KNOWLEDGE AND THE ACTUS REUS OF POSSESSION OFFENCES

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INTRODUCTION

Voluntary conduct on the part of an accused, usually in the form of an act but occasionally in the form of an omission, is central to criminal liability. The underlying moral premise is that by acting, or omitting, the accused controlled events by exercising a choice for which he may be held responsible. Choice is the key element, at least in the sense that the accused was in a position to avoid bringing about the prohibited event and failed to do so. In the ordinary scheme of things it is reasonable to conclude that the accused chose the outcome where it lay within his control not to act, or not to omit, in the manner proscribed by law. On the other hand an accused does not attract responsibility where he is incapable of exercising choice and a number of legal principles are employed to avoid liability in the form of defences such as lack of mens rea, automatism, impossibility, insanity and lack of capacity.

The general requirement of voluntary conduct is obvious where offences are defined in terms of acting or omitting, as is usually the case. Where the accused is penalised for an act or omission which he has brought about it is clear that he is being punished in respect of an event which lay within his control. In the case of an act the control is obvious; and while liability for omissions might arise in more random or fortuitous circumstances typically the accused is penalised for not doing that which was possible or, in other words, for not doing something which lay within his control. However, in some cases the law imposes liability for a state of affairs, typically a status, condition or situation, which exists in relation to the accused. This form of liability, sometimes called situational liability, includes possession offences and status offences, to the extent that the latter remain part of the criminal law. Difficulties are associated with status offences. Frequently the status in question is acquired without any voluntary conduct in the accused’s part. The difficulty is that status offences tend to impose a penalty for the existence of a state of affairs or set of circumstances, the bringing about of which might lie beyond the control of the accused. To penalise in those circumstances is objectionable, and probably unconstitutional, since there is nothing the accused can do to avoid the prohibited status. Where, however, it is

possible to avoid acquiring, or retaining, the status in question those objections lose force. In that case it is possible to attribute the status to voluntary conduct on the accused's part, at least in the sense that the law understands that concept. There is a difference between penalising being red-haired (a status which is unavoidable and cannot be altered) and being red-bearded (a status which can be avoided). As with status offences the requirement of voluntary conduct does not fit easily with possession offences. This is so where possession might be acquired without active participation on the part of an accused and especially if possession might be acquired without his knowledge. In this essay it is proposed to examine the possession element of those offences and to reconcile it with the general voluntary conduct requirement which underlies criminal liability. The social interest secured by statutory possession offences is obvious but they form a category which comes close to the identified problem of abandoning the voluntary conduct requirement. The crucial point is that the law should avoid convicting an accused who is not in a position to avoid the occurrence of that which the law prescribes. In this context it will be suggested that possession offences meet that requirement if 'possession' is considered to include a knowledge element and to exclude unconscious possession.

At common law possession per se did not constitute an offence, the courts taking the view that possession is not an act. However, many statutory offences prohibit the possession of a variety of items such as firearms, explosives, weapons, drugs and implements of crime. Some such offences prohibit the simple possession of the relevant item, while others require proof of specific or ulterior intent. It is clear that the law's real concern is with the use or consumption of the illicit goods. Their possession in itself is of no great concern but is penalised for one of two principal reasons. One is that possession, while not being harmful in itself, is sufficiently harm threatening to merit prohibition. Thus, possession of firearms does not of necessity result in harm but there is a sufficiently close relationship between possession and a harmful result to justify its prohibition. An offence of this type has been termed a 'precursor' offence. It precedes another offence but, unlike an inchoate offence, it is a full offence in itself. Never-

3. See Australian Commonwealth Criminal Code s. 4(5) which provides that a state of affairs satisfies the voluntary act requirement only where it is one over which the accused is capable of exercising control.
7. Firearms and Offensive Weapons Act 1990, s. 9.
9. Larceny Act 1916, s. 28 (inserted by Larceny Act 1990, s. 2).
10. See Benton v. United States (1956) 232 F 2d 341 – possession of firearms gives rise to 'sinister implications'.
theless both types of offence can be regarded as steps toward the commis­sion of a full offence. Possession in this instance is liable to result in a secondary or indirect harm, such as the evoking of fear of suffering injury or a disruption of the public peace. Moreover, possession injures the com­munal interest in regulating the circulation and availability of implements of harm. To this extent the law’s strategy is preventative – by attempting to eliminate the possession of dangerous items the law seeks to eliminate their use and the consequent harm which might result. The second reason for enacting possession offences is that it is often easier to detect, and prove, possession than use. Thus, as a matter of convenience the law is directed towards possession of the items in question although the primary social concern is with their use. Possession of drugs can be explained on this ba­sis. It is notoriously difficult to detect the use or supply of drugs, but it is reasonable to conclude that there is a nexus between their possession and use or, depending on the circumstances, their supply.

ELEMENTS OF POSSESSION

Possession has been aptly described both as being a deceptively simple concept12 and an ambiguously defined act.13 In R v. Martin14 it was said to be sufficiently broad to embrace physical possession, legal possession and a right to possession. Although the court there considered that it was merely applying the common law meaning of the concept to a statutory offence it is far from clear that all possession offences have such a broad compass. The ideal case of possession was explained by Lord Wilberforce in Warner v. Metropolitan Police Commissioner:15

[i]deally, a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities: he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others. But these elements are seldom all present in situations with which the courts have to deal, and where one or more of them is lacking, or incompletely present, it has to be decided whether the given approxi­mation is such that possession may be held sufficiently established to satisfy the relevant rule of law.

As Lord Wilberforce acknowledged the ideal rarely exists and courts have frequently expressed the view that ‘possession’ is to be interpreted in rela-

14. [1948] OR 963; but see Marsh v. Kulchon [1952] 1 DLR 593 where physical pos­session was distinguished from a right to possession.
tion to its statutory context and purpose.\(^\text{16}\) An understanding of possession is not aided by terminological looseness in both the authorities and commentaries. Nevertheless a distinction can be drawn between custody (which is sometime called physical or \textit{de facto} possession) and possession in the legal sense.\(^\text{17}\) It follows that the physical location of the proscribed items is not central to the question of their possession. Thus, one may be considered in law to possess goods which are not physically present but which are present on one's land or in a place over which one has dominion.\(^\text{18}\) By the same token, the custodian (that is, the person who physically holds them) does not necessarily possess them and consequently is not guilty of a possession offence. These points are illustrated by \textit{Sullivan v. Earl of Caithness}.\(^\text{19}\) There the accused, who resided in Oxfordshire, deposited firearms in his mother’s residence in London. He was charged with possession of firearms without holding a firearms certificate,\(^\text{20}\) having failed to renew the relevant certificate. He was held to possess the weapons since he retained the right to obtain them at any time; his mother, on the other hand, was not in possession but had the ‘barest custody’ of the firearms. This leads to a second distinction which is drawn, namely that between actual and constructive possession. Actual possession is enjoyed by one who both physically holds the goods and in law is deemed to possess them – it thus involves a merger of custody and possession. In contrast constructive possession segregates possession from custody. Constructive possession exists where the goods are held by another over whom the possessor exercises an element of control – he enjoys the right to call for their delivery and thus possesses them through the custodian.

The criminal law has tended to eschew technical civil law doctrines when considering possession offences.\(^\text{21}\) Nevertheless, several American decisions\(^\text{22}\) have cited with approval the proposition contained in the \textit{Restatement on Torts}.\(^\text{23}\) In the absence of a comprehensive definition of possession it has become settled that the basic ingredients of possession are the


20. Contrary to Firearms Act 1968, s. 1(1) [Eng].


23. Section 216 of the \textit{Restatement} provides ‘[i]n the Restatement of this Subject, a person who is “in possession of a chattel” is one who has physical control of the chattel with the intent to exercise such control on his own behalf, or on behalf of another.’
exercise of control or dominion over the goods by the accused coupled with knowledge on his part of their existence. If either element is absent the accused is not considered to possess the item in question. The application of these general principles is evident in the words of Davitt P. in Minister for Posts and Telegraphs v. Campbell:

... a person cannot, in the context of a criminal case, be properly said to keep or have possession of an article unless he has control of it either personally or by someone else. He cannot be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in the actual possession of some other person over whom he has control so that it would be available to him if and when he wanted it. ... He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge.

Davitt P's words were cited with apparent approval by the Court of Criminal Appeal in The People (D.P.P.) v. Foley. That Court did not elaborate on these principles, the primary issue concerning the drawing of an inference of knowledge rather than the question of knowledge itself.

24. The Model Penal Code reflects this view. In s. 2.01(4) it states '[p]ossession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.' The Canadian Criminal Code, s. 3(4) provides 'For the purposes of this Act (a) a person has anything in possession when he has it in his personal possession or knowingly (i) has it in the actual possession or custody of another person or (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person and (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.' While this definition appears to be more complete it has had to be supplemented by case law; see Stuart, Canadian Criminal Law (3rd ed., Toronto, 1995) p. 76. The English Draft Criminal Code (Law Com. No. 177) is silent as to the ingredients of possession. The Forgery Act 1913, s. 15 is unusual in that it provides a definition of possession: '[w]here the having of any document, seal, or die in the custody or possession of any person is in this Act expressed to be an offence, a person shall be deemed to have a document, seal, or die in his custody or possession if he – (a) has it in his personal custody or possession; or (b) knowingly and wilfully has it in the actual custody or possession of any other person, or in any building, lodging, apartment, field, or other place, whether open or enclosed, and whether occupied by himself or not. It is immaterial whether the document, matter, or thing is had in such custody, possession, or place for the use of such person or for the use or benefit of another person.'

25. [1966] IR 69 at 73.

The question of control was central to the decision in *The People (Attorney General) v. Kelly and Robinson*,27 which involved *inter alia* a charge of receiving stolen goods. The applicants were observed in a room in the presence of two others, who were sorting through what transpired to be stolen goods. With regard to Kelly, who was convicted of receiving the goods, it was contended that the trial judge inadequately instructed the jury on the question of possession.28 The Court of Criminal Appeal concluded that the jury had been properly instructed, having been told in effect that unless they were satisfied that Kelly had some control over the goods or that they were being held for him they should acquit him. His explanation of his presence in the house was that he had accompanied his co-accused on a visit to deliver a half-dozen eggs to the householder's sick child. It can be taken from his conviction that the jury were unimpressed with his suggestion that he was merely performing one of the corporal works of mercy. But had his explanation been believed it is clear that he would be found not to have been in possession. Thus the crucial question of fact, as the trial judge outlined in his direction, was whether the meeting was held 'for the purpose of dividing the loot'.29 To this extent the purpose of applicant's presence was relevant to the question whether he possessed the goods in question. Had his purpose been innocent he would have lacked the necessary element of control.

The extent of the control which is exercised by the accused over the goods might have a bearing on the question of possession. The issue has not arisen in the Irish courts but American authority supports the view that what has variously been called 'momentary or transient holding' or 'superficial possession' does not constitute legal possession.30 In *People v. Mijares*31 it was held that the handling of a narcotic for the sole purpose of disposing of it is not sufficient to constitute possession of the narcotic. Thus, where the question arose the jury should have been directed that handling the item for

27. (1953) 1 Frewen 147.

28. In his direction the trial judge stated at 1 Frewen 147 at 149: 'It is not necessary that there should be manual touch in respect of the property stolen. A person may have joint possession of property with one person or others, though the property may be in the physical custody of another person. If you are satisfied that [the thief] had in his house this stolen property and that all the people that were there had some control over this property, or that he was holding it for them, they would have what is called constructive possession of it. . . .'

29. Ibid.

30. See *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256 at 290 per Lord Morris of Borth-y-Gest '[i]f there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains – then, ordinarily, I would suppose that there would not be possession.'

a brief moment prior to its abandonment is not possession. In *Tingley v. Brown*, which involved a prohibition on the possession of undersized crawfish, it was held that the possession must be ‘substantial’; the mere holding of a crawfish to determine if it was of legal size is a superficial possession and insufficient to support a conviction. In these cases the purpose for which the object was held influenced the court in reaching the conclusion that there was no possession. By the same token, however, the item was held by the accused for a very brief period of time, possibly measured in seconds rather than minutes. It is not clear from the decisions which, if either, factor is more important in determining the issue. If the purpose for which the thing is held is crucial it should follow that the length of time for which it is so held ought to be of lesser significance. On this view one could hold contraband for several hours, or even days, without possessing it as long as a purpose to dispose of it persisted. In those circumstances the duration for which the item is held would be evidence from which it might be inferred that the accused did not have that purpose in mind, but it would not be determinative of the issue. Nevertheless, it seems to be clear that while possession involves something more than momentary control it can be brief, once it is complete. That raises the crucial question of what makes possession ‘complete’ and in some cases the purpose for which the item was held was considered to be irrelevant. In *People v. Norris* the accused, who was convicted of possession of a blackjack, had testified that he removed it from a customer intending to keep it until the customer was ready to leave his premises. It was argued that he did not intend to exercise dominion and control over the item. The Michigan Court of Appeals considered that his reason for having the blackjack was immaterial and the proffered defence was rejected. This appears to reject the idea of temporary possession which was advanced in the other cases. However, if the accused intended to return the item to its owner, as his testimony suggested, then his

32. See also *State v. Flaherty* (1979) 400 A 2d 363. But it would seem that a specific instruction on momentary handling is not necessary unless there is a sufficient evidential basis; see *People v. Tuadles* (1992) 7 Cal App 4d 1777 where it was held that in the absence of evidence of a purpose to dispose of the drug an instruction on the matter is not necessary; the accused’s evidence was that he was going to deliver the drugs to someone, not that he was going to dispose of them.


34. See *People v. La Pella* (1936) 272 NY 81 holding that temporary possession which is incidental to a lawful purpose does not come within a statute which prohibits possession. In this case the holding of a gun for about 20 minutes to hand over to the police was considered to be a temporary possession.


37. See *Woodage v. Moss* [1974] 1 WLR 411. There the accused took a gun from an unknown person in order to hand it over, by arrangement, to a registered firearms dealer. Although the accused acted in 'perfect good faith' and held the gun for about two hours he was held to have had it in his possession.
purpose differs somewhat from that of the accused who holds drugs momentarily in order to dispose of them. Unlike the latter he holds the item for safekeeping and on the occurrence of a defined event, namely the departure of the owner, will restore it to the owner's (exclusive) possession. The item was never discarded or abandoned and, on this basis, it is not difficult to conclude that it was in the accused's possession, either solely or jointly with the owner. Moreover, it seems that the accused held the blackjack for a considerably longer period than in those cases where possession was held to be temporary, again making it easier to conclude that he was in possession or, to put it another way, that he did not hold the item for a lawful purpose. A workable compromise between purpose and duration is that temporary possession is a combination of the purpose for which an item is held and the duration for which it is so held. On this view an accused would be held not to have had possession of the item if he held for no longer than was reasonably necessary to dispose of it.\textsuperscript{38}

A different view was suggested by the Northern Irish Court of Criminal Appeal in 	extit{R v. Murphy}.\textsuperscript{39} The Court suggested, obiter, that picking up a pistol with a view to throwing it into a river would amount to unlawful possession but that were the weapon held with the sole object of handing it over to the police no offence would be committed. The distinction seems to be that in the latter case the accused acts with a justifiable purpose - the Court considered it to be identical to the case of a fireman who picks up a bomb and carries it to a safe place. It is unclear whether the accused should be considered not to possess the item or to possess it but in circumstances of justification; if it is the latter the court has, in a sense, engrafted a special defence onto the statute. However, a difference in emphasis from the American cases is discernible. \textit{Murphy} seems to require the existence of a purpose which is capable of legal justification (such delivery of the item to the police) and a mere intent to abandon the item does not prevent possession from being acquired. In contrast the American cases establish that the latter intent negates possession on the accused's part.

THE ELEMENT OF KNOWLEDGE

Allied to the element of control is the requirement that the accused knows of the item over which he has control. Without that knowledge the essential control cannot be exercised.\textsuperscript{40} In \textit{The People (Attorney General) v. Nugent}

\textsuperscript{38} See \textit{State v. Flaherty} (1979) 400 A 2d 363 holding that knowingly to hold an item for no longer than a sufficient period to terminate possession does not constitute possession; the law allows a 'grace' period; moreover, the sufficient period is not always confined to the absolute minimum necessary to abandon possession. It must be noted that the statute in question made express provision for the 'grace' period, but the principle is capable of being applied generally.

\textsuperscript{39} [1971] NI 193.

\textsuperscript{40} See \textit{People v. Gory} (1946) 28 Cal 2d 450; \textit{R v. Murphy} [1971] NI 193.
and Byrne\textsuperscript{41} the accused were charged with receiving stolen money. The money in question was found in a car which was driven by the first accused and in which the second accused was a passenger. The driver's defence was that the money had been placed in the car without his knowledge while the passenger claimed that he was unaware of anything untoward in the car. In allowing their appeals the Court of Criminal Appeal held that the prosecution bore the onus of proving knowledge of the money's presence in the car on the part of each accused. As to the passenger the court was satisfied that there was no evidence that he was or should have been aware of what was in the car, nor was there any evidence from which such knowledge could be inferred; thus, the court concluded that there was no evidence that he was ever in possession of the money. The driver's case was somewhat different. It was said that an owner normally possesses a car and its contents; were he aware of the presence of the money in his car he could be said to have had it in his possession. His appeal was allowed, and a retrial ordered, since his defence that he was unaware of the presence of the money in his car (saying that it must have been placed there by a third party) was not adequately put to the jury.

Nugent and Byrne was applied by the High Court in Minister for Posts and Telegraphs v. Campbell\textsuperscript{42} where the defendant was charged with possession of an unlicensed television set. The set was found in a cottage of which the defendant was the rated occupier, the inspector having been admitted by a woman who was in the house at the time he called. Davitt P. noted that there was no evidence as to how the television set came to be in the cottage, nor as to whether the defendant was aware of its presence or existence; equally there was nothing to indicate that the defendant had any control over the actions of the woman who admitted the inspector to the cottage. The evidence, he concluded, was consistent with the set's having been placed in the cottage without the defendant's knowledge or consent. It would appear, however, that knowledge might either be actual or imputed. In R v. Lewis\textsuperscript{43} drugs were found in a house of which the appellant was tenant, but which he rarely visited and to which others had access. He denied knowledge of the drugs and contended that they must have been placed there by someone else. A direction by the trial judge that the question was whether the accused availed himself of the opportunity to discover what was in his house was upheld by the English Court of Appeal. Relying on dicta to that effect\textsuperscript{44} the Court was satisfied that imputed knowledge would suffice to establish possession and, therefore, that the trial judge had correctly instructed the jury. Imputed knowledge might have been invoked in

\textsuperscript{41} (1964) 98 ILTR 139; 1 Frewen 294.
\textsuperscript{42} [1966] IR 69.
\textsuperscript{43} (1988) 87 Cr App R 270.
Campbell and it appears from the strictness of the approach adopted in that case that proof of something more than the existence of an opportunity to discover is necessary.

The question of whether knowledge should be imputed from the accused’s proximity to the prohibited item has been considered. In R v. Whelan the three appellants were found in a room in a house which was occupied by 14 people. On searching the room a revolver and ammunition were found on top of a cupboard and covered by men’s clothing. The appellants, who were the only men in the house, denied any knowledge of the weapon and asserted that it had been ‘planted’. In overturning their convictions the Northern Irish Court of Criminal Appeal noted that while there was a strong case that one of the men was in possession of the gun it was difficult conclusively to decide which of them it was. It might have been the case that one or two possessed the gun and, consequently, that the remaining two or one were innocent. Some additional evidence would, therefore, be necessary to support a finding that any one or all of them knew of the weapon’s presence.

Whelan was distinguished on its facts by the Court of Criminal Appeal in The People (D.P.P.) v. Foley. In this case three accused were present in a bed-sit apartment in which firearms and ammunition were found. The applicant sat on a bed in close proximity to a shotgun; a revolver which was placed on a heating unit was clearly visible; the butt of another shotgun visibly protruded from a hold-all and electronic surveillance equipment was found in the room. One of the accused testified that his visit was an innocent one, an explanation which the trial court accepted could reasonably be true and, accordingly, he was acquitted. The applicant and the third accused did not testify and were convicted of possession of firearms in suspicious circumstances contrary to section 27A(1) of the Firearms Act 1964. The Court of Criminal Appeal held that on the evidence it was open to the trial court to conclude that the applicant was aware of the existence of the weapon and exercised control over them. The Court explained the grounds for distinguishing Whelan:

The crucial difference between the material facts of R v. Whelan and the applicant’s case is that the firearm was hidden under clothing in Whelan’s case, whereas in the applicant’s case the sawn-off shotgun was beside him clearly to be seen on the bed in the small bedsitter. In R v. Whelan there was no evidence at all to suggest that any of the accused had any knowledge of the existence of the firearm nor was there any evidence from which an inference of intent to possess could

46. A statutory presumption to this effect now exists in Northern Irish law; Northern Ireland (Emergency Provisions) Act 1973, s 7.
47. [1995] 1 IR 267.
48. Ibid. at 282-283.
be drawn. However, in the applicant's case, it was entirely open to the Special Criminal Court, on the evidence of the witnesses called by the prosecution, to draw the inference that all three occupants of the room were in joint possession of the firearms and ammunition.

The principal difference between the two cases relates to the inferences which could permissibly be drawn from the established primary facts. In *Whelan* it was impossible to conclude that the accused knew of the existence of the concealed firearms. On the other hand in *Foley* that knowledge could be inferred from the visible proximity of the firearms to the accused coupled with the lack of an explanation of his presence in the room.

**TYPES OF KNOWLEDGE**

While knowledge is essential to establish possession the law draws a distinction between knowledge of the existence of the item in question and knowledge of its characteristics and qualities. The line between the two types of knowledge is apt to become blurred but it is clearly settled that knowledge of the former type is all that is required to establish possession. This knowledge is an element of the actus reus of the offence, not the mens rea. The importance of this point should not be underestimated given the tendency to impose strict liability on many possession offences. Where the offence is one of strict liability the prosecution will nevertheless bear the burden of establishing that the accused knew of the existence of the relevant item. Failing that the accused will be held not to have possessed the item. But once that knowledge is established any further element of knowledge is a mens rea requirement and does not have a bearing on the question of possession. Thus, in *Lockyer v. Gibb* the accused was held to be guilty of possession of dangerous drugs once it was established that he knew that he possessed items which in fact turned out to be dangerous drugs;


had he believed them to be innocuous he would nonetheless have been guilty. This view was confirmed by the House of Lords in *Warner v. Metropolitan Police Commissioner*. There the appellant was found with bottles which he said he believed to contain scent, but which in fact contained prohibited drugs. In holding the offence to be one of strict liability the Law Lords stated that his belief did not provide a defence – all that the prosecution was required to establish was that the appellant knew of the existence of the thing which in fact turned out to be a drug. The view of the majority is conveniently summarised in the words of Lord Pearce:

Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets.

In *R v. McNamara* the appellant was found with a box which contained cannabis. He stated that he believed the box to contain pornographic or pirated videotapes. He was held to be in possession of the cannabis as he knew that he was in control of the box and he knew that the box contained something even if he did not realise what that thing was. American jurisprudence supports this approach. In *People v. Gory* the Supreme Court of California observed the distinction noted above and held that knowledge of the presence of the goods is all that is required. In *Commonwealth v. Lee* the appellant opened a packet which contained marijuana. Her conviction of being found in possession of the drug was upheld, the court noting that it was unnecessary to consider whether there was evidence that she knew the packet to contain the drug. These decisions reflect the position which pertains in Irish law as to the passing of possession in larceny. In *R v. Hehir* the appellant was given an envelope which contained a £10 note. At the time of delivery both parties believed the envelope to contain a £1 note, but on subsequently discovering the error the appellant decided to retain his windfall. The question of liability for larceny depended on whether the accused acquired possession of the note at the time it was delivered or at the later stage when he discovered the error and thereupon formed the necessary intent. Only if possession passed at the later stage would he have been guilty of larceny as the felonious taking which is the essence of that offence would have then occurred. The Court for Crown Cases Reserved held that

51. [1969] 2 AC 256.
52. Ibid. at 305.
53. (1988) 87 Cr App R 246
54. (1946) 28 Cal 2d 450.
55. (1954) 331 Mass 166.
56. See *R v. Hallam* [1957] 1 QB 569 where the offence of being knowingly in possession of explosives, under the Explosive Substances Act 1883, s. 4(1) requires proof that the accused knew not only the fact of possession but also the nature of the thing possessed.
57. [1895] 2 IR 709.
possession of the money was acquired by the appellant at the time the envelope was handed over, not at the later stage when he converted the excess payment to his own use. This was based on the premise that the appellant knew of the existence of the thing, namely currency in an envelope, and was merely in error as to one of its characteristics, namely its value. Like the English and American possession cases Hehir relies on the crucial distinction between knowledge of the existence of the item and knowledge of its characteristics. 58

The distinction between knowledge of an item’s existence and knowledge of its qualities appears to have the convenience of clarity and precision. It helps resolve the dilemma of ‘planted’ goods. The accused’s disavowal of any knowledge of the presence of the goods on his person, in his car, his luggage or his house facilitates the drawing of the conclusion that he did not possess the item in question. This is supported by Lord Parker’s statement in Lockyer v. Gibb: 59

In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she had control. That I should have thought, is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it.

This statement, which was approved by the House of Lords in Warner v. Metropolitan Police Commissioner, 60 reflects the distinction between custody and possession and puts beyond doubt the view that an item which is surreptitiously placed in the accused’s control or dominion is not in his possession. Thus, the frequent defence that the item was ‘planted’ becomes one that the accused did not possess it because he did not know of its existence. However, matters are not as straightforward as they might at first sight seem and the apparent simplicity of that proposition conceals a more complex state of affairs. Leaving aside, for the moment, the special difficulties presented by the ‘container’ cases 61 it does seem that the ‘knowledge

58. With regard to larceny the English courts rejected this approach preferring the view that the accused did not acquire possession of the item until he knew of both its identity and nature. R v. Ashwell (1885) 16 QBD 190 is identical to Hehir except that the parties mistook a sovereign for a shilling. The English Court for Crown Cases Reserved required an ‘intelligent delivery’ before possession passed; the parties were ignorant when the coin was handed over and possession passed only when the accused discovered its true value. This approach was also adopted in R v. Hudson [1943] KB 458 and Russell v. Smith [1958] 1 QB 27. Ashwell was rejected by the Irish court in Hehir.


60. [1969] 2 AC 256 at 282, 286, 300, 303, 305.

61. See below at fnn. 72-83.
of existence' formula requires some refinement. If the woman is said not to possess the drugs which have been slipped into her handbag it can only be because knowledge of the particular item is required. It can be taken that she knows the bag to contain a selection of items which have been derived from a variety of sources. But once she realised that there were items in the bag she can only be said not to possess the drugs because she was unaware of the existence of those particular items as distinct from anything else in the bag. Thus, the prosecution would be required to show, at least, that she knew of the existence of the particular items which turned out to be prohibited drugs. This, in essence, is the position which was adopted by the Supreme Court of California in *People v. Gory.*

There a search of a box, which had been given to a prisoner to store his personal effects, revealed the presence of marijuana. His defence was that it must have been placed there by someone else and there was evidence to the effect that a number of his fellow inmates had the opportunity so to act. While invoking the distinction between the different species of knowledge the Court held that it was the duty of the trial judge to submit to the jury the question whether it had been established that the accused had knowledge of the presence of marijuana. Support for this approach can be derived from *The People (Attorney General) v. Nugent and Byrne* where proof that the driver of the car knew of the existence of the stolen money which was discovered therein was held to be necessary. It can be assumed that the accused knew the car to contain the usual variety of items one expects to find in a car; what he was not shown to have known is the 'unexpected' presence of the stolen money. To similar effect is the decision in *Minister for Posts and Telegraphs v. Campbell* where it was held that it was necessary to prove that the accused knew of the existence of the unlicensed television set which was found on his premises. The real difficulty in cases of this nature is that the item which is the subject of the charge has been mixed in the same domain with other items the existence of which the accused is fully aware or of which knowledge may be imputed to him. It is in those circumstances that the usual inference that the accused is aware of that which is on his premises or in his domain cannot be drawn and attention is directed to his knowledge of the particular item. Thus it is quite possible that one might be held to possess some items yet not others which are located together in a place over which one has control. This is not as nonsensical as might be sug-

63. (1964) 98 I.LTR 139.
64. [1969] IR 69.
65. See *R v. Martindale* [1986] 1 WLR 1042 at 1044 per Lord Lane CJ '[i]t is true that a man does not necessarily possess every article which he may have in his pocket. If for example some evil minded person secretly slips a portion of cannabis resin into the pocket of another without the other's knowledge, the other is not in law in possession of the cannabis.' Dicta in *R v. Hehir* [1895] 2 IR 709 at 758 could be taken to contradict this view. For purposes of that decision Palles CB saw no difference between the instant case in which the £10 note in fact delivered was believed
gested. It is reasonable to suggest that the airline passenger whose luggage contains a bomb planted by a terrorist without her knowledge is in possession of the items which she packed but not in possession of the bomb. It does seem sensible to conclude that she did not possess the bomb rather than that she did not knowingly possess the bomb. The latter conclusion, of course, raises questions of mens rea which might provide the basis of a defence but the point suggested is that the elementary material element of possession which precedes that issue is absent.

KNOWLEDGE OF EXISTENCE VERSUS KNOWLEDGE OF QUALITIES

The distinction between knowledge of an item’s existence and of its qualities is more oblique than the authorities suggest and it might prove difficult to draw the line between the two. At a fundamental level a thing’s existence is related to its qualities. Some one or more of those qualities define the existence of the thing and, it can be argued, a mistake as to quality might be of sufficient magnitude as to make the thing substantially different from that which it was believed to be. For instance, can it be said that one to be £1 and a case where 10 £1 notes were delivered in the belief that a £1 note was being passed. In substance the two mistakes were of the same order, namely a mistake as to the value of currency which was being delivered. However, viewed from another angle a significant difference emerges. In *Hehir* the accused believed that the envelope contained one currency note, value £1; what he got was one currency note, value £10. Thus, the only mistake was as to the denomination of the currency note, the existence of which he was aware. In the hypothetical case the accused believes the envelope to contain one currency note, value £1; but what he gets are 10 currency notes, each worth £1. It might be argued that he knows of the existence of one such note, but is ignorant as to the existence of the other nine which, accordingly, could not be said to be in his possession. This was the approach adopted by the English courts in relation to larceny (see *Russell v. Smith* [1958] 1 QB 27) but, of course, it is not applicable in Ireland. Nevertheless, an inference to be drawn from the Palles dictum is that when an unknown item is mixed with those the existence of which are known all items are possessed by the accused. On this basis the accused would be held to possess the drugs which have been placed in her handbag unless, as is unlikely, she believed the bag not to contain anything. Given this unsatisfactory state of affairs it is probable that the broader consequences of *Hehir* will be confined to the law of larceny; the concern in that case was to prevent the extension of the offence of larceny into wider areas of dishonesty by expanding the concept of possession rather than with offences where possession is the principal element of the actus reus.

66 This, in essence, is the approach adopted in *Police v. Rowles* [1974] 2 NZLR 756 where on a charge of possession of drugs it was held that proof of guilty knowledge was necessary. Where the accused had forgotten about drugs which were stored in a cabinet over which he exercised control he was held not to be guilty. The requirement of guilty knowledge was additional to proof of the fact of possession.

67 An analogy exists in contract law where it is accepted that a mistake as to the subject matter of a contract might be of sufficient magnitude that the thing delivered is
possesses currency notes which are contained in an envelope which one believed to contain tickets for the opera? Is the difference between currency notes and opera tickets merely one of quality or is it so fundamental that the mistake should be classified as being one as to existence? There is some support for this general idea in Warner v. Metropolitan Police Commissioner, especially in Lord Pearce's qualification to his remarks about heroin tablets and sweets that 'it would be otherwise if I believed them to be something of a wholly different nature.'68 This was, in his view, a question of degree which would be for the jury to determine and he was confident that they would approach the matter in a manner which favours the 'genuinely innocent.'69 If the question is to be left to the jury it would have been better had Lord Pearce not provided an example; it is not difficult to imagine a jury reaching the conclusion that heroin and confectionery are sufficiently different to the point that a person does not possess heroin tablets if he believes them to be sweets. On the other hand if, as Lord Pearce suggested was the case, heroin tablets and sweets are not of a 'wholly different nature', then we might well ask just what are? The later decision in R v. McNamara70 where the accused was found with a box which contained cannabis does not help matters. He said that he thought the box contained pornographic or pirated video tapes and thus contended that he did not possess the cannabis. In upholding his conviction the English Court of Appeal reiterated the view that once a person knows of the existence of a thing which is within his control he possesses it and a mere mistake as to the quality of the thing is not enough to prevent his having possession of it. Although the Court noted Lord Pearce's observations on things of a 'wholly different nature', the fact that the conviction was upheld supports the drawing of one of two possible inferences. The first is that the Court did not consider cannabis and pornographic video tapes to be things of a 'wholly different nature'. The second is that the question of the things being of a wholly different nature was either not raised or not considered to be relevant to the issue of possession.71 Thus while the possibility has been raised that a mistake as to quality might be of sufficient magnitude to deny the accused possession of the different from that which it was believed to be; see Bell v. Lever Brothers Ltd [1932] AC 161. In Nicholson & Venn v. Smith-Marriott (1947) 177 LT 189 table napkins were sold as the authentic property of King Charles I. They were in fact Georgian and worth far less than the purchase price. The purchaser recovered damages for breach of contract but Hallett J. said that the contract might have been treated by the buyer as void depending on what the parties believed was the subject of the contract. If they believed it to be a sale for specified items of table linen then the mistake would have been one of quality; on the other hand if they believed it to be a sale of Carolean relics the mistake went to existence. In short, the question is one of categorising the subject matter of the contract. See also McRae v. Commonwealth Disposals Commission (1951) 84 CLR 377.

68. [1969] 2 AC 256 at 305 (emphasis added).
69. Ibid.
70. (1988) 87 Cr App R 246.
Knowledge and the Actus Reus of Possession Offences

item in question the case law is too vague to allow the drawing of any firm conclusions in this regard.

CONTAINERS AND THEIR CONTENTS

The possession of containers and their contents has presented some difficulties. In principle the same requirements of control and knowledge apply to the contents of a container or package as apply to any other item. However, the defence might be that while the accused was aware of the existence of the container he did not know that the contents were proscribed items. Indeed both Warner and McNamara involved this issue and the outcome of those decisions is that the prosecution need only prove that the accused knew of the existence of the contents, not their nature. It follows that once the accused is aware that the packet contains something he possesses that thing regardless of his state of mind as to its nature. In principle it should follow that an accused will be held not to have possession of the contents if he believes the container to be empty. Accordingly, it is possi-

71. Matters were confused somewhat the Misuse of Drugs Act 1971, s. 28 [Eng.] which places an affirmative burden on the accused to prove that his possession was innocent once the prosecution has discharged the burden of proving possession. This measure was introduced to mitigate the harshness of the imposition of strict liability on drugs' offences by the House of Lords in Warner. In McNamara it is not entirely clear whether the appellant's supposed exculpatory belief was proffered in support of an argument that he did not possess the drugs, in which case the burden would have remained with the prosecution, or that the drugs were innocently in his possession, in which case the appellant would have borne the burden. In the light of the special defence provided by s. 28 a judicial reluctance to act on a belief that the thing is of a wholly different nature is to be expected even it lacks intellectual respectability.

72. See also Commonwealth v. Lee (1954) 331 Mass. 166 where it was held to be unnecessary to consider whether the accused knew that the packet which she possessed contained marijuana. But in some cases it has been held that proof of the exercise of conscious dominion over the drugs and not just the packet is required; see Commonwealth v. Stirling (1976) 361 A 2d 799; Commonwealth v. Rambo (1980) 488 Pa 334. What establishes the conscious dominion was not expressly stated but it appears to involve a consideration of the nature of the contents, not just their existence. These latter cases could have been as effectively dealt with by introducing an unambiguous mens rea requirement as to the nature of the goods. See e.g. Commonwealth v. Aguiar (1976) 370 Mass 490; Police v. Rowles [1974] 2 NZLR 756; Police v. Emirali [1976] 1 NZLR 286.

73. However, note the confusion on this point in Warner v. Metropolitan Police Commissioner [1969] 2 AC 256 at 290 per Lord Morris of Borth-y-Gest 'if, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box, but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents or
ble to possess a container but not its contents. For instance, an accused hires a car in which, unknown to him, drugs have been concealed behind secret panels. While he is clearly in possession of the car he lacks possession of the drugs, the car being from his perspective an empty container. Thus, everything seems to turn on the accused’s state of mind in relation to the contents. In practice in many cases the court will draw an inference that the accused knew of, or at least had an opportunity to become aware of, the existence of the contents of the packet of which he undoubtedly has control. This inference may be drawn from a wide variety of factors including weight, bulk, appearance and circumstances in which the packet is held. Cases where an accused mistakenly believes a packet to be empty are likely to be few. The problem of goods being secretly placed in a container, such as a handbag, which contains items of which the accused is aware can be solved by requiring knowledge of the particular item. Thus, as was suggested earlier, if drugs are slipped into the accused’s handbag she does not possess them because she lacks knowledge of the existence of the items (which in fact are drugs) although she is aware of the existence of all other

if he had made a wrong surmise as to them it seems to me that he would nevertheless be in possession of them. Similarly, if he wrongly surmised that a box was empty which in fact had things in it, possession of the box . . . would involve possession of the contents.’ This last proposition does not follow from those preceding it and it is neither ‘similar’ nor correct. Lord Guest voiced a similar opinion, at 302, stating that he was ‘unable to see how, if I know that I have a parcel in my possession, I am not also in possession of its contents’. Lords Pearce, at 307, and Wilberforce, at 312, envisaged a defence to the effect that the accused was in possession of the parcel but not the contents; see below at nn. 78-79.

74. This must be qualified by the remarks above about showing the accused to have had knowledge of the particular item in question; see above at fnn. 59-66. The point is, of course, that the accused can be taken to realise that the car contains a number of items – a tool kit, a spare wheel, a jack and whatever else; what he is ignorant of is the existence of the surreptitiously concealed items which in fact are packets of drugs.

75. In Minigall v. McCammon [1970] SASR 82 at 89 Bray CJ displayed a reluctance to separate the possession of a container from its contents, stating obiter that ‘... if a man takes a container, knowing that it is a container and therefore likely to have contents, he takes the contents too.’ Different considerations might apply in his view if the person does not realise that he has a container or in the case of an item with a secret compartment. Although it is a larceny case and thus to be read with some circumspection the dictum does indicate an inference which it is natural to draw from proof of possession of a container. It is reasonable to conclude from possession of a wallet that the accused believed it to contain something and thus to possess the contents. In Merry v. Green (1841) 7 M & W 623, a civil action, the purchaser of a bureau was held not to possess money which had been concealed in a secret drawer. The court there assumed that a condition of sale was that the bureau was sold without title to any contents. But it is equally possible to say that the purchaser did not possess the money as he was unaware of its existence. See Glanville Williams, Textbook of Criminal Law (2nd ed., London, 1983), pp. 943-945.

76. See above at fnn. 59-66.
items. Difficulties arise when this is viewed in the light of cases such as Warnerv. Metropolitan Police Commissioner.\textsuperscript{77} The accused collected boxes which he believed to contain bottles of scent; unknown to him some bottles contained drugs. Leaving aside the natural scepticism which such exculpatory pleas attract a problem remains. How does Warner differ from the case of the innocent woman who has drugs planted in her handbag? Both know that they possess containers and that the containers have contents, yet one is deemed to be in possession of drugs while the other is not. One difference is that the accused in a case like Warner might know of the existence of the particular items, one or more of which turn out to be drugs. He expected a box containing, say, two dozen bottles of scent; he got a box containing two dozen bottles not of scent but drugs. Thus, he knew of the existence of the particular items which in fact were drugs. Had the box contained two dozen bottles of scent plus a surreptitiously concealed packet of drugs the case would be closer to that of the handbag and the conclusion might well be that the accused did not possess the drugs – after all, he would not have known of the existence of the concealed packet.

Another difference between the cases lies in the possibility of inspecting the container. Some of the speeches in Warner attributed significance to the existence of an opportunity to inspect the boxes. Lord Pearce put it thus:\textsuperscript{78}

\textit{... the prima facie assumption [that he possessed the contents] is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself of its actual contents.}

Lord Wilberforce expressed a similar view:\textsuperscript{79}

\textit{... the starting point will be that the accused had physical control of something – a package, a bottle, a container – found to contain the substance. This is evidence – generally strong evidence – of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession.}

\textsuperscript{77} [1969] 2 AC 256. 
\textsuperscript{78} Ibid. at 306 (emphasis in original). 
\textsuperscript{79} Ibid. at 312.
In short, if the accused either does not avail of a reasonable opportunity to acquaint himself with the circumstances that exist or accepts the container with ‘all that it might contain’ he will have knowledge imputed to him. It might have been the case that Warner did not avail of the opportunity to inspect the boxes.\(^80\) \(R\ v.\ Wright\)\(^81\) supports this proposition. The accused was handed a tin box which he had no time to inspect and which he discarded on being so instructed. When recovered by the police it was found to contain drugs. The English Court of Appeal was satisfied on these facts that the accused did not have possession of drugs.\(^82\) On the other hand the owner of the handbag has no reason to know of the ‘illicit nature’ of the thing which was placed therein and thus there was no basis for imputing knowledge to her. But consideration of the ‘illicit nature’ of the contents is similar to consideration of a belief in something of a ‘wholly different nature’ which as is far from satisfactorily treated by the courts.\(^83\)

ITEMS DEPOSITED ON LAND

Where items are found on the accused’s land or in premises which he owns or controls a court will usually infer that the accused knows of and controls, and therefore possesses, those items. The position is somewhat similar to that of containers as is evident in the words of Davitt P. in \(Minister\ for\ Posts\ and\ Telegraphs\ v.\ Campbell\) that ‘[n]ormally speaking a person can properly be said to be in possession of the contents of his own dwelling house, but only if he is aware of what it contains.’\(^84\) In \(The\ People\ (D.P.P.)\ v.\ Foley\) the Court of Criminal Appeal opined that ‘of itself, the presence of an article on the accused’s property will not give rise to an inference of possession [but] there are circumstances where an inference of knowledge and control can be drawn … from particular surrounding circumstances.’\(^85\) The question therefore is whether it is open to the trier of fact to infer knowledge and control from the circumstances in which the items are found. In \(Foley\) the drawing of that inference was appropriate given the applicant’s close proximity to the firearms which were on open display.

The inference of possession is of course rebuttable but in some cases a

80. The question whether he had a reasonable opportunity to inspect was not considered by the court and thus we can only speculate on the matter. The jury indicated that they were satisfied that Warner knew that the boxes contained drugs thus rendering consideration of the question of opportunity to inspect redundant.


82. An alternative explanation might be based on the notion of ‘temporary’ possession which has been invoked in American cases; see above at fnn. 30-38; this point was not considered in \(Wright\) but its facts might support the view that the accused’s handling of the drugs fell short of ‘full’ possession.

83. See above at fnn. 68-70.

84. [1966] IR 69 at 73.

court will be prepared to draw that inference where the accused had the opportunity to acquire knowledge of the existence to the item. In *R v. Cavendish*\(^{86}\) it was stated that the mere finding of goods on the accused’s premises does not amount to possession; it must be shown that he had become aware of their existence and that he exercised some control over them or that they came there at his invitation or by some arrangement to that effect. However, the mere existence of an arrangement might not be sufficient to establish possession on the part of the landowner. In *R v. Goddard*\(^{87}\) stolen goods were taken to the appellants’ premises with a view, it appears, to their being distributed. It was held that in the absence of evidence that either of the appellants was present when the goods arrived they could not be said to have had possession of them. This decision adopts a somewhat restrictive approach that might not now commend itself to the courts. In *R v. Peaston*\(^{88}\) a more expansive approach was adopted. The accused occupied a bed-sit in a house which was divided into a number of such units. A letter which was addressed to him and placed on a hall table was found to contain drugs. The accused was unaware of the arrival of the letter but since it had been delivered by arrangement with a supplier he was held to have possession of the drugs.\(^{89}\)

In a number of larceny cases it has been held that a landowner possesses items which are deposited on his land even where he is unaware of their existence.\(^{90}\) This appears to be an exception to the normal knowledge requirement and could be viewed as an anomaly which should be confined to larceny. However, the larceny cases might be explained on the basis that the landowner manifested an intention to exclude others from entering the land and removing anything that might be found thereon. This intention to exclude would provide a basis from which knowledge of the goods might be imputed; and the taking of measures to exclude would establish the requisite degree of control. Thus, in *R v. Woodman*\(^{91}\) a company arranged for the sale of scrap metal which was lodged in its disused factory premises. The purchasers entered the premises and removed the metal but left behind a small amount which they considered to be worthless. Subsequently the site owners erected a barbed wire fence around the site and posted ‘no entry’ signs. They were unaware of the fact that some metal had been left behind by the purchasers. The appellant entered the premises and removed the remaining metal. On a charge of theft the question of possession or control of


87. [1962] 3 All ER 582.

88. (1979) 69 Cr App R 203.

89. See also *United States v. Sawyer* (1961) 294 F 2d 24, cert. denied (1961) 368 US 916 where it was stated that the delivery of goods to a person’s premises by prior arrangement and with his knowledge and consent establishes possession.


the metal arose. The English Court of Appeal held that it was in the possession of the site owners at the time of its removal by the appellant. The Court took the view that where a person occupies a site he is prima facie in control of articles on that site even if he is ignorant that they were there. In this case the site owners took steps to exclude trespassers and this furnished evidence from which the jury could find that they were in control of the site and therefore of the scrap metal. Clearly the fact that they took exclusionary measures influenced the conclusion that the owners possessed the metal. But what if a packet of drugs had been thrown over the fence by an unknown party in an effort to abandon it? It would be manifestly unjust to conclude that the drugs were possessed by the landowner in those circumstances from the fact that he had adopted measures to exclude trespassers. In this circumstance it is probable that a jury would refuse to draw the inferences that might otherwise be justified due to the owner's lack of intention to control contraband. In this respect the case is similar to that of the owner of the handbag into which contraband is slipped - lack of knowledge of the particular item would deprive the individual of possession of it.92

CONTINUITY OF POSSESSION

It has been established in a number of cases that possession is a continuous 'act', or state of affairs to be more accurate. This has two possible consequences. The first is that possession is not disrupted where the accused forgets of the existence of the item. Once an item is in a person's possession it remains so until possession is disrupted or terminated. In this regard possession is not dependent on the individual's powers of memory. In R v. Buswell93 the accused who had been lawfully prescribed drugs forgot about their existence although they remained in his custody all the time. It was held that he did not cease to be in possession of them; moreover the lawful quality of that possession persisted throughout. In R v. Martindale94 a small piece of cannabis was found in the accused's wallet. Two years earlier he had been given the drug, placed it in the wallet and subsequently forgot about it. He was nevertheless held to possess the drug, although in this case the possession was unlawful.95 The second consequence is that since it is a continuous state of affairs all acts of dominion which establish possession are punishable as one. It is not permissible to charge the accused with a

92. See above fnn. 59-66.
number of incidents of possession which occur during the duration of the alleged possession. 96

JOINT POSSESSION

Possession of contraband may be shared by a number of people. Where one person in pursuance of a common design or intention acquires the proscribed item he does so on behalf of all. 97 The participants are considered to have joint possession and each may be convicted of the possession offence. This principle is reflected in The People (Attorney General) v. Kelly and Robinson 98 where the appellant was held to have had joint possession of goods which were held by his confederate. Likewise, where contraband is received by an employee on his employer's behalf the parties share possession of it. 99 The employer possesses the goods constructively since he retains the power of control over them through the hands of his employee. However, in those circumstances it is necessary to establish that the employer in some way authorised the receipt in question or that it was so received on the basis of an arrangement to that effect. 100

POSSESSION AND RESPONSIBILITY

The concern with possession offences is that liability might arise without voluntary conduct on the part of the accused. Instead the accused is held liable for a state of affairs, responsibility for which the law attributes to him. This is compounded by the tendency in some jurisdictions to impose strict liability on certain possession offences, especially drugs' and firearms' offences. Thus, the law approaches the stage where an accused might possibly be made liable for an occurrence in the bringing about of which he had little or no role and in respect of which he might not be blameworthy. In an effort to mitigate the potential injustices which might result from this a number of distinctions and refinements were developed by the law. Hence the emergence of the rule that even in the case of a strict liability offence the prosecution must establish that the accused had knowledge of the existence

98. (1953) 1 Frewen 147.
of the item. Likewise special rules were developed to deal with containers and articles deposited on an accused’s land. Some of the difficulties encountered might have been avoided had the law resisted imposing strict liability in this area. In this event the focus of attention would not have been on technical, and somewhat strained, rules of possession but on the more straightforward issue of whether the accused was blameworthy – did he know the prohibited nature of the item, or was he reckless in that regard? This might adequately resolve problems posed by cases such as that of the woman who has had drugs slipped into her handbag. She would be considered to possess the drugs but would be acquitted on the grounds of lack of mens rea. Likewise it would dispose of cases where the accused is unaware of the nature of the object in his possession. In this way the need for the fine distinctions which are suggested by decisions like Warner v. Metropolitan Police Commissioner would be avoided. Nevertheless this approach leaves the question of possession unresolved and would not provide a satisfactory solution to all possession cases. Cases will arise where the accused clearly has mens rea but the real issue is whether the actus reus ingredient of possession is established. For instance, an employer arranges for his employee to collect a consignment of drugs; the employee is apprehended immediately on taking delivery of the drugs. While it is clear that the employer has mens rea the issue is whether he possesses the drugs. A number of doctrines can be marshalled to allow the conclusion that he does. He could be said to possess the drugs because he and his employee were engaged in a joint enterprise; or it might be that the employer and employee have joint or shared possession of the drugs; or the employee might have been an innocent agent through whom the drugs were possessed. The point, however, is that to focus on blameworthiness alone will not necessarily provide a solution to the problem. Thus the elements that constitute the actus reus of possession offences fall to be considered.

To establish possession it must, of course, be shown that the accused knew of the existence of the item which he controlled or had a capacity to control. Control can be acquired passively and without any physical conduct, such as by manual delivery or physical proximity, on the accused’s part. For instance, goods which are delivered to the accused’s premises, located many miles distant, can quite possibly be in his possession even though he neither is physically present nor has even seen them. In this event possession is established if he either knows of the existence of the goods or they have been deposited in consequence of some arrangement to that effect. At this stage his control over the goods is largely symbolic and it is his

101. See Glanville Williams, Textbook of Criminal Law (2nd ed., London, 1983), p. 944 suggesting that Warner is ‘an abstruse and irrational compromise between liability for fault and strict liability’; its knowledge requirement is ‘an imperfect substitute for mens rea’ at p. 945; Smith & Hogan, Criminal Law (8th ed., London, 1996), pp. 112-113 argue that possession is a neutral concept and problems would not have arisen if there was a fault requirement for possession offences.
mental state in respect of the goods which is of importance to the question of possession. American jurisprudence suggests that the knowledge requirement saves possession offences from constitutional invalidity; the view suggested is that it would be constitutionally impermissible to penalise unconscious possession. This has the attraction of ensuring that cases of planted goods fall outside the scope of possession offences. But in this regard the law comes close to penalising for the existence of a state of mind without an accompanying act or omission. How can it be said that a person who knows that drugs have been deposited (or possibly abandoned) on his premises by others has acted (or for that matter omitted)? Yet the law allows it to be concluded that he possesses the drugs and, other things being equal, he is guilty of a possession offence. One solution to the dilemma is that typically there is antecedent or concurrent conduct which establishes possession – the accused does something to acquire possession. Thus attention might be focused on that which occurred to bring about the accused’s possession. However, the law regards possession as a phenomenon which is distinct from any activity through which it is acquired or retained. The law punishes possession, not the act of acquiring it. It is equally unsatisfactory to classify possession as an omission, namely a failure to dispose of goods which come into the accused’s possession. Possession offences are not typically drafted in terms of a duty to act in defined circumstances and the law is concerned with having possession, not failing to abandon it. A wider reading of the voluntary conduct requirement in the criminal law, which extends beyond acts and omissions, would facilitate possession. The concept can be taken to include the existence of a state of affairs for which the accused may fairly be held responsible and consequently there is little difficulty in concluding that possession meets the law’s requirement. The question then, just as with status offences, is whether the possession offence is justifiable in terms of general principle. In this respect the knowledge requirement is crucial. While that requirement does not necessarily demand blameworthiness on the part of the accused it does ensure that punishment is confined to those who can be considered responsible for the state of affairs which is constituted by possession. Some status offences meet the minimum demands of the criminal law and so too do offences which require conscious possession. Once he knows of the existence of the item the accused normally has a sufficient degree of control to avoid the existence of the circumstances which the law seeks to penalise.

103. Nevertheless the Model Penal Code attempts to bring possession within the act requirement by so defining it and relating it to procurement or retention of the goods; see fn. 24 above. But procurement or retention are logically prior to, and distinct from, possession. The fact that it was considered necessary specifically to define it as being an act is indicative of the dilemma in this regard.
105. See above at fn. 3.
it is not unreasonable to conclude that if one knows of the existence of something lying within one's control one possesses it. On the other hand, the punishment of unconscious possession attracts the same objections which are directed at offences which penalise an unavoidable status. The accused lacks control and is not in a position to avoid breaching the law and, therefore does not engage in voluntary conduct. Hence the importance of the knowledge element in the actus reus of possession.

In summary, it may be said that possession offences satisfy the voluntary conduct requirement if it is possible for an accused to avoid possessing the prohibited substance. This is secured by the imposition of a knowledge element as part of the actus reus of possession and in this way unconscious possession is excluded from the ambit of the offence. While it is not essential to possession that the accused perform a physical act his knowledge of the existence of the items, coupled with a failure to divest himself of them, amounts to the exercise of a choice by him in respect of a state of affairs which lies within his control. In these circumstances it is not objectionable to hold an accused responsible for events which lie within his control and this satisfies the demand for voluntary conduct.