

# Insanity/Lack of criminal responsibility by reason of mental disorder at the time of the offence

## Law

*Stair Encyclopaedia*, Reissue Volume 7, paragraphs 107 to 109; *Gordon*, 3rd edition, Volume I, Chapter 10.

**1** Under the common law it was for the accused to prove on a balance of probabilities that he was insane when the offence with which he is charged was committed ([Ross v HM Advocate 1991 JC 210](#), at 218 per Lord Justice General (Hope)). The onus of proving the special defence of insanity at the time of the offence charged rests upon the accused because proof of insanity is required before the presumption of sanity can be displaced ([Lambie v HM Advocate 1973 JC 53](#), at 57 per Lord Justice General (Emslie)).

**2** The following *dicta* summarised the principles which applied.

“[I]nsanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or unsoundness of mind.” ([Brennan v HM Advocate 1977 JC 38](#), at 45 per Lord Justice General (Emslie)).

“Where ... the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be said to be suffering from the total alienation of reason in regard to the crime with which he is charged which the defence requires ... [An] inability to exert self-control ... must be distinguished from the essential requirement that there should be a total alienation of the accused’s mental faculties of reasoning and of understanding what he is doing” ([Cardle v Mulrainey 1992 SLT 1152](#), at 1160 (opinion of the court)).

**3** The position is now set out in [section 51A of the Criminal Procedure \(Scotland\) Act 1995](#). The statutory provision is in the following terms:

### Section 51A (Criminal responsibility of persons with mental disorder)

This section provides as follows:

- “(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.
- (2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.
- (3) The defence set out in subsection 1 is a special defence.
- (4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.
- (5) In this section, “conduct” includes acts and omissions.”

For a discussion of section 51A, see [Mackay v HM Advocate \[2017\] HCJAC 44, 2017 JC 311](#).

Mental disorder is defined in [section 307 of the 1995 Act](#) by reference to [section 328\(1\) of the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#).

Section 328 (Meaning of “mental disorder”)

This section provides as follows:

- “(1) Subject to subsection (2) below, in this Act “mental disorder” means any
- (a) mental illness;
  - (b) personality disorder; or
  - (c) learning disability, however caused or manifested; and cognate expressions shall be construed accordingly.
- (2) A person is not mentally disordered by reason only of any of the following—
- (a) sexual orientation;
  - (b) sexual deviancy;
  - (c) transsexualism;

- (d) transvestism;
- (e) dependence on, or use of, alcohol or drugs;
- (f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;
- (g) acting as no prudent person would act."

The defence has two elements which require to be established:

1. The presence of a mental disorder suffered by the accused at the time of the conduct which forms the subject matter of the charge.
2. The mental disorder requires to have a specific effect upon the accused, namely to be unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

See also chapter on [Diminished Responsibility](#) above.

**4** Evidence from a suitably qualified skilled witness, usually a psychiatrist, of the presence of a mental disorder is a necessary precondition for the defence going to the jury. It can be assumed, as in diminished responsibility, that the disorder must be a recognised one ([Graham v HM Advocate \[2018\] HCJAC 57, 2018 SCCR 347](#), at paragraphs 115 to 124).

**5** There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury ([Carr v HM Advocate \[2013\] HCJAC 87, 2013 SCCR 471](#)). It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury.

Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position outwith the presence of the jury before parties address the jury ([Lucas v HM Advocate \[2009\] HCJAC 77, 2009 SCCR 892](#)).

## **Possible form of direction on lack of criminal responsibility by reason of mental disorder at the time of the offence**

"The first thing you have to decide is this. Has the Crown proved beyond reasonable doubt that the accused committed the crime set out in the charge?

If you are not satisfied about that, you give the accused the benefit of that doubt and acquit them of the charge. Although there has been little challenge by the defence of the evidence about this, you cannot take it for granted it has been proved. But, looking at the evidence; the contents of the joint minute, which you must treat as facts proved in the case; and what has been said by the defence in closing submission, maybe you will have little difficulty in deciding this.

If you are satisfied that the accused committed the crime charged, that raises the only other issue in this case, the special defence of lack of responsibility at the material time. That was read out to you at the start of the trial, and you have a copy of it. The defence say that, if the accused committed this crime, they were not responsible for their actions by reason of mental disorder. Hence they should be acquitted.

The law presumes that you are of sane and sound mind, and responsible for your actions. The accused here challenges that presumption. So, the accused has the burden of proving they were not responsible for their actions by reason of suffering from a mental disorder at the time. While the Crown has to prove beyond reasonable doubt that the accused committed this crime, a lesser standard applies to the defence, namely proof on a balance of probabilities.

Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. If, on balance, you thought that it is more probable that the accused was not responsible for their actions at the material time by reason of suffering a mental disorder when the conduct which would constitute the crime charged was carried out, you would hold the special defence proved. If not, you would reject it.

Therefore, a person is not to be found criminally responsible if, at the time, and because of a mental disorder, they were unable to appreciate the nature or wrongfulness of their conduct. That is the statutory test. It has two parts.

1. First, there is the requirement that the person was suffering from a mental disorder at the time. You will have to consider all the evidence, including that of the psychiatrists on that matter.
2. If you are satisfied that the person was suffering from such a disorder, you require to consider, secondly, whether, because of that disorder he was unable to appreciate the nature or wrongfulness of his actions.

The words of the statutory test speak for themselves. However, it may be of assistance if I explain that the phrase 'appreciate the nature or wrongfulness of his conduct' is not limited to a lack of knowledge of these matters. It can also cover an inability to conduct oneself in accordance with a rational and normal understanding of them. Bear in mind that this lack of reasoning must be caused by the mental disorder, and not some other factor, such as the voluntary consumption of an excessive amount of alcohol.

Personal responsibility for our actions is the norm. This is because we are all presumed to enjoy functioning reasoning faculties and a normal understanding of the world around us and how we should behave. But if the accused's conduct is attributable to a mental disorder which deprived him of that kind of appreciation of the nature of what he did, or of its wrongfulness, or indeed both, that presumption is displaced, and our law says that he is not to be convicted of an offence arising out of that conduct."

"How do you decide if the defence has discharged the onus of proof on it?

There must be evidence which you accept from a skilled witness such as a psychiatrist [or psychologist] that the accused suffered from a recognised mental disorder.

If you do accept such evidence, you must then consider whether, because of that disorder, the accused was unable to appreciate the nature or wrongfulness of his/her/their conduct at the time. In deciding that you must look at all the circumstances of the case, and use your common sense and your collective experience of life in general. This is a question of fact for you to decide, not the doctors [or psychologists.] You will obviously give very careful consideration to their opinions. Their qualifications, areas of expertise, and the time they have worked in those areas have been detailed in evidence. However, their opinions are not conclusive on the issue of whether the accused was unable to appreciate the nature or wrongfulness of his/her/their conduct. You should consider also the nature of any

acts proved, the accused's conduct around the time of their commission, and his past history to the extent that you find it relevant. (If appropriate because of a dispute between Crown and defence experts give directions as to how to deal with competing evidence - refer to chapter 31).

The question comes down to this. Have the defence proved on a balance of probabilities that at the time the crime was committed the accused was suffering from (specify condition) which resulted in their being unable by reason of that mental disorder to appreciate the nature or wrongfulness of their conduct?

You will remember the various opinions expressed by the psychiatrists. On the one hand the defence say ... On the other the Crown says ... The decision is yours."

"A word about your verdict.

There are two verdicts you can return, not guilty or guilty.

An accused found not guilty of a charge cannot be prosecuted again on that charge, save in exceptional circumstances.

It is not necessary that your verdict [on a charge] is unanimous, but for any verdict of guilty, there must be at least [ten (*where jury of 14 or 15*) / nine (*where jury of 13*) / eight (*where jury of 12*)] of you in favour of that guilty verdict.

So, before you can find the/an accused guilty [of a charge], there must be at least ten/nine/eight [as appropriate] votes for guilty. Otherwise, your verdict would be not guilty.

In cases like this, you should reach your verdict in stages:

1. Decide if the Crown has proved that the accused committed this crime. If that has not been proved, your verdict should be not guilty.
2. If you decide it is proved that the accused committed the crime, you then decide if the defence has established the special defence.
3. If you consider that the special defence has been established, the law requires your verdict to be in a special form. That is because the court has to know if you decided that the accused committed the acts charged. So, if the special defence has been established, I have to direct you to find that the accused was at the time of doing the acts charged unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct and therefore the accused would be acquitted on that ground. In practical terms, in that case

your verdict should be “We find the accused not guilty as he/she was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct”.

4. If you think the defence has failed, you will find the accused guilty of the charge. You could delete from any verdict of guilty any part of the charge which has not been proved to your satisfaction, but what is left must define the crime and describe how it was carried out.”