

Unwilled Acts (Automatism): section 23(1)(a)

Legislation

23 Intention—motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, **a person is not criminally responsible for—**
 - (a) **an act or omission that occurs independently of the exercise of the person’s will; or**
 - (b) an event that—
 - (i) the person does not intend or foresee as a possible consequence; and
 - (ii) an ordinary person would not reasonably foresee as a possible consequence.

Note—

Parliament, in amending subsection (1)(b) by the *Criminal Code and Other Legislation Amendment Act 2011*, did not intend to change the circumstances in which a person is criminally responsible.

- (1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.
- (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Commentary

Section 23(1)(a) (formerly the first "limb" of s 23) incorporates, as a primary element of every offence charged, an "act" (or omission) of the defendant (*Kaporonovski v The Queen* (1973) 133 CLR 209 at 226-227), that is a result of the exercise of his or her will; or, in other words, a "voluntary" act (or omission): *R v Falconer* (1990) 171 CLR 30 at 38, 72.

In *Ugle v The Queen* (2002) 211 CLR 171 at [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](#) at 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 the 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 *Kapronovksi* 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 section 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: *Falconer*.

In murder, death is not the “act”, but the intended consequence (*Falconer* at 38); in grievous bodily harm, the act is the pushing of the glass into the victim’s face and not the injury that ensues (*Kapronovksi* at 228-232).

The concept of an “act” within section 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, only if the discharge of the gun was a deliberate choice by that person, so a person can be criminally responsible for the consequences of driving his vehicle forward only if he 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 he or she was 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](#) at [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](#); 69 ALJR 77 at 78 n 1. 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* at 77 at 80; and c.f. *Falconer* at 30, 40, 62, 68; *Guise* [\(1998\) 101 A Crim R 143](#); [\[1998\] QCA 158](#).

In the case of a sexual assault, where the evidence raises the excuse (such as where it is suggested that the touching of genitals was accidental), see *R v Khaled* [2014] QCA 349 and *R v Sologinkin* [2020] QCA 271.

The following suggested direction comes from *Murray v The Queen* (2002) 211 CLR 193 at [17]. Under section 23(1)(a) a person is excused from criminal responsibility for an act that, so far as he or she is concerned, is involuntary *Falconer* 38, 72. Hence a person is not criminally responsible for an act done by an employee without authority and contrary to instructions, nor for an act done, for example, while asleep; or in a state of automatism due to concussion; (*Kaporonovski* at 227) or in the state of disassociation (*Falconer*). But he may be criminally responsible under section 7 for an act done by another (*Kaporonovski* at 227) and cases of insanity and intoxication are governed by sections 27 and 28 and not by section 23(1)(a) (*Kaporonovski* at 227).

Suggested Direction

Read the section to the jury (that is section 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 (injury or death causing) physical act (for example the discharge of a loaded gun) quite separate from its consequences.

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 injury or death causing act) of the kind done.

Obvious examples of acts that are not willed would include a reflex action following a painful stimulus; or a spastic movement,¹ or an act done when sleep-walking, or when concussed and in a state of post traumatic automatism.² [A defence of post traumatic automatism must be closely scrutinized: blackout can be one of the first refuges of a guilty conscience and is a popular excuse.]

¹ *Falconer* at 43.

² As in *Cooper v McKenna; ex parte Cooper* [1960] Qd R 406.

The prosecution must exclude, beyond reasonable doubt, the possibility that the (injury or death causing) act 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). [For example:] You should ask yourselves if the prosecution has excluded beyond reasonable doubt the possibility of discharge of the gun without pressure being applied to the trigger, or the possibility of that discharge 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) (of inserting the knife in the deceased's body) was an act willed by the defendant?