

Insanity: ss 26, 27(1), (2), 28(1), (2)

If you are satisfied beyond reasonable doubt that the defendant committed the offence with which he has been charged, you will need to consider the effect of the evidence about his state of mind.

Every person is presumed to be of sound mind, that is sane, and to have been of sound mind at any time which comes into question until the contrary is proved.¹

The defendant contends that he was not of sound mind [or the evidence in this case raised the question whether] when he did the things which constitute the offence with which he is charged. The defendant must satisfy you of this fact, but does not have to do so beyond reasonable doubt. It is enough if you are satisfied that it is more probable than not that he was not of sound mind when he did the act constituting the offence.

The defendant will not be criminally responsible for the offence if, when doing the act (or making the omission) which constituted it, he was in a state of mental disease or natural mental infirmity that it had one or more of the following consequences, namely, deprived him of the capacity to understand what he was doing, or of the capacity to control his actions, or of the capacity to know that he ought not to do the act (or make the omission).

Putting it another way, the question is whether the defendant had a mental disease or natural mental infirmity which took away his ability to understand what he was doing, or to control his actions, or to know that he ought not do the act or make the omission.

A mental disease, or disease of the mind, is a condition that affects the functions of the mind, its ability to reason, remember and understand. Were the functions of reason and understanding deranged or disordered from some mental disease or natural mental infirmity?

The next point to consider is whether that disease or infirmity took away the defendant's capacity to know the nature and quality of the act he was doing at the time of committing the offence; or the capacity if he did know it, to know that what

¹ Where there is evidence before the court which could justify the finding by the jury of a verdict of not guilty on the ground of insanity, it is the duty of the trial judge to give the appropriate direction to the jury and to leave the decision thereon to them, notwithstanding that the defence does not seek to raise such an issue: *R v Meddings* [1966] VR 306.

he was doing was wrong when judged by the standards of ordinary reasonable people; or the capacity to control his actions. A loss of the capacity to know that what he did, or omitted to do, was wrong means that, because of the mental disease or natural mental infirmity, the defendant was deprived of taking into account the considerations which determine whether something is right or wrong. That is, that he was unable to reason about the rightness or wrongness of the act or omission.

You are not obliged to accept the opinions of the doctors but should evaluate their evidence by having regard to all of the evidence and the circumstances which are relevant to the defendant's state of mind.²

If you are satisfied that it was more probable than not that, because of mental disease or natural mental infirmity, the defendant was deprived of one or more of the capacities, you should find him not guilty on account of unsoundness of mind. Before you can reach that verdict, you must be satisfied that the defendant had a mental disease or natural mental infirmity and that the disease or infirmity deprived the defendant of one or more of the capacities. If you are not so satisfied and the prosecution has satisfied you beyond reasonable doubt that the defendant committed the offence, you would find him guilty.

I will now remind you of the evidence that you should consider in respect of the defence of insanity.

Whether a particular mental state amounts to "a disease of the mind" or a "natural mental infirmity", is a question of law for the judge.³ So the judge must determine whether the evidence is capable of establishing the elements of the defence. It is for the jury to determine whether it was more probable than not that the defendant did have a mental disease or natural mental infirmity and, if so, whether it was more probable than not that it deprived him of one or more of the described capacities.⁴

Where the evidence is capable of supporting a defence of insanity the trial judge must give the jury a direction on that issue.⁵

As to the meaning of "disease of the mind", see *Falconer* at 53-4.

² For a variation of this possible direction, see "Expert Witnesses".

³ *R v Falconer* (1990) 171 CLR 30 at 49, 51

⁴ *R v Joyce* [1970] SASR 184 at 194; *R v Kemp* [1957] 1 QB 399.

⁵ *Hawkins v The Queen* (1994) 179 CLR 500 at 517.

“Natural mental infirmity” is a defect in intelligence or of the higher intellectual processes such as abstract thinking or problem solving.⁶

The question for the jury is whether the defendant suffered from a malfunctioning of the mind having its source primarily in some subjective, internal condition or weakness which prevented him from perceiving the reality of the situation in which he acted or deprived him of making a moral judgment about how to act in the situation.⁷

Expert medical or psychiatric evidence is admissible on the question of unsoundness of mind. Such an expert may swear to the very fact in issue, that is whether a defendant was insane with respect to the act in question.⁸ The court may act on other than expert evidence and may take into account “the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality.”⁹

The jury is not obliged to accept the expert medical evidence. But if it is unanimous, its rejection will be perverse in the absence of other evidence conflicting with the expert testimony so as to throw doubt on it.¹⁰

Expert medical evidence is not essential to support a defence of insanity but its absence may mean that there is insufficient evidence to support the defence.¹¹

When s 27 speaks of the deprivation of one of the described capacities “at the time of doing the act”, the deprivation must operate with respect to the particular act which constitutes the criminal offence with which the defendant is charged.¹²

The capacity “to know that the person ought not to do the act” is the capacity for moral judgment.¹³ A defendant will lack that capacity if he is unable to reason about the moral character of the acts in question or to make a moral judgment about it.

The jury should be directed, if satisfied of insanity, to bring in a verdict of “**not guilty on account of unsoundness of mind.**”¹⁴ It is generally undesirable that a jury be informed on the consequences of a verdict of not guilty on the ground of insanity.¹⁵ Where, however, some such direction is needed, the jury may be informed, **there is a system in force under the *Mental Health Act* which provides for the indefinite detention of such persons and there are review procedures which could lead to release at some future stage.**¹⁶

If a defendant is deprived of one or more of the capacities described in s 27 as a result of his mind becoming disordered from the unintended consumption of alcohol or drugs, he will have

⁶ *GNM v ER* [1983] 1 NSWLR 144 at 147; *Re Jenkins* 1999 QMHT [14].

⁷ *Falconer* at 51.

⁸ *R v Holmes* [1953] 1 WLR 686; *R v Barry* [1984] 1 Qd R 74 at 89.

⁹ *Walton v The Queen* [1978] AC 788 at 793; *R v Jennion* [1962] 1 WLR 317 at 321.

¹⁰ *R v Dick* [1966] Qd R 301 at 305-6; *Taylor v The Queen* (1978) 22 ALR 599.

¹¹ *Lucas v The Queen* (1970) 120 CLR 171 at 174.

¹² *Stapleton v The Queen* (1952) 86 CLR 358 at 370.

¹³ *R v Porter* (1933) 55 CLR 182 at 189, approved in *Stapleton* at 367. See also *Willgoss* (1960) 105 CLR 295, 301.

¹⁴ *Code* s 647; *R v Smith* [1949] St R Qd 126; *R v Foy* [1960] Qd R 225.

¹⁵ *Maloney* [2001] 2 Qd R 678; [2000] QCA 355, [19]; *Shannon v United States* 512 US 573 (1994).

¹⁶ *Maloney* at [23].

a defence as if he were insane: s 28(1). The suggested direction will need adjustment for this circumstance.