

83. Unintentional Intoxication: s 28

83.1 Legislation

[Last reviewed: February 2025]

Criminal Code

[Section 27](#) – Insanity

[Section 28](#) – Intoxication

83.2 Commentary

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Section 28(1) makes it clear that the provisions of s 27 ‘apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means’. In *R v Smith* [1949] St R Qd 126, Macrossan CJ held at [130] that:

‘The first paragraph of s 28 in very plain language applies the provisions of s 27 to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by any other means. The effect of this is the same as if there were inserted after the words ‘natural mental infirmity’ the words ‘or his mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by other means.’

Consequently, a Defendant will not be responsible for an act or omission if at the time of the act or omission the Defendant was, as a result of unintentional intoxication, deprived of one of three capacities:

- (1) To understand what he/she was doing;
- (2) To control his/her actions; or
- (3) To know that he/she ought not to do the act or make the omission.

The onus of proof is placed on the Defendant, on the balance of probabilities (see *R v Foy* [1960] Qd R 225, [240]).

In circumstances where unintentional intoxication did not deprive the Defendant of these capacities, it may still be relevant to whether the Defendant was able to form the intent necessary to prove offences of specific intent (s 28(3)). See further **Chapter 84 – Intentional Intoxication**.

83.3 Suggested Direction

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(The suggested direction is tailored to circumstances where the provisions of s 27 are to be applied. Where appropriate to the state of disorder, substitute 'stupefied' for 'intoxicated' throughout the direction).

The Defendant says [he/she] was intoxicated through no fault of [his/her] own at the time when [he/she] did the things which constitute the charge against [him/her]. If that is so, you will need to consider if the liquor [or drugs] which caused this intoxication disordered [his/her] mind.

Every person is presumed to be of sound mind until the contrary is proved. As the Defendant contends that [he/she] was not of sound mind, [he/she] must prove that. The Defendant does not have to prove that beyond reasonable doubt. It is enough that the Defendant satisfies you that it was more probable than not that [he/she] was not of sound mind when [insert event]. Proving this involves three steps:

- 1. The first step is to prove that the intoxication was caused without any intention on the part of the Defendant.**
- 2. The second step is to prove that the intoxication disordered the Defendant's mind. The medical evidence provides guidance about the effect of drugs on how the mind functions. Among people there is a range within which normal, ordered minds function. The Defendant must satisfy you that [his/her] mind was functioning so differently at the time that you can say it was disordered. You should consider all of the evidence, including the medical opinions, in considering whether the Defendant's mind was disordered at the time [he/she] is alleged to have [insert essence of prosecution case].**
- 3. The third step is to decide whether the Defendant's disordered mind had one or more of the following consequences: did it deprive the Defendant of the capacity to understand what [he/she] was doing, or did it deprive the Defendant of the capacity to control [his/her] actions, or did it deprive the Defendant of the capacity to know that [he/she] ought not to do the act [substitute 'make the omission', where appropriate] in question?**

Again, you will be guided by the medical evidence.

It is not necessary to explain further what is involved in a loss of understanding of what [he/she] was doing, or of a loss of control of [his/her] actions. A loss of the ability to know what [he/she] did was wrong means that, because of intoxication, [he/she] was quite incapable of taking into account the considerations which go to make right or wrong.

If the Defendant satisfies you that it was more probable than not that, because of unintended intoxication, [his/her] mind was disordered so that [he/she] was deprived of one or more of these capacities, you should find [him/her] ‘not guilty on account of unsoundness of mind’.

The essence of the evidence you need to consider in deciding these issues is:[refer to the evidence].