Unwilled Acts (Automatism) s 23(1)(a)[1]

Read the section to the jury.

This section excuses a person from criminal responsibility for an act that the prosecution does not prove beyond reasonable doubt was a willed act.[2] The law holds that the relevant willed act is the (injury or death causing) act (for example the discharge of a loaded gun)[3] considered as a physical act, and quite separate from the consequences of the act.[4]

The need to prove an act was willed does not need proof of any intention or wish to cause a particular result by doing the act. What is needed to prove that an act was willed is proof of a choice, consciously made, to do a (physical) (injury or death causing) act[5] of the kind done.[6]

Obvious examples of acts that are not willed would include a reflex action following a painful stimulus; or a spastic movement,[7] or an act done when sleep-walking, or when concussed and in a state of post traumatic automatism.[8] [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 Section 23(1)(a) (formerly the first "limb" of s 23) incorporates as a primary element of every offence charged that there be an "act" (or omission) of the defendant (*Kaporonovksi v The Queen* (1973) 133 CLR 209 at 226-227), and that it be an act which results from the exercise of his will; or, in other words, that it be a "voluntary" act (or omission): *R v Falconer* (1990) 171 CLR 30 at 38, 72. For the purpose of s 23(1)(a), the word "act" means some physical action apart from its consequences (*R v Taiters, Ex parte A-G* [1997] 1 Qd R 333 at 335), more fully defined as 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*. The "act" must be distinguished from the "event" or result caused by it: *R v Taiters* [1997] 1 Qd R 333 at 335; 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: *Kaporonovksi* at 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, 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].

2 *R v Falconer* (1990) 171 CLR 30 at 63

3 *Falconer* at 40 at 81.

4 *R v Taiters ex parte Attorney-General* [1997] 1 Qd R 333.

5 *Ugle v The Queen* (2002) 211 CLR 171 at [26].

6 *Falconer* at 39 at 40.

7 *Falconer* at 43.

8 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). You should ask yourselves if the prosecution[9] 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.[10] Putting it the other way, have the prosecution 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?

---

[9] 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 78n I. 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.

[10] This direction comes from *Murray v The Queen* (2002) 211 CLR 193 at [17]. Under s 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 s 7 for an act done by another (*Kaporonovski* at 227) and cases of insanity and intoxication are governed by ss 27 and 28 and not by s 23(1)(a) (*Kaporonovski* at 227).