Attempted Murder: section 306(1)(a)

Legislation

306 Attempt to murder

(1) Any person who—

(a) attempts unlawfully to kill another; or

(b) with intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a nature as to be likely to endanger human life;

is guilty of a crime, and is liable to imprisonment for life.

Commentary

For section 306(1)(b), the direction should be in the terms of the section. It may require reference to sections 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 subsection (1)(b), see the commentary at chapter 184.5.

There is conflict in the authorities about whether s 4 of the Code applies (Attempt to commit offences). In *R v Leavitt* [1985] 1 Qd R 343, the Court of Criminal Appeal held that section 4 does *not* apply to offences in the *Code* in which an attempt is an element of the offence.

In *R v O'Neill* [1996] 2 Qd R 326 at 431-432, Dowsett J observed that the section 4 definition did apply to the offence of attempted murder in section 306.

Although his Honour's remarks were obiter, the editors of Carter's *Criminal Law of Queensland* cite *O'Neill* as authority for the proposition that the section 4 definition applies to section 306.

However, the question appears to remain unsettled, possibly because reference to the section 4 definition as opposed to the term in ordinary usage is unlikely to produce a different outcome.

In *Leavitt* the phrase used by Andrews CJ (345) in eschewing the section 4 definition was "meaning by action to achieve a particular result" (Williams J to similar effect at 347).

In *R v Saebar* [2008] QCA 407, Muir JA, at 71, endorsed Williams J's observation in *Leavitt* that one cannot "attempt" to do something unless one contemplates a particular result and intends to bring it about.

The model direction proposed incorporates section 4.

See *Barbeler v The Queen* [1977] Qd R 80 as to the components of an attempt charge, namely:

(1) A person *intending* to commit an offence.

(2) Which person begins to put his *intention* into execution by means adapted to its fulfilment;

(3) Which person manifests his *intention* by some overt act;

(4) But, which person does not fulfil his *intention* to such an extent as to commit the offence.

See Direction 59.1 on "Intention". An elaboration as to the meaning of the word "intention" should be avoided: see *R v Willmot (No 2)* [1985] 2 Qd R 413; *Cutter v The Queen* (1997) 143 ALR 498. See also the discussion in *R v Glebow* [2002] QCA 442.

The starting point for the jury is whether they could infer that the defendant did have a specific intention at the time they did the relevant act – see *Alister v The Queen* (1984) 154 CLR 404; *Knight v The Queen* (1992) 175 CLR 495; *Cutter v The Queen* (1997) 143 ALR 498.

An inference may be left open that there was not an intention to kill, but an intention to scare/wound/injure etc. – see *Cutter v R* (1997) 143 ALR 498 where a victim was stabbed with "anger and aggression".

Where there is a live issue as to whether the defendant's intention was to cause grievous bodily harm rather than to kill, the trial judge should explain to the jury what grievous bodily harm is, rather than risk leaving it with the impression that it is no more than an intention to hurt: *R v Rogers* [2013] QCA 52.

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

A defendant might be found guilty of attempting to commit an offence even if it was impossible to complete it – see section 4(3) *Code*.

By application of section 28(3) of the *Code*, intoxication may be relevant if intention to cause a specific result is an element of the offence charged.

Although the word "intent" does not appear in section 306(1)(a) of the *Code*, a jury is nonetheless required to consider whether the defendant had an intention to cause a specific result (death) – see *Cutter v R* (1997) 143 ALR 498 at 501 (Brennan CJ and Dawson J):

> The finding as to the consumption of alcoholic liquor is relevant to the existence of the specific intent that must be found before the offence of attempting unlawfully to kill is established.

Intoxication may therefore be regarded for the purpose of ascertaining whether such an intention in fact existed.

The offence is a prescribed offence under section 161Q *Penalties and Sentences Act* 1992 and a serious organised crime circumstance of aggravation may be applicable.

It would not be appropriate to give an attempted murder direction in a case that also involved a charge of murder.

Suggested Direction

Our law provides that "any person who attempts to unlawfully kill another … is guilty of a crime, and is liable to imprisonment for life".

The offence involves two legal concepts – the law of attempt and the law of murder.

In law, an "attempt" is defined in the following way:

> **"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."**

For the purposes of <u>this</u> offence (here, to avoid confusion, reference to an intention to cause grievous bodily harm has been omitted. This definition is adapted from section 302 *Code*), the law of murder is as follows:

> **"If a person unlawfully kills another and intends to cause the death of the person killed, they are guilty of murder. It is unlawful to kill any person unless such killing is authorised or justified or excused by law."**

[It is open to read these provisions to the jury, although it may also be open to question the value of instructing them in terms such as "means adapted to its fulfilment".

Another way of explaining these concepts, when applied to the circumstances of a particular case, might be to direct the jury as follows.]

Before you could convict the defendant, you would need to be satisfied beyond reasonable doubt of four things.

First, you would have to be satisfied that, at the time when they (insert description of the relevant act, e.g., stabbed X, fired a shot at X, had their hands around X's neck)**, the defendant had an intention to kill X.**

And the second thing is that the (again, the relevant act – to be identified by the Crown, but usually the stabbing/shooting choking etc.) **was in fact a manifestation of that intention** (i.e., of the defendant's intention to kill)**.**

Third, you would need to be satisfied that when the defendant began to give effect to their intention to kill, they did so in a way that was suitable to bring about what they intended to achieve. That is, you would have to be satisfied that (by stabbing/shooting choking etc.) **they were doing something that was capable of killing someone.**

Fourth, if you were satisfied of those three things, you would need to be satisfied that the attempt to kill was unlawful.

Each of those first three steps will involve consideration of the defendant's intention.

Intention is a state of mind.

You may draw a conclusion about the defendant's intention from what they said or what they did. The starting point would be considering whether you could infer that the defendant did have a specific intention at the time they (insert description of relevant act, e.g., stabbed/fired/choked)**.**

In this case, the Crown urges that an inference about the defendant's intention to kill can be drawn from the following circumstances: (insert).

It is on the basis of those circumstances that the Crown says that the only inference reasonably available is that the defendant intended to kill X.

You will recall what I told you about the drawing of inferences. I remind you that if more than one inference is reasonably open, then you must give the defendant the benefit of the inference in their favour.

In this context, that means that if you could infer that the defendant's intention may not have been an intention to kill, but may have been an intention only to (e.g., scare/wound/injure)**, and if that inference is reasonably open, then you would have to give the defendant the benefit of acting on that inference.**

In sum, before you could convict of attempted murder, you would have to conclude that the defendant intended to kill X. Unless that is the only inference reasonably open on the evidence that you accept, you must find the defendant not guilty of this charge. You would also have to conclude that they began to implement their intention by (insert) **and that the act of** (insert) **was something that was suited to the purpose of killing X. Those conclusions would have to be reached beyond a reasonable doubt.**

Finally, if you were satisfied of those things, you would also need to be satisfied beyond reasonable doubt that the attempt to kill was unlawful.

[Either direction below]

(As I have said) **It is unlawful to kill any person unless it is authorised, justified or excused by law. In this case, it is agreed that if in the circumstances of this case the defendant had in fact killed X, it would have been unlawful. That is, no authorisation, justification or excuse is suggested to be relevant.**

OR

In this case, it is said that what the defendant was attempting to do by (insert act) **was not unlawful by reason of** (insert authorisation, justification or excuse – e.g., self-defence)**.**