

The jury must specify whether they have found the accused 'not guilty because of mental impairment' (NGMI) (the 'special verdict') (s.22(2)(b)) If they are found NGMI, the court must either declare that they are liable to supervision under Part 5 or release them unconditionally (s23)

- A supervision order may commit the person to custody, or release them on conditions (s26)
- The court will set a 'nominal term' during which a supervision order cannot be revoked.
- Supervision orders will not be revoked unless the court is satisfied it is safe to do so – can lead to lengthy periods in custody.

Automatism

For [D] to be found guilty of [insert offence], he/she must have committed an act voluntarily if it is subject to the control and direction of the accused's will (Falconer) The accused will not be convicted for an act that was not of their own will. (Falconer)

Automatism is a complete defence (Falconer). [Defendant] bears the evidential burden for raising automatism. If the prosecution is unable to dispel this evidence beyond reasonable doubt, the physical element of [insert offence] will not be voluntary and [defendant] must not be convicted (Falconer).

QUICK ANALYSIS (if running out of time):

[X] could argue that he/she was in a state of automatism when he/she [FACTS] and was unable to control himself/herself. Automatism is a full defence that negates the actus reus element of voluntariness (Falconer). [D] bears the evidential burden of raising automatism. It is then for P to dispel this evidence beyond a reasonable doubt (Falconer).

Step 1: Presumption of Voluntariness

It is presumed that all actions are voluntary. To meet the evidential burden, [defendant] must be able to point to some evidence suggesting he/she acted involuntarily. This will/will not be satisfied, as [insert facts].

The term is not a medical term but it is a legal concept that refers to acts that are committed without volition. The term 'automatism' implies the total absence of control and direction by the accused's will. Impaired, reduced or partial control is not sufficient

Conditions giving rise to Automatism

- Concussion from a blow to the head
- Sleep disorders
- The consumption of alcohol or other drugs
- Neurological disorders
- Hyperglycemia
- Epilepsy
- Disassociation arising from extraordinary external stress

Automatism: *R v Falconer* (1990) 171 CLR 30

The law distinguishes two types of automatism:

1. **Insane automatism:** Involuntary actions caused by a 'disease of the mind'
2. **Sane automatism:** Involuntary actions caused by something other than a 'disease of the mind'.

Step 2: Sound/Unsound Test

OVERVIEW

1. Is this person having a disease of the mind?
2. Sound mind?

R v Buck

- The facts were not capable of sustaining a finding that the D was in possession of the drugs.

R v Van Swool

- After placing the bag in the tea chest, D continued to be possession of the opium within the meaning of s 233B(1)(ca) of the *Customs Act 1901* (Cth).
- They lived as a couple

MINIMUM QUANTITY

In **Bocking v Roberts**, there was not a clear answer on minimum quantity however, it was found 20 micrograms of cannabis found in a hookah pipe constitutes possession despite the fact it was microscopic trace quantities detectable only by chemical test. The court determined there is no answer to say that the quantity of the drug in possession was so small that the law should not take it into account. However this has to be balanced by whether the traces were so slight that they really indicated no more than that at some previous time he had been in possession of the drug.

However, **Williams v R** provided a more concrete position on this notion, and thus, should be used as the binding precedent on this issue. In the case, the D had possession of minute quantity of Indian hemp in pockets of his coat. The court held possession of trace quantities only detectable by scientific means is not enough to make it 'reasonable as a matter of common sense to say that the person is currently in possession'. Therefore, the precedent set was that quantities detectable only by scientific means do not suffice.

The doctrine of *de minimis* does NOT apply. (**Bocking v Roberts**)

- However, prosecution have to prove that there was some of the drug in the possession of the defendant to justify the charge, and the distinction which has to be drawn in cases of this kind whether the quantity of the drug was enough to justify the conclusion that the defendant was possessed of a quantity of the drug or whether, on the other hand, the traces were so slight that they really indicated no more than that at some previous time he had been in possession of the drug. (**Bocking v Roberts**)
- **Does not matter if the quantity is so small that is cannot be seen/used etc.**

Rebutting Deemed Possession via Common Law

Defendant] will be found guilty of possession/attempted possession unless he/she can satisfy the court to the contrary (**s5 DPCSA**).

[Defendant] bears the burden of proving on the balance of probabilities (**Momcilovic**) that the drug was not in his/her custody or control or that he/she did not intend to possess the drug (**R v Tran**).

[Defendant] will argue that this is satisfied, as [insert facts].

On balance, [defendant] will/will not be able to satisfy the court on the balance of probabilities.

Attempted Possession

Section 73 of the Drugs Act makes it an offence to possess or 'attempt to possess' a DOD. A person charged with attempted use under s 73 will be subject to the same penalties as a person charged with possession of a DOD A person can also be charged with attempted use under s 321M of the Crimes Act 1958 and will be subject to the lesser penalties set out in **s 321P**.

Although [ITEM] turned out not to be a DOD, [X] will be liable for attempted possession under **s73 DPCSA**. If it is shown BRD that he/she intended to possess a DOD and that his/her conduct was more than merely preparatory and was immediately and not remotely connected with the commission of this offence, [X] will be liable for the same penalties as possession (**s 321N; s 321R**).

SEE ATTEMPTS

Second Element cont.: Possession for sale a DOD

For D to be found guilty of trafficking by having in possession for sale a DOD, the prosecution must prove BRD that [D] must have had a general actual, pure intention to sell in the future (**Francis-Wright**). However, no specific buyer or sale date required (**Francis-Wright**)

Element 1: Common Law Possession

The prosecution must establish common law possession. Deemed possession under s.5 does not apply to trafficking offences (**Momcilovic**).

- **See common law possession** (likely write 'see above' in exam as you would have already analysed possession)

Element 2: Intention to Sell (e.g. lists of names; collection of baggies)

The prosecution only needs to prove that [defendant] had a general intention to sell the drug in the future. It is not necessary to prove that a particular sale was in contemplation, or that [defendant] had a specific buyer in mind.

- [P/D] will be advised that, per **Francis-Wright**, only the quantity that is intended for sale should go towards a **s 70 offence** (and not any quantity for personal use).

On balance, this will/will not be satisfied, as [insert facts].

Third Element: Common Law Trafficking

An activity performed in a commercial setting where it can be inferred that someone involved is making a profit. Mere possession is not sufficient even if clearly intended for sale (**Holman**). Accordingly, [defendant] will be guilty of trafficking if the prosecution can prove BRD that he/she was involved in the onward movement of a DOD from the source to the consumer, including contact between [defendant] and at least one other person (**Falconer; Giretti**).

- Contact between alleged trafficker and at least one other person is required (**Holman**).
- P may prove that D carried on a drug dealing business over a specified period of time (**Giretti**).
- D need not have personally profited (**Falconer**) or personally possessed the DOD (**Holman**)
- P does not need to prove D knew of the specific DOD, just any DOD (**Heh Koh Teh**)

Made Out:

Firstly, [X] facilitated the progress of the DOD from source to consumer when [FACTS] and there was contact between [X] and at least one other person (**Holman; Giretti**) – i.e. [Y]. Secondly, this occurred in a commercial setting because [FACTS > WHO WAS MAKING MONEY].

Not Made Out:

However, although [X] intended to sell / deliver / send [DRUGS] to [Y], he/she did nothing to actually progress the drugs from source to consumer (**Giretti; Holman**). Mere possession alone is insufficient (**Holman**), so CL trafficking won't be made out.

Analogous Facts?

- **Falconer**, where the accused simply acted as courier for Indian hemp between a dealer and consumer without payment.
- **Holman**, where the court held that intent needs to be made out even though the accused were caught growing 100s of kilograms of cannabis on 3 fenced-off plots of land.

Falconer v Pedersen

Held:

- Principle: A voluntary trader acting as a link between parties to a transaction may still be involved in trafficking at common law, even if they are acting without reward (**Falconer v Pedersen**).