

186. Attempted Murder: s 306(1)(a)

186.1 Legislation

[Last reviewed: October 2024]

Criminal Code

[Section 306](#) – Attempt to murder

[Section 4](#) – Attempts to commit offences

186.2 Commentary

[Last reviewed: October 2024]

This commentary should be read with the commentary on attempts generally in **Chapter 71 – Attempts**.

Two species of attempted murder

Section 306(1)(a) involves attempts to unlawfully kill and s 306(1)(b) involves the criminally negligent endangerment of human life with intent to kill.

Sub-section (1)(b), expressly refers to “intent” unlawfully to kill. In contrast, sub-s (1)(a) imports the element of intent unlawfully to kill via:

- the element of intention to commit an offence which is inherent in an “attempt” to do so; and
- that offence being “unlawfully to kill another”.

The below suggested direction relates to the more commonly alleged offence under s 306(1)(a). For s 306(1)(b), the direction should be in the terms of the section. It may require reference to ss 285–290 of the *Code*. With respect to an act or omission “of such a nature as to be unlikely to endanger human life” in sub-s (1)(b), see the commentary in **Chapter 184 – Murder, s 302(1)(b)**.

Section 306(1)(a) involves an attempt to unlawfully kill another

While the title of the offence is “Attempted murder”, s 306(1)(a)’s reference to the offence being attempted is to the offence of unlawfully killing another. That offence is contained in s 300, “Unlawful homicide”, which provides “any person who unlawfully kills another is guilty of a crime”. Section 300 goes on to provide that crime “is called murder or manslaughter according to the circumstances of the case”, though what the completed crime is called is irrelevant to s 306(1)(a). The crime it describes is the attempt to commit the crime in s 300, which is unlawfully killing another.

Section 4 “Attempts to commit offences” applies

Attempted murder’s element of intention to commit the crime derives not from the elements of the crime but from intention being a constituent element of an attempt to commit an offence, as defined by s 4, “Attempts to commit offences” – see **Chapter 71 – Attempts**.

In *R v O’Neill* [1996] 2 Qd R 326 at 431-432, Dowsett J, with whom Pincus JA agreed, explained that s 4’s definition of an attempt to commit an offence applies to the offence of attempted murder in s 306(1)(a) because it relates to the attempted commission of an offence, viz, unlawfully killing another. Dowsett J distinguished *R v Leavitt* [1985] 1 Qd R 343, where the Court of Criminal Appeal held that s 4 does not apply to the crime provided for in s 317 by which a person, who with intent to resist the lawful arrest of any person, unlawfully attempts to strike a person with any kind of projectile. The distinction is that there is no offence in its own right of striking a person with any kind of projectile and the word “attempts” in s 317 is itself a constituent element of the offence as distinct from referring to an attempt to commit an offence in its own right, such as unlawfully killing another.

Elements of s 306(1)(a)

The below suggested direction therefore incorporates the elements of s 4, as identified in *Barbeler v The Queen* [1977] Qd R 80 at 82, namely:

- (1) the defendant intended to unlawfully kill the complainant;
- (2) the defendant put that intention into execution by means adapted to fulfilling it;
and
- (3) the defendant manifested that intention by some overt act.

For reasons explained in **Chapter 71 – Attempts**, the suggested direction and the elements table in Appendix A also add a preliminary element to those three, namely:

- that the acts alleged to have been committed by the defendant in attempting to unlawfully kill the complainant (i.e. the acts relied on for elements (2) and (3)) were in fact committed and the defendant was responsible for committing them.

Intention

See **Chapter 59 – Intention** for further commentary on the element of intention.

Attempts to elaborate upon the word “intention”, a word of plain meaning, have resulted in error: *R v Willmot (No 2)* [1985] 2 Qd R 413 (where the misdirection referred to knowledge of probable consequences); *R v Hughes* (1994) 76 A Crim R 177; [1994] QCA 554 (where the misdirection referred to foresight of consequences and desire to produce a result). Knowledge or foresight of a result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the *Criminal Code*: *Zaburoni v The Queen* (2016) 256 CLR 482; [2016] HCA 12 at [14].

Intention is usually a matter of inference and therefore usually requires a circumstantial evidence direction (see **Chapter 48 – Circumstantial Evidence**). The starting point for the jury is whether they could infer that the defendant had the specific intention to kill at the time the defendant did the relevant act: *Alister v The Queen* (1984) 154 CLR 404 at 421; *Knight v The Queen* (1992) 175 CLR 495. It would then be necessary to consider whether rival lesser inferences, such as an intention only to hurt, scare or resist have been excluded: *Cutter v R* (1997) 143 ALR 498; [1997] HCA 7. Another rival inference may be that the defendant held no particular intention at all about what was to result from the defendant's actions.

Intoxication may be regarded, per s 28(3) (see Ch 84), for the purpose of ascertaining whether such an intention in fact existed: as confirmed in *Cutter v R* (1997) 143 ALR 498 at 501 (Brennan CJ and Dawson J).

Motive is not intention and is not required to prove intention but the presence or absence of motive may be relevant in considering whether the inference of intention should be drawn (see **Chapter 49 – Motive**).

Defences

As is explained in **Chapter 71 – Attempts**, where a defence might operate to make a person "not criminally responsible" for an "act" relied upon in proof of the alleged attempt, for example an unwilling act per s 23(1)(a), then it ought be considered as part of the preliminary question of whether the defendant is responsible for committing the acts relied upon as constituting the defendant's alleged attempt to unlawfully kill the complainant.

In contrast, where a defence might operate to make such an act "lawful", for example a defensive act per s 271, and thus preclude proof of the element of unlawfulness in the offence of unlawfully killing another, then it ought be considered in assessing whether the element of intention to "unlawfully" kill the complainant has been proved. That is because it informs the assessment of whether what the defendant was intending to commit would have constituted an offence.

Provocation is not a defence to a charge of attempted murder. It may be a circumstance that can be taken into account on sentence.

Aggravation

Attempted murder is a prescribed offence under s 161Q [Penalties and Sentences Act 1992](#) and a serious organised crime circumstance of aggravation may be applicable.

186.3 Suggested Direction

[Last reviewed: October 2024]

Our law provides it is a crime to unlawfully kill another. It also provides it is a crime, known as attempted murder, to attempt to unlawfully kill another.

For you to determine whether the defendant attempted to murder the complainant, you need to know what would have constituted the unlawful killing of the complainant and what an attempt is.

What constitutes the offence of unlawfully killing another? Proof of that offence would require proof of three ingredients or elements:

- (1) firstly, that the other person is dead;**
- (2) secondly that the defendant caused that person's death; and**
- (3) thirdly, that the defendant did so unlawfully.**

As to that third element of unlawfulness, all killing is unlawful unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse an unlawful killing, making it lawful. A well-known example is acting in self-defence.

In the present case, if the defendant caused the death of the complainant by [the stabbing/shooting/choking/poisoning etc of the complainant], and did so unlawfully, then the defendant would have unlawfully killed the complainant.

What is an attempt? Our law provides: when a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.

That description gives rise to three elements which must be proved beyond reasonable doubt to prove an attempt to unlawfully kill another. [If using an elements table: they are set out as elements (1), (2) and (3) in the elements table I have given you].

They are:

- (1) the defendant intended to unlawfully kill the complainant;**
- (2) the defendant began to put that intention into execution by means adapted to fulfilling it; and**
- (3) the defendant manifested that intention by some overt act.**

You will appreciate that element (1), intention, relates to the defendant's state of mind. In contrast, elements (2) and (3) require the occurrence of physical acts with particular qualities connected to the defendant's intention. Before they could even potentially have such a connection it is essential, as a preliminary requirement, that those physical acts were in fact committed and that the defendant was responsible for committing them.

The prosecution alleges for element 2 that the act/s of the defendant which began to put the defendant's intention into execution [was/were]: [insert the act or acts alleged by the prosecution re element 2]. Further, the prosecution alleges for element 3 that the overt act of the defendant which manifested the defendant's intention was: [insert the act alleged by the prosecution re element 3 (in some cases it might be the same act as in element 2)].

It is therefore a preliminary element of the charge that the act/s alleged for elements 2 and 3 were committed and that the defendant was responsible for committing them. [If using the elements table: this is the preliminary element mentioned in the elements table].

[Here identify what, if any, issues the jury must resolve as to whether the alleged acts were in fact committed and whether the defendant was responsible for committing them. Where it is open for the jury to conclude the defendant committed an alleged act in a physical sense, but there is an issue as to whether the defendant is responsible for committing the act because of the potential operation of a defence making the defendant "not criminally responsible" for the act, direct the jury as to the potential operation of the defence (Note that defences making an act "lawful" are not dealt with here – they are dealt with below in the context of the element of intention)].

If you are not satisfied that that the acts allegedly committed by the defendant in allegedly attempting to unlawfully kill the complainant were in fact committed and the defendant was responsible for committing them then you would find the defendant not guilty. If you are so satisfied it remains to consider the three constituent elements of an attempt.

Element 1, intention, requires that the defendant intended to unlawfully kill the complainant.

There are two aspects to such an intention. One is that the intention must have been an intention to kill, that is, to actually cause the complainant's death. No lesser or other intention will suffice. The other is that the intention must have been to cause the complainant's death unlawfully.

(If there is no suggestion that a critical alleged act of the defendant may be rendered lawful by the potential operation of a defence): **There is no suggestion in this case that if the defendant had intended to cause the complainant's death it would have been anything other than an intention to do so unlawfully.**

(If, on the other hand, such a defence does arise for consideration): **It is essential that the defendant intended to unlawfully kill the complainant. Even if the defendant did intend to kill the complainant, it would not have been unlawful to do so if the act of [eg shooting, choking/etc] would have been excused as lawful by the operation of a defence. In the present case ...** [here identify and explain the nature of the defence relied upon and the issues of fact to be determined by the jury in determining whether the allegedly intended offence would not have been an offence because of the operation of the defence].

“Intention” carries its ordinary meaning. The defendant would have intended to unlawfully kill the complainant if that is what the defendant meant to do.

Intention may be inferred or deduced from the circumstances in which the defendant acted and from the defendant’s conduct before, at the time of and after the defendant’s actions. Of course, whatever the defendant has said about the defendant’s intention may also be considered for the purposes of deciding whether the defendant held the requisite intention at the time the defendant acted as alleged.

[Here explain, if relevant, how the defendant’s motive or lack of motive or the defendant’s intoxication may be circumstances relevant to inferring what if any intention ought to be inferred – adopting directions in **Chapter 49 – Motive** or **Chapter 84 – Intentional Intoxication** as appropriate. Also, identify any factual issues the jury need to resolve in determining the presence of motive or intoxication].

While you can have regard to earlier or later events in considering whether the alleged intention to unlawfully kill the complainant existed, the time at which the defendant must be proved to have held the intention is the time at which the defendant committed the acts the prosecution alleges were committed in attempting to unlawfully kill the complainant.

In considering whether the defendant held the intention to unlawfully kill the complainant, you will be drawing inferences from evidence of the surrounding circumstances, which you find established by the evidence concerning the defendant’s state of mind. For you to infer the defendant held the intention to unlawfully kill the complainant, it is necessary not only that the evidence rationally sustains that inference but that it is the only rational inference. That is, that the evidence excludes beyond reasonable doubt any rational inference consistent with innocence, such as that the defendant held no particular intention at all or that the defendant held some lesser or different intention than an intention to unlawfully kill the complainant.

[Here identify any potential rival innocent inferences as to intention, such as an intention to cause injury or to hurt or to scare or, perhaps in light of intoxication or the frenzy or emotion of the moment, no particular intention at all. More generally, also

identify any factual issues arising from circumstances before, during or after the event which the jury need to consider or resolve of relevance to the element of intention].

For the element of intention to be proved, you must be satisfied beyond reasonable doubt that, at the time the defendant engaged in the conduct which the prosecution alleges was an attempt to unlawfully kill the complainant, the defendant held the intention to actually cause the complainant's death and to do so unlawfully. That intention will not have been proved unless you are satisfied beyond reasonable doubt that any innocent inferences about the defendant's intention have been excluded and the only inference reasonably open on the evidence you accept is that the defendant actually intended to unlawfully kill the complainant. If you are not so satisfied, you would find the defendant not guilty. If you are so satisfied, it remains to consider the remaining elements.

Element 2 requires that the defendant began to put the intention to unlawfully kill the complainant into execution by means adapted to fulfilling it.

A mere intention to unlawfully kill the complainant is not enough. Nor is it enough that the defendant's actions were merely preparatory to beginning to implement the defendant's intention. This element requires that the defendant committed an act [or acts] which actually began to put the intention to unlawfully kill the complainant into effect in a way that was suitable to bring about what was intended.

While it is necessary to prove the defendant actually took a step towards committing the offence, not just preparing to commit it, it is unnecessary to prove that the defendant did everything which the defendant could have done to commit the offence.

[Here identify the act or acts relied upon by the prosecution as constituting the means by which the defendant allegedly began to implement the intention. More generally, also identify any factual issues the jury need to consider or resolve in respect of this element].

(Where appropriate, the following paragraph might also be added): **The argument for the defendant is that what was done/alleged to have been done was, at the most, merely preparation ahead of any attempt to kill, so that when the defendant was doing those things, he/she was not then in the process of trying to unlawfully kill the complainant. Our law recognises that merely doing something to prepare for the commission of an offence, is not of itself an attempt to commit the offence. It is for you to assess whether you are satisfied, beyond reasonable doubt, that the defendant's acts went beyond mere preparation.**

For element 2 to be proved you must be satisfied beyond reasonable doubt that the defendant began to put the intention to unlawfully kill the complainant into execution by means adapted to fulfilling it. If you are not so satisfied, you would

find the defendant not guilty. If you are so satisfied, it remains to consider the remaining element.

Element 3 requires that the defendant manifested the intention to unlawfully kill the complainant by some overt act. The prosecution has to prove at least one overt act beyond reasonable doubt and you must be in unanimous agreement as to which overt act has been so proved.

The overt act alleged by the prosecution is [insert the overt act alleged].

An overt act is an act of the defendant which, if anyone had seen it, would have made the defendant's purpose clear. It must have been an act of such a nature as to manifest the alleged intention; that is, to make it apparent to a hypothetical observer that the defendant had the intention to unlawfully kill the complainant.

[Here identify any factual issues the jury need to consider or resolve in respect of this element].

For element 3 to be proved you must be satisfied beyond reasonable doubt that the defendant manifested the intention to unlawfully kill the complainant by some overt act. If you are not so satisfied, you would find the defendant not guilty. If you are so satisfied and, provided you are likewise satisfied in respect of all the other elements, you would find the defendant guilty

186.4 Appendix A – Elements Table

[Last reviewed: October 2024]

R v

Elements of attempted murder

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| | To prove the charge of attempted murder the prosecution must prove the preliminary element and all of elements (1), (2) and (3) beyond reasonable doubt: |
| Preliminary element | The acts alleged to have been committed by the Defendant in attempting to unlawfully kill the complainant (i.e. the acts relied on for elements (2) and (3)) were in fact committed and the Defendant was responsible for committing them. |
| Element (1) | The Defendant intended to unlawfully kill the complainant. |
| Element (2) | The Defendant began to put that intention into execution by means adapted to fulfilling it. |
| Element (3) | The Defendant manifested that intention by some overt act. |