An Evaluation of ‘Possession’ in the Construction of Criminal Liability

Dr Gerard Coffey*

Introduction

The common law did not consider possession a constituent element of the actus reus based on the idea that possession was not equated with the external manifestation of mens rea. However, with the development of the criminal law, with an ever-increasing volume of criminal offences on the statute books,¹ the concept of possession as an element of the actus reus became intrinsically important in the construction of criminal liability.² Although it is passive rather than active possession is an element of certain offences that prohibit the mere possession of objects or substances considered harmful to the public such as illegal drugs,³ child pornography,⁴ offensive weapons,⁵ unlicensed firearms,⁶ and theft offences.⁷

This article evaluates the intricacies of possession in the light of its various forms as an exception to the act requirement in the construction of criminal liability.

Voluntary Act Requirement

Commentators on the classic examination of actus reus typically challenge the voluntary act principle either construing it as a creature of legal doctrine or viewing it as a general metaphysical

¹ LL.B., Ph.D. (NUI), Lecturer in Law, Centre for Crime Justice and Victim Studies, School of Law, UL.
³ The actus reus consists of all elements of an offence other than the state of mind of the defendant (mens rea), which may consist of conduct offences (possession of illegal drugs or firearm), result offences (such as criminal damage), a state of affairs (‘being’ rather than ‘doing’ such as ‘being’ intoxicated in charge of a vehicle) or omission liability (occasionally an omission might amount to the actus reus such as where the defendant was under a common law or statutory duty or duty imposed by law). Possession offences essentially pertain to omission rather than commission liability and have engendered much controversy: Markus Dubber, “The Possession Paradigm: The Special Part and the Police Model of the Criminal Process” in R.A. Duff and S. Green (eds.), Defining Crimes (Oxford University Press, 2005); Markus Dubber, “Policing Possession: The War on Crime and the End of Criminal Law” (2000–2001) 91 J. Crim. L. & Criminology 829; Charles Whitebread and Ronald Stevens, “Constructive Possession in Narcotics Cases: To Have and Have Not” (1972) 58 Va. L. Rev. 751.
⁶ Firearms and Offensive Weapons Act, 1990, particularly section 7 (possession, sale, etc., of silencers), and section 9 (possession of knives and other articles).
⁷ Firearms Act 1971; Firearms and Offensive Weapons Act 1990; Criminal Justice Act 2006 (possession of illegally imported fireworks with intent to supply; mandatory minimum sentences, of between five and ten years, for certain firearms offences, including possession of a firearm in suspicious circumstances, possession of firearm with criminal intent, possession of a firearm with intent to endanger life or cause serious injury to property possession of a firearm while hijacking a vehicle, use or production of a firearm to resist arrest).
truth about human actions. Status offences are compatible with the voluntary act requirement because acts may consist of a state of affairs instead of an event per se. Exceptions to the voluntary act requirement include possession offences that prohibit the state of possessing a prohibited object or substance. The meaning of ‘possession’ is a term of art in criminal law and defined in terms of either an act of acquiring possession or an omission to rid oneself of possession, which are prerequisites to criminal liability. Possession offences do not conflict with the voluntary act requirement, at least to any greater extent than that presented by omission liability considerations.  

Defining Possession

The word ‘possession’ remains one of the most elusive and ambiguous of legal constructs. In The People (DPP) v Ebbs, O’Donnell J opined:

“Possession is unusual in the criminal law, in that what is criminalised is a state, rather than an activity. It is clear that the concept of possession in criminal law necessarily involves an irreducible element of knowledge. One fixed point in the otherwise confused law of possession is that a person does not possess something of which he or she is unaware….The point is also well illustrated in those drugs cases where it was necessary to consider whether the modern misuse of drugs legislation made possession of a drug a strict liability offence in the sense that it was not necessary for the prosecution to prove that the accused knew that he or she had a specific drug, or indeed a controlled drug at all…[T]he actus reus of possession involves knowledge that the person possesses ‘something’. In many cases this is illustrated by the negative proposition that a person cannot be said to possess something which is slipped into his or her handbag, pocket, or some other place over which he or she has control.”

A notable feature of this judicial statement is that knowledge required to establish possession pertains to the actus reus rather than the mens rea, that is to say, in the absence of proof that defendant was aware of the existence of the prohibited objects or substance there is no proof of the physical element of possession.

The superior courts have grappled with a definitive meaning of possession in criminal law, typically invoking descriptive terms rather than definition. Warner v Metropolitan Police Commissioner dealt with the question whether the defendant had been proved to have knowledge of the substance at issue (illegal drug). Lord Wilberforce defined possession as:

“...a concept which is both central in many areas of our legal system, and also lacking in definition....In relation to it we find ... law ... working by description rather than by definition. Ideally, 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

---

12 This requirement is independent of mens rea considerations once the defendant is proved to have had possession of the prohibited objects or substance or substance.
13 In The People (DPP) v Foley [1995] 1 I.R. 267 at 290 Budd J opined: “It is clear that the concept of possession is one of the most difficult in our law and has created a dilemma difficult of resolution in many common law jurisdictions.” Likewise, in R v Boyesen [1982] A.C. 768 at 773-774, Lord Searman stated: “Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do not possess it unless you know you have it.”
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. Naturally this has led to a number of distinctions and even inconsistencies in borderline cases, such as where a person receives something without knowledge of either the existence or character of other things contained in it, or where he receives one thing thinking that it is something else, or that it has a different value or a different character from what it really has.\footnote{[1969] 2 A.C. 256 at 309-310.}

While this is the ideal concept of possession in criminal law, it does not necessarily arise in all circumstances. The legal meaning of possession in the construction of criminal liability needs to be examined in relation to its legislative context and purpose.\footnote{Possession offences appear both in the general part (as a variety of inchoate liability) and the special part (attached to particular offence categories) of criminal law and as specific offences (such as possession of controlled drugs, weapons, stolen property).}

The distinguishing features of possession and ownership, together with the nuances of possession, are inherently complicated. Possession does not have the same legal meaning as ownership in that the owner of an object or substance may not always possess the object or substance.\footnote{Whereas the owner of a car could lend it to someone else to drive and the driver would then possess the car, the owner does not give up ownership simply by lending the car to someone else.} To avoid confusion over exactly what is meant by possession, the word is frequently modified by adding a term describing the type of possession.\footnote{Possession in law may be actual, constructive, exclusive, illegal, joint, legal, physical all of which originate from 'actual possession.'}

**Knowledge of the Object or Substance**

A key element in possession offences is that the defendant has knowledge of the object or substance over which he has control, since without such knowledge control cannot be exercised. Possession is passive therefore the mental element is knowledge meaning the defendant is aware that he possesses the object or substance. A person does not possess something of which he is unaware.

In *The People (AG) v Nugent and Byrne*,\footnote{(1964) 1 Frewen 294.} the defendants were convicted of receiving stolen money that was found in a car driven by the first defendant and in which the second defendant was a passenger. Their defence was that they did not know that the money was in the car. The Court of Appeal allowed the appeal holding that the onus of proof was on the prosecution to prove knowledge on the part of the defendant that the money was in the car. It was necessary for the prosecution to prove that the driver knew of the existence of the stolen money that was discovered in the car.\footnote*Cf. The People (DPP) v Goulding* [2010] IECCA 85. *Nugent and Byrne* was applied in *Minister for Posts and Telegraphs v Campbell*,\footnote{[1966] I.R. 69.} where the defendant was charged with possession of an unlicensed television set in a house of which he was the occupier. The television licence inspector was let into the house by a woman who was in the house at the time that he called. Davitt P. noted that there was no evidence as to how the television set came to be in the house, nor as to whether the defendant had any knowledge of its presence, nor did he have any control over the woman who let the inspector in. On a consultative case stated the High Court held that the complainant (Minister) had not discharged the onus of showing that the defendant, at the relevant time, kept the television set or had it in his possession,
either actual or constructive, and that the District Justice accordingly would be correct in law in dismissing the charge. Davitt P. concluded that the evidence was consistent with the television set being put into the house without the knowledge or consent of the defendant. It was necessary for the prosecution to prove that the defendant knew of the existence of the unlicensed television set that was found on his premises.

Proximity can be an important issue pertaining to the knowledge element of possession. In *R v Whelan*, the defendants were found by the police in a room occupied by 14 other people. A revolver and ammunition was found in the room on top of a cupboard and covered by clothes. Each of the three defendants denied possession of the gun and asserted that the gun had been ‘planted’ by the police. The Court of Criminal Appeal noted that although there was very strong evidence that somebody was guilty of an offence in connection with the revolver and ammunition, there was nothing to indicate which individual was guilty, and insufficient evidence on which to found the inference that all three persons were in possession. The convictions were quashed. *Whelan* was distinguished in *The People (DPP) v Foley*, where the three defendants were found in a room with firearms and ammunition. The objects were in reasonably plain view in the room. One of the defendants stated that he was there innocently, which the jury believed and he was acquitted. The other two were convicted. The essential point was that the firearms were out in the open. Foley was sitting on the bed beside a shotgun and a handgun was also clearly visible. The two defendants were convicted of possession by the Special Criminal Court, but a third defendant was acquitted on the basis of his explanation that he called to the premises only on a casual visit. The Court of Criminal Appeal concluded that it was impossible, in the absence of any explanation, to find that the defendant was innocently sitting on the bed alongside the gun without being part of an enterprise that he, together with the occupier of the house (who was convicted but did not appeal), should have possession of it as well as the handgun and ammunition. Budd J. stated:

“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 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 superior courts may draw reasonable inferences from the facts of the case, particularly where the defendants had clearly engaged upon a common enterprise. While all inferences are rebuttable by evidence to the contrary the court will more likely draw inference in circumstances where the defendant had an opportunity to gain knowledge of the existence of the prohibited object or substance.

*Whelan* and *Foley* are distinguished with regard to the inferences that the jury could draw from the facts tendered in evidence. In *Whelan*, the prosecution could not establish that the defendants

---

26 Cases such as these indicate the need for the courts to be able to draw reasonable inferences; see also *The People (DPP) v O’Neill* [1997] 1 IR 365.
knew of the existence of the concealed weapons, whereas in Foley that knowledge could be inferred from the facts, that is to say, the visible proximity of the weapons to the defendants together with the absence of a reasonable explanation of the defendant’s presence in the room at the pertinent time.27

In The People (DPP) v Byrne,28 the Court of Criminal Appeal held that the prosecution had first to establish possession which involved knowledge that the defendant had something and then the onus would shift to the defendant to seek to prove (on the balance of probabilities) that he did not know that what he had in his possession was a controlled drug. The Court held that the prosecution had to prove that each of the defendants had “and knew that he had, the bales in his control, that they further knew that the bales contained something....” 29

In The People (DPP) v Power,30 the Supreme Court considered whether it was a necessary element in the offence contrary to section 15A of the Misuse of Drugs Act 1977 that the defendant was aware that the market value of the controlled drug alleged to be in his possession was greater than the statutory amount. The defendant was convicted and appealed to the Court of Criminal Appeal on the basis that the trial judge failed to direct the jury that it was necessary to prove that the accused was aware the value of the controlled drug alleged to be in his possession exceeded the statutory amount. The Court held that section 15A did not require knowledge of the value of the drugs involved in the offence. On further appeal to the Supreme Court on a point of law, the Court held that in the prosecution of an offence contrary to the section 15A it was not necessary for the prosecution to establish the defendant knew or ought to have known the market value of the controlled drugs. It is necessary for the prosecution to prove that the defendant had in his possession controlled drugs above a certain value and it would not be necessary to establish that the defendant had actual knowledge of the value of the drugs.

**Control Over the Object or Substance**

The defendant must have actual or constructive control of an objects or substance to be legally in possession. In The People (AG) v Kelly and Robinson,31 the defendants were found in a room by the police in the presence of two others who appeared to be sorting through stolen goods. The two others pleaded guilty to stealing the goods, and the issue was whether the two defendants were also in possession of the stolen goods and therefore whether a conviction for receiving stolen goods would stand. The jury were instructed that unless they were satisfied that the defendants had control over the goods, or that the goods were being held for them, they should acquit the defendants. One of the defendant’s explanations for being in the room was that he was delivering eggs to the homeowner’s sick child, but the jury clearly did not believe his explanation and convicted him. The issue on appeal was whether the jury had been properly instructed on the meaning of possession in law and the Court of Criminal Appeal held that they were. However, if the jury had believed him, he would have been acquitted. Thus, on the facts of the case the issue was whether the meeting was held for the purposes of dividing the stolen goods, and the purpose of the defendant’s presence was essential to whether he possessed the goods.

---

27 In Whelan the firearm had been concealed under clothing on top of a chest of drawers, whereas, in Foley a sawn-off shotgun had been on the bed in close proximity to the defendant.
31 (1953) 1 Frewen 147.
In *R v Murphy, Lillis and Burns*, three men were found guilty on charges of being in possession of unlicensed firearms and ammunition. They appealed against conviction on the ground that the jury had been misdirected on the legal meaning of possession. The factual circumstances of the case were that three men had entered a premises consisting of a shop and dwelling-house. When the premises were searched by army personnel, the men were found in rooms, which contained two rifles and a quantity of ammunition. The Court of Criminal Appeal held that the concept of possession connotes voluntary possession by actual or potential physical control, with knowledge of the nature of what is kept or controlled, and held that there was sufficient evidence to uphold the convictions. MacDermott L.C.J. stated:

“Possession is an ambiguous word and one which ... is always giving rise to trouble. Its precise meaning must depend on the context and policy of the statute using it and no comprehensive definition is therefore possible or desirable.”

The question of momentary possession was considered. The Court suggested that picking up a pistol with a view to throwing it into the river would amount to possession, while picking it up with the intention of handing it in to the police would not. Thus, if the purpose of picking up the gun, or presumably some other objects or substance with similar characteristics, has a justifiable purpose, it will not constitute legal possession, while picking it up with the intention to abandon it does.

**Characteristics, Qualities and Quantities**

There is a distinction in criminal law between knowledge of the existence of an objects or substances and knowledge of its characteristics and qualities. If the offence charged is one of strict liability, then the prosecution need only establish knowledge of the existence of the item. In *Warner v Metropolitan Police Commissioner*, the defendant was charged with having drugs in his possession. His evidence was that he believed that a bottle in his possession contained scent while, in fact, it contained prohibited drugs. The House of Lords held that the prohibited conduct was a strict liability offence and, consequently, all the prosecution needed to establish was the defendant’s knowledge of the existence of the item. The question then arises as to what characteristics of the objects or substance the defendant needs to know. Lord Pearce stated:

“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. It would be otherwise if I believed them to be something of a wholly different nature. At this point a question of degree arises as to when a difference in qualities amounts to a difference in kind. That is a matter for a jury who would probably decide it sensibly in favour of the genuinely innocent but against the guilty.”

The object or substances in question must in every respect be physically distinct to exculpate the defendant of criminal liability. With regard to containers, the general rule of law is that a defendant will be held to have knowledge of anything in a container, which is in his possession as long as he thinks that there is something in the container. However, if the defendant thinks the container is empty, then knowledge will not be imputed. In *Warner*, it was held that knowledge will be imputed if the defendant had an opportunity to acquaint himself with knowledge of the contents of the container, but didn’t. Essentially, an inference will be made that the defendant has knowledge of the

---

contents and bears the onus of proving that in fact he did not have knowledge. It is a question for the jury to decide.

The legal distinction between knowledge of an object or substance and knowledge of its qualities seems to have been clarified by the superior courts, especially in relation to cases where the defendant alleges the object or substance at issue were planted on his person or property. In R v McNamara, the defendant was found with a box that contained cannabis and he claimed that he thought the box contained pornographic or pirated video tapes. The defendant claimed not to have possessed the cannabis. The Court of Appeal upheld his conviction and held that once the defendant knew of the existence of a thing that is within his control he is deemed to possess it and a mistake as quality is insufficient to prevent the defendant from having possession. Lord Lane CJ, delivering the judgment of the Court of Appeal, propounded the following propositions of law based on the ratio decidendi of Warner:

“First of all a man does not have possession of something which has been put into his pocket or into his house without his knowledge: in other words something which is ‘planted’ on him, to use the current vulgarism. Secondly, a mere mistake as to the quality of a thing under the defendant’s control is not enough to prevent him being in possession. For instance, if a man is in possession of heroin, believing it to be cannabis or believing it perhaps to be aspirin. Thirdly, if the defendant believes that the thing is of a wholly different nature from that which in fact it is, then the result … would be otherwise. Fourthly, in the case of a container or a box, the defendant’s possession of the box leads to the strong inference that he is in possession of the contents or whatsoever it is inside the box. But if the contents are quite different in kind from what he believed, he is not in possession of it.”

If the quantity of an object or substance in custody or control is minute, the question arises as to whether it so minute that it cannot be proved that the defendant knew he had it. If knowledge cannot be proved, possession would not be established.

The ‘usability test’ in drug possession cases is problematic. The issue is not usability per se but possession. Quantity can be instrumental in two respects when the courts have to determine whether or not a defendant has a controlled drug in his possession: first, whether the quantity is sufficient to enable a court to find as a matter of fact that it amounts to something; secondly, whether it is visible, tangible, and measurable, it is certainly something. The issue is one of fact for the common sense of the jury.

**Constructive Possession**

Constructive possession pertains to a situation where a defendant is deemed to have control over the prohibited object or substance without actually having physical control. A defendant with constructive possession remains in the same legal position as a person with actual possession. Conversely, constructive possession segregates possession from custody. In other words, constructive possession is where the objects or substances are held by someone over whom the possessor exercises an element of control. In this context, the constructive possessor may call for the delivery of the goods and possesses them through the custodian.

---

38 Actual possession is where someone holds the object or substances physically and legally, that is to say, a merger of custody and possession; see The People (DPP) v Gallagher [2007] 2 I.R. 246.
Constructive possession indicates that the object or substance is not on the defendant’s person, but is within the defendant’s area of control, such as inside a house or vehicle with the defendant. More than one defendant can be in possession although this would clearly be a constructive possession for at least one of them. Constructive possession is a legal theory used to extend possession to situations where a person has no hands-on custody. It exists where a defendant has knowledge in addition to the ability to control the object or substance, even if the person has no physical contact with it.\textsuperscript{39}

In \textit{Minister for Posts and Telegraphs v Campbell},\textsuperscript{40} judgment was given on a case stated from the District Court in respect of an unlicensed television set. The High Court held that the complainant had not discharged the onus of showing that the defendant, on the specified date, kept the television set or had it in his possession, actual or constructive. Davitt P. explained the elements of possession in the following terms:

“...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. Normally 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. He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge. Assuming, for the sake only of the argument, that the evidence established that the cottage was the defendant’s dwelling house, there is in this case no evidence as to how the television set came to be there, how long it was there, or whether the defendant was ever at any time aware of its presence or existence. There is therefore no evidence that it was ever actually in his control or possession. There is no evidence as to who was the woman who was present in the house on the occasion of [the inspectors] or as to what was her relation, if any, to the defendant. There is nothing to indicate that he had any control over her actions. There are therefore no grounds for concluding that he had constructive possession of the television set. As far as the evidence goes, the set may have been placed in the cottage without his knowledge or consent.”\textsuperscript{41}

In \textit{Sullivan v Earl of Caithness},\textsuperscript{42} the defendant was charged with an offence of possessing firearms without holding a firearms certificate. He lived in Oxfordshire and kept the firearms in his mother’s house in Surrey. The defendant argued that he did not possess the firearm and therefore did not require a certificate. May J. stated:

“Looking at the context of the word ‘possession’ ... I have no doubt that one can be in possession of a firearm even though one is at a place other than that at which the firearm physically is. To agree with the justices’ decision in the present case would in my view effectively be to equate the word ‘possession’ ... with custody, and this I am satisfied would be wrong....[T]he owner of a firearm who does not at the relevant time have physical possession of it can nevertheless truly be said still to be in possession of it. In the present case

\textsuperscript{39}For example, people often keep important papers and other valuable items in a bank safety deposit box. Although they do not have actual physical custody of these items they do have knowledge of their existence and the ability to exercise control over them. Thus, under the doctrine of constructive possession, they are still considered in possession of the contents of their safety deposit box.

\textsuperscript{40}[1966] I.R. 69.

\textsuperscript{41}[1966] I.R. 69 at 73.

\textsuperscript{42}[1976] Q.B. 966.
the defendant was at all material times the owner of the firearms. He could no doubt obtain them from his mother’s flat at any time when he wanted them. She had the barest of custody of them, not because she had any interest in them, but because her flat was safer than the defendant’s home in Oxford.”

Although the defendant left firearms in his mother’s house, he was nevertheless deemed to have had constructive possession. Thus, the meaning of possession in the construction of criminal liability includes situations other than mere physical custody.

In Williams v Douglas, the meaning of constructive possession was considered by the High Court of Australia. The defendant, Williams, while staying at a hotel, acknowledged that he owned certain gold bars, which were found in a bathroom some distance from his bedroom and which was used by all lodgers on the same floor as Williams. The contraband gold bars were held to be in William’s possession or control within the meaning of section 36 of the Gold Buyers Act 1921. Rich J. said:

“Possession does not mean actual physical possession or manual detention. ‘Suppose I request a bystander to hold anything for me, it still remains in my possession. So also possession may be required or retained over goods which are in the manual detention of a third person’: R. v. Sleep (1861) Le. & Co. 44 ... per Willes J. And the phrase possession and control denotes the right and power to deal with the article in question. In the instant case the question resolves itself into one of fact. In any given case it is necessary to take into consideration all the circumstances and the nature of the thing the subject of the inquiry. In the circumstances of this case as the accused claimed the gold when it was ‘discovered’ I consider that the inferences which can be drawn are that the accused knew that the gold was concealed under the bath, that it was placed there by himself or an accomplice and to use the words of Dwyer C.J. that ‘he could have got it when he wished’. He had it as effectually under his control or his de facto possession as if he had locked it in a box in the bathroom, a box of which he and he alone had the key, or if you like he and an accomplice alone had keys.”

Latham C.L., with whom Dixon J. and McTiernan J. agreed, stated:

“The result is much the same as if the word ‘actual’ had been written before the word ‘possession’; but de facto possession is a conception which is itself much more extensive than that of physical custody. It is wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident.”

This case is authority for the proposition that a person may be held in law to possess something, which could be many miles away from his person.

Containers

The contentious issue is that a defendant will typically claim that while he was aware of the existence of the container he did not know that it contained prohibited objects or substances. It is sufficient for the prosecution to establish that the defendant had control of the container, that he knew of its existence and that there was something in it, and that the something was in fact the

---

44 (1949) 78 C.L.R. 521.
45 (1949) 78 C.L.R. 521 at 527.
46 (1949) 78 C.L.R. 521 at 526.
object or substance which the prosecution alleges it to be. The prosecution does not have to prove that the defendant knew that the item was a controlled drug.

Warner and McNamara were concerned with possession of a parcel or a package and its contents, and the outcome of both cases suggests the prosecution only need to prove that the defendant knew of the existence of the contents but not their nature. Therefore, once the defendant becomes aware that the container holds something then he is deemed in law to possess the object or substance regardless of his mental state as to their nature. Conversely, the defendant will not be held to have possession of the contents if he honestly believed that the container was empty. In Warner, Lord Pearce and Lord Wilberforce suggested a defence in that the defendant might be said to be in possession of a parcel but not the contents. The court will consider the defendant’s state of mind in relation to the contents and may draw inferences that the defendant knew, or had the opportunity to become aware, of the existence of contents of which he clearly had control. The court may consider the weight, bulk, appearance and circumstances in which the packet was held. Ultimately, the court would be unlikely to accept the defence that the defendant mistakenly believed the container to be empty.

If objects or substances have been surreptitiously placed in a container, such as a backpack, which of the defendant is aware, then he will not be deemed to have knowledge of the prohibited items. Cases such as Warner might be distinguished from the backpack scenario where the innocent party has prohibited objects or substances planted, by the fact that the defendant in Warner knew of the existence of the items of which some transpired to be prohibited. The defendant expected to collect containers of bottles of scent but instead received bottled containing drugs. Therefore, the defendant knew of the items, which it transpired, out to be prohibited. If the defendant in Warner had collected the container with bottles of scent, with a packet of prohibited drugs surreptitiously concealed then this would correlate to the backpack scenario ad the court would probably find that he did not possess the drugs, based on the fact that he would not have known of the existence of the concealed packet. Furthermore, the defendant in Warner had the opportunity to inspect the container.

It is clear from the speeches of Lords Pearce and Wilberforce in Warner that there was a distinction to be made between the mere physical custody of an object or substance and its possession, and that possession connotes a mental element of some sort. Thus, if the defendant had not availed of all reasonable opportunities to familiarise himself with the content, and the circumstances that exist, then the court may impute knowledge. Warner was applied in R v Wright, where the defendant threw a tin can out of a car which was found to contain cannabis. He claimed that he had done so at the driver’s request, but had not known that anyone in the car had drugs. He admitted that on being told to throw the tin away, he had suspected that the tin might contain drugs. The trial judge directed the jury that possession meant simply custody and control. The defendant was convicted and on appeal, the Court of Appeal, allowing the appeal, held that the conviction must be quashed because the jury had been wrongly directed. MacKenna J stated:

“If a person is handed a container and at the moment when he receives it does not know or suspect, and has no reason to suspect, that it contains drugs, and if, before he has time to

51 In Warner, the jury were satisfied that the containers contained drugs however, the issue as to whether he had a reasonable opportunity to inspect the containers was not considered by the Court.
examine the contents, he is told to throw it away and immediately does so, he cannot, in our opinion, be said to have been in possession of the drugs which happened to be inside the container so as to be guilty of an offence…. This is so even though the instruction to throw away the container, which he instantly obeyed, made him suspect that there was something wrong about its contents. That was the defence by which the appellant Wright sought to meet the prosecution’s case and if the jury accepted it, or thought that it might possibly have been true, they should have acquitted him. The judge ought to have given the jury a direction to this effect. He did not do so, and the failure was a fatal defect.”

Thus, if a person is handed a container but at that moment he does not know or suspect, and has no reason to suspect, that it contains prohibited object or substances, and he is then instructed to throw it away and immediately does so, he has not been in possession even though the command to throw it away gave rise to suspicion.

Continuous Possession

Possession can be a continuous act or state of affairs, depending on the factual circumstances of the case under consideration. For instance, it may be the case that possession has not been disrupted merely because the defendant has forgotten the objects or substances existence, and the policy of the law is that once an item is on the defendant’s possession it remains until possession is disrupted or terminated. In R v Buswell,\(^5^4\) the defendant who was under treatment for drug addiction was given amphetamine tablets on a prescription. He put the tablets in the pocket of his jeans. Later when he could not find the tablets and discovered that his jeans had been washed he concluded that the tablets had been dissolved in the wash. Accordingly he went to his doctor and was given a second prescription for tablets to replace those that he believed had been destroyed: in fact they were in the back of a drawer in his room. Ten months later, after the end of his course of treatment, the defendant rediscovered the tablets in the drawer. He consumed some of them and the police found him in possession of the remainder. The defendant was convicted of being unlawfully in possession of controlled drugs. On appeal against his conviction, the Court of Appeal allowing the appeal, held that where a person mislaid an item or thought erroneously that it had been destroyed or disposed of, if in fact it remained in his care and control he did not lose possession. Consequently, the defendant remained in possession of the tablets by virtue of the original prescription, his possession was lawful and the conviction was quashed. Thus, possession in the construction of criminal liability does not depend on the defendants powers of memory.

In R v Martindale,\(^5^5\) a small amount of cannabis resin was found in the wallet of the defendant, who claimed to have forgotten about it. Notwithstanding that it was found two years after he had first come into possession of it, he was deemed to have possession. He was charged with unlawful possession. The defendant sought a ruling on whether he had a valid defence on the assumption that he had been given the drug over two years previously in Canada, that he did not smoke cannabis, and had completely forgotten about it so that he could not be said to be in possession. The trial judge held that the assumed facts could not constitute a defence, so the defendant pleaded guilty and was convicted. He appealed against the conviction on the ground that possession did not exist in the absence of knowledge of the item’s presence and nature, and furthermore that knowledge did not exist if the defendant had forgotten that he had the article in his possession. Lord Lane C.J. stated:

\(^{54}\) [1972] 1 W.L.R. 64.
“It 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....Here the appellant himself put the cannabis in his wallet knowing what it was and put the wallet into his pocket. In our judgment, subject to the authorities, to which reference will have to be made in a moment, he remained in possession, even though his memory of the presence of the drug had faded or disappeared altogether. Possession does not depend upon the alleged possessor’s powers of memory. Nor does possession come and go as memory revives or fails. If it were to do so, a man with a poor memory would be acquitted, he with the good memory would be convicted.”

On the facts of the case, the Court of Appeal upholding the conviction, held that although a defendant did not necessarily possess every article which he might have in his pockets, possession did not depend on the powers of memory of the defendant and did not come and go as memory revived and faded. Consequently, since the defendant had himself placed the controlled drug in his wallet he was then in possession of it and he remained in possession even though his memory of its presence had faded.

**Objects or Substances Found on Land or Premises**

If prohibited objects or substances are found on the defendants land or in premises that he owns or controls he is deemed in law to possess those items. This issue was exemplified by Davitt P. in *Minister for Posts and Telegraphs v Campbell* where the High Court per Davitt P held that the prosecutor had not discharged the onus of showing that the defendant kept the item, in this case an unlicensed television, or had it in his possession either actual or constructive and further that the District Justice accordingly was correct in law in dismissing the charge against the defendant. Likewise, in *The People (DPP) v Foley*, the Court of Criminal Appeal per Budd J opined:

> “Was there sufficient evidence in the transcript from which the court of trial could reasonably have drawn the inference that the applicant intended to exercise control, either exclusively or in common design with others, over the shotgun? On the authorities it is clear that the finding of an unlicensed firearm hidden in a person’s car is not proof of his possession of it unless the prosecution proves that he knew the gun was there; moreover, of itself, the presence of an article on the accused’s property will not give rise to an inference of possession. However, there are circumstances where an inference of knowledge and control can be drawn from the open and obvious presence of an article in circumstances where the accused’s relationship to it would lead to a conclusion that he had knowledge of its presence.”

The issue will depend on whether the court may infer knowledge and control from the circumstances of the case under consideration in which the prohibited items were found. In cases, such as *Foley* where the defendant was in close proximity to the firearms that were on open display, the proximity of the defendant to the prohibited items will make the inference more likely.

**Common Design and Possession Offences**

---

56 [1986] 1 W.L.R. 1042 at 1044.
Possession offences may involve a common design, or joint enterprise, whereby possession of the prohibited items may be shared among several people. If a defendant acquired the prohibited objects or substance in pursuance of a common design then he does this on behalf of all co-defendants to the joint enterprise who are deemed to have joint possession and each may be convicted accordingly. In The People (DPP) v O’Neill, five defendants and one co-defendant were tried in the Special Criminal Court for offences of possession of explosive substances in such circumstances as to give rise to a reasonable suspicion that they did not have them in their possession for a lawful purpose and having the substance in their possession with intent to endanger life or to cause serious injury to property. The five defendants were convicted. On appeal, the Court of Criminal Appeal held that the court had to determine the appropriate inference to be drawn from the facts and that on the evidence it was reasonable to find that the defendants were engaged upon a common purpose and there was ample evidence that the defendants conduct were criminal offences. Furthermore, without a finding of common enterprise it is difficult to infer common knowledge but in the absence of any explanation by the defendants it was impossible to conclude that the activities of the defendants were other than central to the business of preparing explosives and that they must be held to have had possession of them. The defendants appeal was dismissed.

**Possession Offences and Preventive Justice**

Possession holds a unique position in the criminal law and can also be a form of preventive justice. The imposition of criminal liability has been increasingly used for the purpose of preventing or reducing the risk of anticipated future harm typically criminalising prohibited conduct at an early stage. Criminal possession, especially of controlled drugs, has been a major source of controversy, as this mode of liability allows for arrests and convictions without necessarily proving the use or sale of a controlled substance. In order to mitigate the possibility that innocent persons might be prosecuted and convicted for possession offences it is essential that the prosecution’s evidence includes more than just a temporal and spatial nexus between the defendant and the prohibited item.

**Conclusion**

Possession offences are specifically designed for ease of enforcement thus reflecting an approach to criminal liability with an emphasis on crime control. These offences are, as a general rule, consistent with situational liability in that the prosecution do not have to establish the voluntarily taking possession of the prohibited object or substance. It is sufficient to establish the defendant was in possession. Whether or not possession offences are consistent with the voluntary act requirement, criminal liability is nonetheless imposed on the basis that the defendant voluntarily remained in possession.

Possession offences may potentially circumvent traditional notions of imputed liability through the doctrine of constructive possession, which accommodates vicarious liability (through dominion over a person) and spatial liability (through dominion over an area). These offences resist categorisation according to the traditional distinction between conduct and status offences.

---


62 Cf. The People (AG) v Nugent and Byrne (1964) 1 Frewen 294, The People (AG) v Kelly and Robinson (1953) 1 Frewen 147.


Moreover, they challenge the traditional distinction between voluntariness and *mens rea* in the construction of criminal liability.