledge for the reasons set out in *Pace and Rogers* is equally applicable to possible attempts; in reality, setting out an alternative view from *Khan* about the wrongs of attempt liability. For the Court of Appeal in *Pace and Rogers*, ‘s.1(1) … as a matter of ordinary language *and in accordance with principle*, an “intent to commit an offence” connotes an intent to commit all the elements of the offence.’[[19]](#footnote-19) In contrast, in *Khan* the view was taken that ‘attempt does not require any different intention … from that for the full offence.’[[20]](#footnote-20) If (as it seems) the distinction between *Khan* and *Pace and Rogers* reflects different views on the wrongs of attempt liability in general, their co-existence (however convenient their separation) is incoherent.[[21]](#footnote-21)

Indeed the court in *Pace and Rogers* set out a number of common criticisms of the *Khan* approach (equally applicable to the context of possible attempts). These include the straining of the statutory wording in the CAA to require any mens rea less than intention or knowledge;[[22]](#footnote-22) the fact intention/knowledge as to circumstances was intended by those framing the legislation;[[23]](#footnote-23) that the *Khan* approach relies upon the troublesome distinction of circumstances from other offence elements;[[24]](#footnote-24) as well as the inconsistency that the *Khan* approach creates with the overlapping offence of conspiracy.[[25]](#footnote-25)

Finally, this list should be bolstered by reference to the pre-1981 debate, where the potential for different approaches to possible and impossible attempts (on exactly these lines) was mooted and quickly rejected. The reasons included problems created by the complexity inherent in maintaining parallel mens rea requirements. However, even if this could be tolerated, each case would require a decision to be made about whether the attempt in question was possible or not. It should not be assumed that this distinction will always or generally be clear.[[26]](#footnote-26) Does the bank robber have the right tools to break into the bank? Are the goods obtained stolen property? Was there enough arsenic in the drink for the son to kill his mother? The possible list of examples might well be legion, and will be added to each day in court as opposing counsel seek to urge one or the other, because so much will turn on it.

**Generalising *Khan*?**

Having rejected the compromise position, we must then decide between the competing rationales for criminal attempt. Therefore the next option to consider involves extending *Khan* as a general approach to the mens rea of attempts, and rejecting *Pace and Rogers*. This approach has been favoured in recent Law Commission recommendations (although, in the context of a change of statutory wording),[[27]](#footnote-27) and offers the flexibility required to convict defendants like *Khan* (and, indeed, *Pace and Rogers*) where this is seen as desirable.

However, it is contended that this would be the wrong approach. This is because the *Khan* approach simply does not provide a coherent model for the mens rea of attempt as a *general* offence. As we have discussed elsewhere,[[28]](#footnote-28) if attempt is designed to punish those trying to (i.e. intending to) commit an offence, then there is no basis for allowing anything less than intention as to every element of that offence. In *Khan*, D is not intending to rape, he is intending to sexually penetrate V aware of the *possibility* that V is not consenting. D is reckless as to committing rape.

Alternatively, if it were to be argued that criminal attempt is designed to punish those who knowingly risk committing an offence, then unlike *Khan*, surely the possibility of recklessness must logically be extended to result elements as well. Take the example of attempted criminal damage. D1 intentionally breaks property that belongs to him, but is reckless as to ownership; thus risking committing the principal offence because he foresees the chance it might not be his. D2 risks breaking property that he knows belongs to another but the property is not damaged; thus risking committing the principal offence because he foresees the chance that the property might be damaged. Both examples involve the actus reus of attempted criminal damage. Both defendants are aware of a *risk* of committing the principal offence. Yet the *Khan* approach would treat them differently. It will (bizarrely) find D1 criminally liable, since D1 was reckless as to a circumstance, whereas D2 will be acquitted since he was reckless as to a result.

Therefore even if one was to favour an approach to attempt which included recklessness, the approach set out in *Khan* is not a coherent option.

**Generalising *Pace and Rogers*?**

It is contended that the approach to be preferred is to require D to intend or know every element of a principal offence before attempt liability is founded. Of course it will be objected that this approach would mean that *Khan* would not be convicted of attempted rape.[[29]](#footnote-29) This is not to say that a defendant such as *Khan* would be free from liability for other sexual offences,[[30]](#footnote-30) but there would be no liability for attempted rape.

We would argue that an intention/knowledge based approach is the only one which properly marries the wording of the CAA with the achievement of a coherent model of attempts liability. It avoids inconsistency between possible and impossible attempts; and avoids the complexity and incoherence of the *Khan* approach. The CAA locates the wrong of attempt as acting with the ‘intent’ to commit an offence. This approach isolates that wrong.

It is hoped that this approach will be adopted by the Supreme Court if and when *Pace and Rogers* is appealed. This is not to say that the intention/knowledge approach is necessarily the ideal approach to the mens rea for inchoate offences, but we believe it is the best approach available to the court. Alongside this recommendation, it is contended that the potential for more fundamental statutory reform of attempts liability in the future should not be ruled out. We have argued elsewhere that the mens rea for inchoate offences should be reformed to be based on ‘belief’;[[31]](#footnote-31) the Law Commission have tried to codify a *Khan*-like approach;[[32]](#footnote-32) the Irish Law Reform Commission contend that inchoate mens rea should mirror the mens rea of principal offences;[[33]](#footnote-33) Stannard’s view is that intention should only be required for ‘missing’ actus reus elements;[[34]](#footnote-34) Williams employs a version of conditional intention;[[35]](#footnote-35) and Duff propounds the semi-objectivist approach to attempts as attacks.[[36]](#footnote-36) These and other commentators provide us with a rich and varied body of work from which to draw inspiration in addressing the challenge of framing coherent statutory solutions to imposing attempt liability in cases such as *Khan*, without unduly expanding the reaches of the criminal law.

1. \* Lecturer in Law, University of Sussex. [↑](#footnote-ref-1)
2. \* Lecturer in Law, University of Birmingham. [↑](#footnote-ref-2)
3. [2014] EWCA Crim 186. [↑](#footnote-ref-3)
4. Para 45-47 and 64. [↑](#footnote-ref-4)
5. Para 62. [↑](#footnote-ref-5)
6. Contrary to section 327(1) of the Proceeds of Crime Act 2002. [↑](#footnote-ref-6)
7. If D achieved his aim (sexual penetration) then he would be straightforwardly liable for the full offence, so trying and failing looks like an attempt. *Khan* [1990] 1 WLR 815. [↑](#footnote-ref-7)
8. Criminal Attempts Act 1981, s1(2). [↑](#footnote-ref-8)
9. These offences have been replaced by the Fraud Act 2006, however, the illustration is still a useful one. [↑](#footnote-ref-9)
10. Williams, ‘The Government’s proposals on criminal attempts – III’ (1981) *NLJ* 128, 128-9. [↑](#footnote-ref-10)
11. Law Commission, *Attempt and Impossibility in Relation to Attempt, Conspiracy and* Incitement (No. 102, 1980) [2.99-100]; Law Commission, *Codification of the Criminal Law: A Report to the Law* Commission (Law Com No 143, 1985); Williams, ‘The Government’s proposals on criminal attempts – III’ (1981) *NLJ* 128, 128; Smith, ‘Rape – R v Pigg’ (1982) *Criminal Law Review,* 446. [↑](#footnote-ref-11)
12. Law Commission, *Inchoate Offences: Conspiracy, Attempt and Incitement* (Working Paper 50, 1973) [135-6]; The Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989) [13.44-13.45]; Williams, *Criminal Law: The General Part* (2nd Ed, Stevens and Sons, London 1961) 199. [↑](#footnote-ref-12)
13. The Government’s original Bill had, contrary to the Law Commission’s recommendations, allowed for reckless as to circumstances (cl. 2). [↑](#footnote-ref-13)
14. Discussed in Williams, ‘The problem of reckless attempts’ (1983) *CrimLR* 365, 371. [↑](#footnote-ref-14)
15. Criminal Law Act 1977, s1(2). [↑](#footnote-ref-15)
16. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009). [↑](#footnote-ref-16)
17. The mens rea of ‘suspicion’ being sufficient for the principal offence: PCA 2002, 340(3)(b). [↑](#footnote-ref-17)
18. Para 52. The court also stress that *Khan* was not intended to create a general rule. However, if we are to isolate *Khan* to its facts, it would be better to remove the precedent entirely: unless it can be shown that attempted rape involves a different wrong from other attempt cases. [↑](#footnote-ref-18)
19. Para 62 (emphasis added). See also paras 46-47. [↑](#footnote-ref-19)
20. Page 819. [↑](#footnote-ref-20)
21. For a discussion of the importance of a unified view of the wrongs of inchoate liability, see Child and Hunt, 'Mens rea and the general inchoate offences: another new culpability framework' (2012) *NILQ* 245; Enker, ‘Mens rea and criminal attempt’ (1977) *AmBFoundResJ* 845. [↑](#footnote-ref-21)
22. Para 61-62. [↑](#footnote-ref-22)
23. Para 45. [↑](#footnote-ref-23)
24. Para 45. See also Buxton, ‘Circumstances, consequences and attempted rape’ (1984) *CrimLR* 25. [↑](#footnote-ref-24)
25. Paras 65-75. [↑](#footnote-ref-25)
26. Williams, ‘The Government’s proposals on criminal attempts – III’ (1981) *NLJ* 128, 129. As the author states, ‘It would often be hard to decide whether an attempt that did not succeed was capable of succeeding.’ [↑](#footnote-ref-26)
27. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009). [↑](#footnote-ref-27)
28. Child and Hunt, 'Mens rea and the general inchoate offences: another new culpability framework' (2012) *NILQ* 245. [↑](#footnote-ref-28)
29. See, for example, Ormerod, *Smith and Hogan’s Criminal Law* (13th ed, 2011) 407. [↑](#footnote-ref-29)
30. Sexual assault for example: Sexual Offences Act 2003, s3. [↑](#footnote-ref-30)
31. Child and Hunt, 'Mens rea and the general inchoate offences: another new culpability framework' (2012) *NILQ* 245. [↑](#footnote-ref-31)
32. Law Commission, *Conspiracy and Attempts* (Law Com No. 318, 2009). [↑](#footnote-ref-32)
33. Irish Law Reform Commission, *Report on Inchoate Offences* (No. 99, 2010). [↑](#footnote-ref-33)
34. Stannard, ‘Making up for the missing element – a sideways look at attempts’ (1987) *Legal Studies*, 194. [↑](#footnote-ref-34)
35. Williams, ‘Intents in the alternative’ (1991) *CLJ*, 120. [↑](#footnote-ref-35)
36. Duff, *Criminal Attempts* (1996). [↑](#footnote-ref-36)