77. Unwilled Acts (Automatism): s 23(1)(a)

77.1 Legislation

[Last reviewed: March 2025]

Criminal Code

Section 23 – Intention–motive

77.2 Commentary

[Last reviewed: March 2025]

Section 23(1)(a) states that a Defendant is not criminally responsible for an act or omission that occurs independently of the exercise of the defendant's will. In other words, the act or omission must be 'voluntary' (*R v Falconer* (1990) 171 CLR 30, [38], [72]; *Kaporonovksi v The Queen* (1973) 133 CLR 209, [226-227]). The subsection is subject to the 'the express provisions of this Code relating to negligent acts and omissions.'

In *Ugle v The Queen* (2002) 211 CLR 171; [2002] HCA 25, [26], Gummow and Hayne JJ said:

> The distinction which is made in s 23 between "acts" and "events" is not without difficulty. In the joint reasons of three justices in *R v Falconer* it was said of s 23 of the *Criminal Code* that:
>
> > "the first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act: it excludes from criminal responsibility consequences of the act which are not only unintended but unlikely and unforeseen".
>
> At least a majority of the members of the Court held in *Falconer* that the "act" of which s 23 speaks is, in a context like the present, the "death causing act … not the death itself". It is not necessary to consider whether that formulation of the meaning to be given to "act" in s 23 leaves some unanswered questions. For present purposes it is enough to notice that a distinction is to be drawn between the "act", with which the first or unwilled act limb of s 23 deals, and the "event" with which the second or accident limb deals.

In *R v Taiters, Ex parte A-G* [1997] 1 Qd R 333, [335], the Court of Appeal said that:

> '[i]t should not be taken that in the construction of s 23 the reference to "act" is to "some physical action apart from its consequences" and the reference to "event" in the context of occurring by accident [the old wording of s 23(1)(b)] is a reference to the "consequences of the act". Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear. Taking an example from Kaporonovksi

itself, the thrusting of the glass by the accused was the act and the injury to the victim's eye which constituted the grievous bodily harm was the event …'

Thus, for the purpose of s 23(1)(a), the word 'act' means some physical action apart from its consequences; that is, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility (*R v Falconer* (1990) 171 CLR 30). Any direction must be framed carefully to identify precisely the 'act' in question. In *R v Beauchamp* [2022] QCA 77, for example, the trial judge did not adequately distinguish for the jury the act of simply holding a knife, as separate from the act of inserting the knife into the complainant. In that case, McMurdo JA held that the misdirection in s 23(1)(a) gave rise to a miscarriage of justice.

For example, in murder, death is not the 'act', but the intended consequence (*R v Falconer* (1990) 171 CLR 30, [38]). In grievous bodily harm, the act is the pushing of the glass into the victim's face and not the injury that ensues (*Kaporonovksi v The Queen* (1973) 133 CLR 209, [228-232]).

The concept of an 'act' within s 23(1)(a) embraces human movement in association with some mechanism or implement. So just as a person can be criminally responsible for the consequences of the discharge of a gun, but only if the discharge of the gun was a deliberate choice by that person, so too can a person only be criminally responsible for the consequences of driving their vehicle forward where they made a choice to drive the vehicle forward by hitting the accelerator. Thus, the discharge of a gun will not be a willed 'act' if the person firing it believed that they were engaging the safety catch. Likewise, the hitting of the accelerator will not be a willed act if the Defendant meant to hit the brake (see *R v Ellis* [2007] QCA 219, [39]).

The onus of proof of voluntariness of the acts rest on the prosecution (*Falconer* at [41]; *Griffiths v The Queen* (1994) 125 ALR 545, [5]; see also *Breene v Boyd ex parte Boyd* [1970] Qd R 292, [297]).

As to the circumstances in which a direction is called for under s 23(1)(a), see *Griffiths v The Queen* (1994) 125 ALR 545, [8]-[15]; cf *R v Falconer* (1990) 171 CLR 30, [30], [40], [62], and [68].

The following suggested direction comes from *Murray v The Queen* (2002) 211 CLR 193; [2002] HCA 26, [17]. Under s 23(1)(a), a person is excused from criminal responsibility for an act that, so far as the person is concerned, is involuntary (*R v Falconer* (1990) 171 CLR 30, [38], [72]). Hence a person is not criminally responsible for an act done while asleep, or in a state of automatism due to concussion, or in the state of disassociation. But a person may be criminally responsible under s 7 for an act done by another and cases of insanity and intoxication are governed by ss 27 and 28 and not by section 23(1)(a) (*Kaporonovksi v The Queen* (1973) 133 CLR 209, [227]; *Falconer*).

77.3 Suggested Direction

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(Read the section to the jury (that is, s 23(1)(a)**).**

This section excuses a person from criminal responsibility for an act that the prosecution does not prove, beyond reasonable doubt, was a willed act.

The relevant 'act' we are concerned about is the physical act of the Defendant [specify the act in question - for example the discharge of a loaded gun**]. This act is quite separate from its consequences [**refer to the consequences – for example injury or death**].**

Proving that an act was willed does not require proof of any intention or wish to cause a particular *result* by doing the act. To prove that the act was willed, the prosecution must prove, beyond reasonable doubt, that the Defendant consciously chose to do the physical act; that is, the Defendant consciously chose to [refer to the act in question**].**

Obvious examples of acts that are not willed would include a reflex action following a painful stimulus, or a convulsive movement, or an act done when sleep-walking.

The prosecution must exclude, beyond reasonable doubt, the possibility that the [refer to the act in question**] occurred independently of the will of the Defendant. This is a matter for you to decide. It may help to ask if the prosecution has proved that the Defendant made a conscious choice to [**do the act**].**

(This is an example of how the question might be framed for the jury, in a case of discharge of a gun**): You should ask yourselves if the prosecution has excluded beyond reasonable doubt, the possibility of the discharge of the gun by an unwilled reflex or automatic motor action of the Defendant. Putting it the other way, the question is whether the prosecution has proved, beyond reasonable doubt, that the act of discharging the firearm was an act willed by the Defendant?**