# 8. Mental health and cognitive impairment defences in a criminal trial

## Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 replaces the defence of mental illness with a defence of "mental health impairment or cognitive impairment": s 28.

The Act also replaces the verdict of "not guilty by reason of mental illness". Where the defence of "mental health impairment or cognitive impairment" is established, the Act now provides for a "special verdict of act proven but not criminally responsible": s 30.

The common law "defect of reason from disease of mind" has been replaced by the statutory definitions of "mental health impairment" found in s 4 and "cognitive impairment" found in s 5 of the Act. See ***2 Defining mental health and cognitive impairment***.

**Note:** if a person has been charged with federal offences, the defence of mental illness is regulated by Commonwealth provisions. See further ***9 Commonwealth provisions*****.**

## Test for mental health and cognitive impairment defence

The test for the defence of mental health impairment and cognitive impairment is set out as follows in s 28(1).

> A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—
>
> (a) did not know the nature and quality of the act, or
>
> (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

Whether the defence has been established is a question of fact to be determined by the jury on the balance of probabilities: s 28(2).

The test is similar to the common law test: *R v Siemek (No.1)* *[2021] NSWSC 1292* per Johnson J at [88]-[89]; *R v Jackson* *[2021] NSWSC 1404* per Johnson J at [14]; *R v MC (No.2)* *[2021] NSWSC 1542* per Dhanji J at [18].

As to the common law test see *The King v Porter (1933) 55 CLR 182* at 188-90 per Dixon J; *Sodeman v The King (1936) 55 CLR 192* at 215; *CJ v R* *[2012] NSWCCA 258* Hall J (Beazley JA and Campbell J agreeing) at [41].

## Mental illness and alcohol/drugs

The Act explicitly excludes a mental health impairment caused solely by the temporary effect of ingesting a substance or a substance use disorder: s 4(3)

If however the use of substances exacerbates a clinical condition (that is not temporary) then that may constitute a mental health impairment: see *R v Tonga [2021] NSWSC 1064* per Wilson J at [89]-[90]; [106]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [103]. See also the consideration in *R v Miller [2022] NSWSC 802* at [1]-[52] by Cavanagh J of the relationship between s.4(1) and (2)(c) and s.4(3) where it is alleged the defendant acted under a drug induced psychosis but was not intoxicated at the time of the offending. For a discussion of the common law position on this issue, see*: R v Fang (No 3) [2017] NSWSC 28* per Johnson J (especially at [110]); *Fang v R [2018] NSWCCA 210; (2018) 97 NSWLR 876* at [95]-[105].

The onus of establishing s.4(3) lies on the party relying upon the exception on the balance of probabilities: *R v Miller [2022] NSWSC 802* at [53]-[62] per Cavanagh J.

## Nature and quality of the act

"Nature and quality of the act" refers to the physical nature and consequences of an offence not the moral aspects: s 28(1)(a); *The King v Porter (1933) 55 CLR 182* at 188 per Dixon J; *Sodeman v The King (1936) 55 CLR 192* at 215 per Dixon J.

## Knowledge of wrongfulness

The test refers to moral not legal wrongfulness and may include someone who has an awareness of the unlawfulness of their act but not the moral wrongness: s 28(1)(b). See *R v Tonga [2021] NSWSC 1064* per Wilson J at [52]-[55]:

> [55] … Section 28(1)(b) imports the expansion upon the latter of the two concepts that was first given by Dixon J in *The King v Porter* (1933) 55 CLR 182 at 189 - 190, that is, that the accused "could not reason about the matter with a moderate degree of sense and composure" as to the wrongness of his act, "having regard to the everyday standards of reasonable people".

As to common law cases see: *Stapleton v The Queen (1952) 86 CLR 358* at 375 per Dixon CJ, Webb and Kitto JJ; *Skelton v R [2015] NSWCCA 320* at [97]–[123]; *Carter v R [2019] NSWCCA 11* at [299]–[324].

## Acts done unconsciously or involuntarily

Although not required for the determination of the appeal, Brereton JA expressed the opinion in *DB [2022] NSWCCA 87* at [69] that s.28 could include acts performed involuntarily and unconsciously if at the time of those acts the person was suffering from a mental health impairment (see further below *Relationship to the common law* defence *of sane automatism*)

## Who can raise the "defence"?

The defence can be raised by the Crown or trial judge as well as the accused: *R v Ayoub (1984) 2 NSWLR 511* applied by Davies J in *R v Jawid [2022] NSWSC 788* at [72]-[92]. The duty of a trial judge to leave to the jury an available defence not raised or relied upon by the accused includes the defence of mental health or cognitive impairment: *R v Fantakis [2023] NSWCCA 3* at [265]-[268] per Ward ACJ.

The approach taken by defence counsel could be important for a future appeal as an accused can only appeal against a special verdict where the defence was not set up by that person; ss 5(2), 5AA(2) *Criminal Appeal Act*. In *R v Brewer (No 2) [2015] NSWSC 1547* at [86]–[93] Bellew J described an approach taken by defence counsel in a judge alone case where the defence was open on the evidence but contrary to instructions. Defence counsel did not run a defence of mental illness but stated he could not rationally argue against the defence if it was raised. For additional appeal cases considering whether the defence was "set up by the accused" at first instance see ***12. Appeals***

## Whether the defence should be left to the jury

This is a question of law and requires some evidence from which the defence was fairly or reasonably open: *Fang v R [2018] NSWCCA 210; (2018) 97 NSWLR 876* at [58]–[62]. See also *R v Fantakis [2023] NSWCCA 3* at [268]-[271] per Ward ACJ.

## Explanation to jury

If the defence is raised, the judge must explain the following matters to the jury:

(a) the findings which may be made on the trial,

(b) the legal and practical consequences of those findings,

(c) the composition of the Tribunal and its relevant functions with respect to forensic patients,

(d) without limiting paragraph (b), that an accused who is found to have committed the act constituting the offence but not to be criminally responsible because of a mental health impairment or cognitive impairment, or both, may be ordered to be released by the Tribunal only if the Tribunal is satisfied, on the evidence available to it, that the accused's safety or that of any member of the public will not be seriously endangered by their release,

(e) that the jury should not be influenced by the consequences of a special verdict of act proven but not criminally responsible in deciding a verdict: s 29.

The purpose of the explanation is to ensure the jury understand the legal and practical consequences of the special verdict, the distinction between punishment and medical treatment and that the person will not be released until the Tribunal is satisfied there is no danger to the community: *R v Kembell [2020] NSWSC 1559* per Johnson J at [90]–[91]; *R v Hilder* (*unrep, NSWCCA, 10 October 1997)* per Hunt CJ at CL. See also *R v Jawid [2022] NSWSC 788* per Davies J at [114]-[119].

## Must prove offence first

The trier of fact must first be satisfied beyond reasonable doubt that the offence was committed by the accused before turning to the question of mental health or cognitive impairment: *R v McDonald [2012] NSWSC 875* at [58] per Bellew J referring to *Styles (1990) 50 A Crim R 13* at 22; see also *The King v Porter (1933) 55 CLR 182* at 184 per Dixon J.

## Offences of specific intent

For offences of specific intent, the tribunal of fact must consider the issues in the following order:

1. Whether the Crown has proved beyond reasonable doubt the physical acts of the offence (including voluntariness) excluding evidence of the mental state of accused;
2. Whether the accused has established the mental or cognitive impairment defence on the balance of probabilities;
3. If the defence of mental or cognitive impairment is not established whether the Crown has proved specific intent beyond reasonable doubt, taking into account all evidence of the mental state of accused.

See *R v Cunningham* *[2017] NSWSC 1176* at [13] per Beech-Jones J applying *Hawkins v The Queen (1994) 179 CLR 500* and *R v Minani* *[2005] NSWCCA 226; (2005) 63 NSWLR 490; (2005) 154 A Crim R 349* at [31]-[33].

This has been applied in cases under the Act: *R v Tonga* *[2021] NSWSC 1064* per Wilson J at [12]-[16]; *R v Siemek (No.1)* *[2021] NSWSC 1292* per Johnson J at [16]; *R v MC (No.2)* *[2021] NSWSC 1542* per Dhanji J at [51]-[54]

## Relationship to the partial defence of substantial impairment

Where the accused also seeks to raise the partial defence of substantial impairment under s 23A *Crimes Act* 1900 (NSW), the tribunal of fact must first consider the mental or cognitive impairment defence then substantial impairment. Although much evidence will be relevant to both, the legal test is different: *R v Eyuboglu (No 2)* *[2019] NSWSC 285* per Button J at [10]–[21]; *R v Davidson (No 2)* *[2019] NSWSC 1011* per Davies J at [141]–[147]; *R v Jawid* *[2022] NSWSC 788* per Davies J at [93]-[108].

## Relationship to the common law defence of sane automatism

After a lengthy consideration of cases in *DB* *[2022] NSWCCA 87* at [11]-[53] the Court concluded the Act did not replace or affect the common law defence of sane automatism which entitles an accused to an unqualified acquittal if the charged act or acts occurred independently of the will of the accused by reason of involuntary conduct not arising from a disease of the mind or natural mental infirmity (examples given included somnambulism, concussion, epileptic fit and hypoglycaemia). In this case Brereton JA, (Ierace J agreeing, Wilson J dissenting) found that sexsomnia (a form of somnambulism where sexual acts are committed while the person is asleep) did not constitute a mental health impairment under s.4 and the respondent, who had committed sexual acts against his daughter while he was sleeping, was entitled to the outright acquittal he received. See further See ***2 Defining mental health and cognitive impairment***.

## Use of expert evidence

Medical evidence is not essential but usually adduced. Although the trier of fact is not bound to accept and act upon expert evidence, they are not entitled to disregard it capriciously and ought not reject unanimous medical evidence unless there is evidence which can cast doubt upon that medical evidence. See *R v Moore* *[2020] NSWSC 1561* at [85] per Johnson J for a recent summary and the following cases under the Act: *R v Siemek (No.1)* *[2021] NSWSC*

*1292* per Johnson J at [91]-[94]; *R v Jackson [2021] NSWSC 1404* per Johnson J at [15]; *R v MC (No.2) [2021] NSWSC 1542* per Dhanji J at [60]. See ***4. Expert witnesses***

## Where there is agreement as to impairment

Under s 31 (new to the Act) where a legally represented accused and the prosecutor agree that the proposed evidence establishes the defence of mental health impairment or cognitive impairment the Court may enter a special verdict if, after considering the evidence it is satisfied the defence is established: s 31.

Where no trial date has been set s.31 permits the judge to consider the agreed position of the parties without the usual elements of a criminal trial: *R v Jackson [2021] NSWSC 1404* per Johnson J at [7]-[10]

The Court is required to be satisfied the defence is made out, and must provide reasons for that decision: *R v Siemek (No.1)* per Johnson J at [20]-[21]; *R v Jackson [2021] NSWSC 1404* per Johnson J at [8], [11]; *R v Sands [2021] NSWSC 1325* per RA Hulme J at [4]. Where the matter has been set down for trial, and an election made for judge alone the judge is not required to comply with the s 132-3 *Criminal Procedure Act* 1986 (NSW) requirements to set out the relevant principles of law in a judge alone trial: *R v Tonga [2021] NSWSC 1064* per Wilson J at [98]-[100]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [17]-[18].

## Effect of special verdict

On the return of a special verdict the Court must make one of the following orders under s 33(1):

(a) an order remanding the accused in custody until a further order is made under this section

(b) an order that the accused be detained in the place and manner the Court thinks fit until released by due process of law

(c) an order for the unconditional or conditional release of the accused from custody

(d) other orders the Court thinks appropriate.

In *R v Siemek (No.2) [2021] NSWSC 1293* Johnson J at [10] noted that an order made under s 33 is not for the purpose of punishment but directed at protection of community and welfare of person who has committed the act

### Detained in custody

If the Court decides to detain a person in custody, the person will be taken into custody by Corrective Services NSW.

### Detained in the place and manner the Court thinks fit

If the Court decides to detain a person in the place and manner it thinks fit, the person could be detained in a mental health facility. There are a number of specialist forensic mental health facilities in NSW. The Forensic Hospital is a high secure hospital situated in Malabar. There are also medium secure forensic mental health facilities at Bloomfield Hospital in Orange, Morisset Hospital in Morisset and Cumberland Hospital in Parramatta. There is a low secure

forensic unit at the Concord Hospital at Concord. There are some forensic beds available at the Macquarie Hospital in Ryde.

Legally, a forensic patient can also be detained at any gazetted mental health facility, although most mental health facilities do not have specialist forensic rehabilitation options, and are not always well suited to supporting and managing forensic patients.

There is a long waiting list for beds in each of these forensic mental health facilities. If the Court orders a person's detention in a particular facility, there may not be a bed available, which can cause practical difficulties.

Before a forensic patient is admitted to a particular forensic facility, staff from that facility would usually review the person and assess whether they are suitable for admission. For example, the forensic Bunya Unit at Cumberland Hospital is a mixed ward and male forensic patients with a history of sexual offending are not usually suitable for admission.

An accused may also be detained in a secure aged care facility if the facility is sufficiently secure that it meets the criteria for a place of detention. The criteria are discussed in *R v Wilson (No 6)* *[2019] NSWSC 529* at [66]–[81] by Schmidt J.

It is also legally possible for a person to be detained in accommodation for people living with cognitive impairments. However in practice, places with sufficient levels of security and control are hard to find, and it can be difficult to obtain sufficient NDIS funding for those arrangements. One exception is if a person is detained in an aged care facility: see *R v Wilson (No 6)*.

## Unconditional or conditional release

The Court may only release an accused if it is satisfied on the balance of probabilities that the accused's safety or that of any member of the public will not be "seriously endangered" by the person's release ss 33(2)-(3), 61(2). The phrase "seriously endangered" was considered by the Court of Appeal *in Attorney General for the State of New South Wales v XY* *[2014] NSWCA 466*, Beazley P at [51], Basten JA at [168]. The Court held that making a decision about serious endangerment involved weighing both the probability of the risk occurring and the gravity of the risk if it were to occur.

Before making an order for the accused's release, the Court may request a report by a forensic psychiatrist or other person of a class prescribed in the regulations (see r 4 and the discussion above), who is not currently treating the accused, as to their condition and whether the accused is likely to seriously endanger their own safety or that of any member of the public.

The Community Forensic Mental Health Service of Justice Health and the Forensic Mental Health Network (FMHN) will provide a free expert report on appropriate placement options. The procedure to obtain this information is as follows:

1. Adjourn the proceedings (the FMHN requires at least 8 weeks to conduct an assessment and prepare a report).

2. The Court may direct that during the adjournment:

   (a) The accused be detained at the Long Bay Hospital (not Long Bay Forensic Hospital) unless an alternative appropriate interim placement is identified by the person's legal representative

   (b) The office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) arrange for FMHN to provide a disposition report to the Court before the next court date. The report will address:

(i) If the Court is considering releasing the person recommended conditions as to care and/or treatment in the community

(ii) If the Court is considering detaining the person recommended placement in a prison or mental health facility

The Court later considers the recommendations of the FMHN report.

**Note:** These free reports from the CFMHS are *only* available for people with a mental illness

There is also no government funded model for a forensic pathway for people with a cognitive impairment but not a mental illness. Many forensic patients with a cognitive impairment only are detained in custody. Securing a community placement usually means obtaining a high level of NDIS funding, and suitable accommodation with a provider willing to accommodate a person with a criminal history. This can be hard to achieve. The difficulties for this group are helpfully described in the article by Kerri Eagle, Todd Davis & Andrew Ellis “Unfit offenders in NSW: paying the price for gaps in service provision” (2020) *Psychiatry, Psychology and Law* 853

If the person has a cognitive impairment and no major mental illness, there is currently no publicly funded government agency that will provide disposition reports. The best option for people with a cognitive impairment is to ask the experts writing reports to the Court on other issues to also address this issue, if they consider they are qualified to do so.

If the experts who provide reports to the Court are forensic psychiatrists or forensic psychologists (or a prescribed person), those experts could also comment on the risks of release.

The Court must refer the person to the Tribunal where an order is not made for their unconditional release: s 67. The Tribunal is then responsible for making decisions about their treatment and supervision: Pt 5.