82. Insanity: s 27

82.1 Legislation

[Last reviewed: February 2025]

Criminal Code

Section 26 – Presumption of insanity

Section 27 – Insanity

Section 647 – Acquittal on ground of insanity

82.2 Commentary

[Last reviewed: February 2025]

The defence of insanity requires proof, on the balance of probabilities, that the Defendant was:

(1) in such a state of mental disease or natural mental infirmity at the time of doing the act or making the omission;
(2) so as to deprive them of the capacity to:
    a. understand what they were doing; or
    b. control their actions; or
    c. know that they ought not to do the act or make the omission.

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; *Hawkins v The Queen* (1994) 179 CLR 500, [517]).

It is generally undesirable that a jury be informed of the consequences of a verdict of not guilty on the ground of insanity (*R v Maloney* [2001] 2 Qd R 678, [683-684]). If the jury is to be told, a short statement along the following lines would be sufficient:

> 'upon a verdict of not guilty on the ground of unsoundness of mind there is a system in force under the *Mental Health Act* which provides for the indefinite detention of such persons and that there are review procedures which could lead to release at some stage in the future'.

Note that where a Defendant is deprived of one or more of the capacities described in s 27 as a result of the Defendant's mind becoming disordered from the unintended consumption of alcohol or drugs, the Defendant will have a defence as if they were insane: *Criminal Code*, s 28(1). See **Chapter 83 – Unintentional Intoxication**.

'Mental disease' and 'natural mental infirmity'

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 (*R v Falconer* (1990) 171 CLR 30, [49], [51]). 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/her of one or more of the described capacities (*R v Joyce* [1970] SASR 184, [194]; *R v Kemp* [1957] 1 QB 399).

See *R v Falconer* (1990) 171 CLR 30, where Mason CJ, Brennan and McHugh JJ said at [49] that:

> 'Cases under the Code, as we shall see, have been decided by reference to concepts drawn from the common law despite some variations in terminology and there is no reason to hold that the term "disease of the mind" in the M'Naghten Rules and the terms "mental disease" or "natural mental infirmity" in s 27 of the Code connote different mental conditions'.

They went on to say that:

> 'The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental facilities called "defect of reason" in the M'Naghten Rules must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli'.

In essence, the question for the jury will be whether the defendant suffered from a malfunctioning of the mind having its source primarily in some subjective, internal condition or weakness that deprived the defendant of one of the three capacities. This malfunctioning of the mind should be distinguished from other states of mind such as jealousy, anger, revenge or lack of self control (see *R v Porter* (1933) 55 CLR 182).

The three capacities

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 (*Stapleton v The Queen* (1952) 86 CLR 358, [370]).

The capacity 'to know that the person ought not to do the act' is the capacity for moral judgment (*R v Porter* (1933) 55 CLR 182, [189], approved in *Stapleton v The Queen* (1952) 86 CLR 358, [367]; see also *Willgoss* (1960) 105 CLR 295, [301]). A Defendant will lack that capacity if he/she is unable to reason about the moral character of the acts in question or to make a moral judgment about it. This approach was confirmed in *LAI v Director of Public Prosecutions (Qld)* [2016] QCA 287, where McMurdo P

stated that the correct approach was that in *Stapleton*. In the same case, Lyons J added at [36] that:

> 'It follows that the primary question will always be whether the defendant had the capacity to know that the relevant act was morally wrong. As Stapleton shows, knowledge that an act is against the law is often helpful in the determination of this question. But the primacy of the question whether the defendant had the capacity to know that the act was morally, rather than legally, wrong cannot be ignored'.

Expert evidence

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 (*R v Holmes* [1953] 1 WLR 686; *R v Barry* [1984] 1 Qd R 74, [89]). 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' (*Walton v The Queen* [1978] AC 788, [793]; see also *R v Jennion* [1962] 1 WLR 317, [321]).

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 (*R v Dick* [1966] Qd R 301, [305-306]; *Taylor v The Queen* (1978) 22 ALR 599).

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 (*Lucas v The Queen* (1970) 120 CLR 171, [174]).

82.3 Suggested Direction

[Last reviewed: February 2025]

If you are satisfied beyond reasonable doubt that the Defendant committed the offence with which [he/she**] has been charged, you will need to consider the effect of the evidence about [**his/her**] 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.

The Defendant contends that [he/she**] was not of sound mind [**or the evidence in this case raised the question whether**] when [**he/she**] did the things which constitute the offence with which [**he/she**] 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/she**] was not of sound mind when [**he/she**] 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/she**] was in a state of mental disease or natural mental infirmity that it had one or more of the following consequences, namely, it deprived [**him/her**] of the capacity to understand what [**he/she**] was doing, or of the capacity to control [**his/her**] actions, or of the capacity to know that [**he/she**] 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/her**] ability to understand what [**he/she**] was doing, or to control [**his/her**] actions, or to know that [**he/she**] 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/she**] was doing at the time of committing the offence; or the capacity if [**he/she**] did know it, to know that what [**he/she**] was doing was wrong when judged by the standards of ordinary reasonable people; or the capacity to control [**his/her**] actions. A loss of the capacity to know that what [**he/she**] 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/she**] 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. (For a variation of this possible direction, see **Chapter 58 – Expert Witnesses).**

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/her**] 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/her**] guilty.**

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

(The jury should be directed, if satisfied of insanity, to bring in a verdict of 'not guilty on account of unsoundness of mind.' 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**.