

Why conditional intent should count as intent

1. The current law

1.1 Conspiracy

Two sources of the same problem. May cause problems for either:

1.1.1 **AR** “necessity requirement”: s.1(a) Criminal Law Act 1977: ‘if a person agrees with any other person or persons that a course of conduct shall be pursued which... *will necessarily* amount to or involve the commission of any offence(s) by one or more parties to the agreement’.

1.1.2 **MR**: s.1(2) CLA 1977: D must ‘intend or know’ of the relevant unlawful circumstance.

As a result, conditionality is patchy & potentially dependent on the offence element at issue:

Element of offence	Legal issue raised	Authority	Conspiracy?
Result element	Necessity requirement s 1(A) CLA 1977 (Actus Reus)	<i>O’Hadhmaill</i>	Conspiracy
Behavioural/conduct element	Necessity requirement s 1(A) CLA 1977 (Actus Reus)	<i>Reed</i> (though NB obiter example of driving from London to Edinburgh)	Conspiracy (but NB obiter example would not be).
Circumstance element	Intent or knowledge requirement under s 1(2) CLA 1977 (mens rea) (though necessity could still be raised)	<i>Saik</i>	Not a conspiracy

1.2 Attempts

1. *AG’s References (Nos 1 and 2 of 1979)* – conditional intent to steal from a bag probably sufficient.
2. However, now *Pace and Rogers* – only looked at suspicion as opposed to knowledge. No inquiry into what Ds would have done if they had discovered the scrap metal to be stolen.

1.3 SCA 2007

1. s. 49(7): for the purposes of the s. 45 requirement that D believe that an offence will be committed, or the s. 46 requirement that D believe that one or more offences will be committed, ‘it is sufficient for [D] to believe that the offence (or one or more of the offences) will be committed if certain conditions are met’.
2. What about s 44? Presumably not intended to be excluded, so conditional intent just assumed to be sufficient there?

1.4 Accessory Liability

1. *Jogee* para [92]-[94] – specific recognition of conditional intent as being sufficient to satisfy the requirement of intent.
2. So sufficient for accessory liability, the SCA (probably), and some conspiracies, but not other conspiracies or attempt. This is inconsistent and no reason or justification for the distinction is suggested.

2. Reform

2.1 Actus Reus (Conspiracy only): s 1(1)(a) should be redrafted to make clear that it is sufficient if the offence will necessarily be committed on certain conditions.

2.2 Mens Rea: conditional intent should count as intent.

2.2.1 *All* intents are conditional to some extent. Therefore where the law requires intent it cannot really be requiring unconditional intent, otherwise 'nobody would ever be convicted' (CA in *Mills*)

2.2.2 The only conditional intent which should not fulfil a mens rea requirement of intent is the following: (this example drawn from the US Model Penal Code)

'when a particular purpose is an element of an offence, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence'.

i.e. 'only if legal' intent.

2.2.2 Conditional intent *can* be distinguished from recklessness in theory.

2.2.2.1 D Ormerod: 'If D1 and D2 had said simply 'we will transfer monies' realizing that the money might be criminal, that would be a state of recklessness; they would not have declared what they would do if the prohibited circumstance materialized. If the circumstance did materialize, it would be necessary to return to them to confirm their plans. Where D1 and D2 have declared an 'even if [illegal]' intention, there would be no point in returning to them to clarify their state of mind, if the circumstance materialized: they have already declared it.'

2.2.2.2. Across all the offences, even in the context of accessory liability this distinction can be drawn because recklessness involves foreseeing the risk but relying (stupidly) on it not eventuating, whereas conditional intent is 'even if illegal' intent.

2.2.3 Can conditional intent be distinguished from recklessness in practice? Yes:

2.2.3.1 D2 sells D1 a baseball bat and either (a) it never occurs to D2 that D1 will use it outside the baseball field or (b) D2 specifies to D1 that it is only for use in playing baseball. D2 has 'only if legal intent' and is not guilty.

2.2.3.2 D2 sells D1 a baseball bat, foreseeing the possibility that D1 will use it to injure someone, but decides that he will probably not and that the risk is worth taking because it is not going (in D2's assessment) to eventuate. → D2 is reckless, but this is insufficient for liability.

2.2.3.3 D2 sells D1 a baseball bat, foreseeing that it might be used for baseball, or it might be used to injure someone. D2 is happy to go ahead with the sale nonetheless → D2 has 'even if illegal' conditional intent and is guilty.

See, e.g. discussion of a plaque in *Pace and Rogers* as ‘a bit naughty’ and ‘genuinely stolen’. Would *Khan* really have stopped if he had known V was not consenting? Baroness Hale thought Saik’s initial guilty plea could be explained on the basis that he had had ‘even if illegal’ intent.

2.2.4 Do we need to bother? Wouldn’t recklessness do? (See LAW COM 318 *Conspiracy and Attempts* 9 December 2009). No:

2.2.4.1 It cannot properly distinguish between ‘even if illegal’ and ‘only if legal’ agreements

2.2.4.2 Behavioural elements of an offence would still presumably need intent so (a) we’d be left with the conditionality problem there and (b) we’d be distinguishing between different kinds of AR element again.

Would we really regard recklessness as sufficient for impossible attempts? (Imagine mirror-image *Khan* where V is consenting and D has achieved penetration). But the whole aim of the 1981 and 1977 Acts is to treat impossible and possible inchoates equally....

Jogee has held that it is insufficient, so we will get differences between offences again without any apparent justification

Conclusion

We should therefore use conditional intent across the board. Few intents are really unconditional, so when we say ‘intent’ we do include conditional intent. The concept of conditional intent is already in use successfully in some parts of the law, it is not over-inclusive, and it does not involve distinguishing between different AR elements or different kind of offence, or between impossible and possible offences.