NOT GUILTY BY REASON OF MENTAL ILLNESS: A DEFENCE PERSPECTIVE

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Overview of Presentation

- Not Guilty by Reason of Mental Illness
- Special Verdict
- ‘Unfit’ and NGMI
- The Special Hearing
- The Limiting Term
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- Forensic Patients
- Role of the MHRT after NGMI and Limiting Term

“What a Life: Give some of us pills to stop a fit, give the rest shock to start one” - Ken Kesey

ONE FLEW OVER THE CUCKOO’S NEST

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"I lay in bed the night before the fishing trip and thought it over, about my being deaf, about the years of not letting on I heard what was said, and I wonder if I can ever act any other way again. But I remembered one thing: it wasn't me that started acting deaf; it was people that first started acting like I was too dumb to hear or see or say anything at all." - Ken Kesey

Not Guilty by Reason of Mental Illness (NGMI)

"But it's the truth even if it didn't happen." Ken Kesey

NGMI – OVERVIEW

At common law it has long been accepted that persons who are mentally ill should not be held criminally responsible for a committing the relevant acts which constitute the elements of the crime, but rather due to mental illness they be dealt with differently.

The law in NSW provides for a **'special verdict' if** the accused is found by the Court to be NGMI: Section 38(1) of the Mental Health (Forensic Provisions) Act 1990 (MHFPA).

The common law definition of 'mentally ill' applies in NSW – not defined in the MHFPA.

The applicable definition derives from *Re M'Naghten's Case* (1843) 4 St Tr (NS) 847; 8 ER 718. The test which is accepted in NSW as forming the basis for the relevant rule where there is evidence of defect of reason is that which was established in *M'Naghton* and *R v Porter* (1933) 55 CLR 182 at 189–190.

Proving NGMI

To sustain a verdict of NGMI, the jury must be satisfied the accused was:

i. The accused must be labouring under a **defect of reason** caused by a disease of the mind.

ii. As a result of which the accused did not know **the nature and quality of his or her act**; or

iii. If he or she did know the nature and quality of the act, he or she **did not know that it was wrong.**

NGMI – Some Procedural Issues

Before the issue of NGMI the Crown must prove to the requisite standard that the accused deliberately, or voluntarily, did the act or acts charged.

The issue can be raised by the Crown or the Judge in certain circumstances if there is evidence available of mental illness.

The onus of proof is on the balance of probabilities irrespective of who raises it: *Mizzi v The Queen* (1960) 105 CLR 658; *R v Pratt* [2009] NSWSC 1108; and *R v Ayoub* [1984] 2 NSWLR 511

In any issue where NGMI is raised, the court is required to give an explanation to the jury as to the consequences for the accused of returning a special verdict: s37 MHFPA

Although there is no rule requiring it, expert medical evidence should be led.

NGMI & ‘Crimes of Specific Intent’

See *Hawkins v The Queen* (1994) 179 CLR 500 (at 510, 512-514, 517) and *R v Minani* (2005) 63 NSWLR 490; [2005] NSWCCA 226 per Hunt AJA at [31]-[32] which cases set out the order in which the issues should be determined:

(1) **Was it the act of the accused** which in this case, caused the malicious wounding?

(2) **Was he criminally responsible for doing that act?** This question is resolved by a finding that mental illness had been established.

(3) **Was that act done with the specific intention required?** This question only arises if second question is not resolved and mental illness, even though insufficient to make out the NGMI defence, is relevant to the issue of specific intent. Mental illness is not relevant to (i) whether the act was a deliberate one.

Also see Judgment of Judge Haesler SC in *R v Ilie Istudor* [2016] NSWDC 1 involving an unfit accused found NGMI at a special hearing on charges of shoot with intent to murder.

Mental illness, *mens rea* and Strict Liability

The courts have held NGMI applies to strict liability crimes.

The defence of NGMI is said to cover a broader concept of '*moral blameworthiness*' and if the offence in question is not one where *mens rea* is required, the defence of mental illness may still have application: *R v Piper* (NSWDC, 2004, unreported); see detail in Howard and Westmore

This issue arose in the special hearing of *R v Sandoval* [2010] NSWDC 255; BD201040424, the question being whether the defence of NGMI was available to charges of dangerous driving causing GBH pursuant to s.52A Crimes Act. The accused believed demons were pursuing him and drove over the Sydney Harbour Bridge on the wrong side of the road. A question for the court was whether the accused could rely upon the defence of NGMI where he was charged with offences that do not require proof that the accused knew he was driving dangerously.

Judge Berman SC ultimately determined that the defence did apply and his Honour returned a verdict of NGMI. His Honour's judgement sets out comprehensively other decisions in the matter.

TRIAL OUTCOMES IF NGMI RAISED

For an accused who is fit to plead, the matter proceeds to trial with a jury (or Judge if judge alone trial elected) as normal.

The trial outcomes are:

1. Not Guilty – acquitted so no penalty.
2. Guilty – sentenced and the applicable penalty will apply.
3. Not Guilty on the ground of mental illness, so a **special verdict** pursuant to **Section 38** of the MHFPA is entered.

Effect of Special Verdict S39: Detention or Release?

If a person is found NGMI, pursuant to S 39, the Court orders the person to be:

i. Detained;

ii. Released conditionally; or

iii. Released unconditionally (neither Court nor MHT maintains supervision).

To make an order under (ii) or (iii) the court must be satisfied on the balance of probabilities ***that the safety of the person or any member of the public will not be seriously endangered any the persons release***: s39(2)

If the Court orders (i) detention or (ii) conditional release, the Court must advise the MHRT and the MHRT will thereafter make orders regarding treatment, care, detention and release of those persons, who become 'forensic patients'.

NGMI - Unconditional or Conditional Release: the Lawyers' Responsibility

S39 is not about punishment: R v Line [2004] NSWSC 1148, BC200409025). The purpose of conditions is what is considered necessary for the protections of others and the community and welfare of the person: *Attorney-General of NSW v X* [2013] NSWSC 1392 ([87]-[92];

If conditional or unconditional release is sought the court needs sufficient information to assess the criteria of safety, e.g. reports from Justice Health and Forensic Mental Health Network. The court can of its own volition order an expert report: S38A MHFPA

The MHRT decision of *Aloisi* [2015] NSWMHRT 13, as a helpful guide to possible conditions.

As observed in Howard & Bruce Westmore at p. 497:

> *"Lawyers involved on both sides on such matters ought to do all they can to provide relevant reports as well as appropriate plans for ongoing management and, where applicable treatment. Corroborative witnesses may be required to establish factors such as risk, the residential arrangements proposed, employment etc. Adversarial integrity must be at its highest when specified inquiry into safety is being undertaken by the court and complete candour is required."*

Forensic Patient after NGMI finding

In the case of a person found NGMI, the MHRT must review the case as soon as practicable, and make orders concerning the person's detention, care and treatment. Forensic patients are reviewed then every 6 months.

If the safety of the patient or the public will not be seriously endangered, the MHRT may decide to release the patient either conditionally or unconditionally upon being satisfied that (in accordance with S43) that neither the safety of the person nor the safety of the community would be endangered.

A person found NGMI remains a forensic patient until unconditionally released.

The length of time varies how each patient responds to treatment and rehabilitation.

The length of time can vary from a few years to never being unconditionally released.

NGMI, the ‘unfit’ accused, & the Special Hearing

“Man, when you lose your laugh you lose your footing.”- Ken Kelsey

Inquiry – 'not fit for trial'

In *Presser* [1958] VR 45, Smith J (adopted in *Kesavarajah* (1994) 181 CLR 230) set out the matters as the minimum standard for an accused to be fit for trial. The test considers the accused at the time of the trial not the time the offence was committed: *Dennison* NSW CCA 3.3.1988

An inquiry to determine if a person is unfit to be tried is held before a Judge alone (s 11(1)) and the accused is represented: s 12(1). The proceedings are: not to be adversarial: s 12(2); onus of proof is not on any particular party: s 12(3); and the question of fitness is to be determined on balance of probabilities: s 6

An accused may be found unfit because he or she does not want to raise NGMI because they do not consider they are mentally ill or lack insight as to the availability of that defence: see *R v JH* (2009) NSWSC 551, and *R v Holt* 9 DCLR (NSW) 87.

If found 'unfit for trial' at what is commonly referred to as a fitness hearing, the matter then proceeds by way of a '**special hearing',** unless DPP don't proceed.

The Special Hearing: Procedure

S21A provides for a judge to try a Special Hearing unless an election is made for a jury. Prior to 1 January 2006, a special hearing was held before a jury unless the accused person made a judge alone election. A legal representative is to make the election which overcomes the difficulties obtaining instructions: s. 21A

The procedures for a special hearing are set out in S21 MHFPA and include the accused:

- must be represented: s.21(2)
- is taken to have pleaded not guilty: s.21(3)(a)
- can raise any defence which can properly be raised at a trial: s.21(3)(c)
- is entitled to give evidence: s.21(3)(d)

S21 requires that the special hearing proceed is to be conducted as closely as possible as if it were a trial of criminal proceedings including that the accused arraigned. See: *R v Zvonaric* (2001) 54 NSWLR; [2001] NSWCCA 505 and *R v Minani* (2005) 63 NSWLR; [2005] NSWCCA 226

SPECIAL HEARING VERDICTS

The following are possible ‘special hearing’ verdicts:

1. Not guilty so an acquittal as in a normal trial.
2. On the limited evidence available, the accused person committed the offence charged (s22(1)(c)), or an available alternative offence (s22(1)(d)). This constitutes a qualified finding of guilt.
3. Not guilty on the ground of mental illness (NGMI) under s22(2) of the MHFPA: s25 (This is equivalent to the ‘special verdict’ provided for in s38 of the MHFPA)

… otherwise raising NGMI at Special Hearing

Prior to July 2003, upon a finding of NGMI, there was no provision for release by the Court and it was generally accepted that a verdict of NGMI was contrary to the best interests of the client, as it resulted in indefinite incarceration regardless of the seriousness of the offence.

Consider the accused wishes on the issue, bearing in mind *R v Smith* [1999] NSWCCA 126; that all not decisions about the conduct of the accused person's defence should be made by the legal representatives, to the exclusion of the accused, if they can communicate those wishes.

Consider client's best interest e.g. for therapeutic reasons not raising NGMI.

Even if you do not run the NGMI, mental illness as a causal factor in the commission of a crime is still relevant on sentence in assessing the objective seriousness and moral culpability: *Elturk v R* [2014] NSWCCA 61 [35]-[39] wherein the CCA upheld an appeal on the basis that the trial judge was in error when he stated evidence that the applicant was mentally ill at the time of the offence was not relevant because he had chosen not to avail himself of the available defence (at [35] and [39]).

Wishes of the accused at Special Hearing

What do you do if and mentally ill and gives instructions contrary to your view?

In *R v Smith* [1999] NSWCCA 126 the Judge allowed the (unfit) accused to make a statement to the jury contrary to the wishes of accused's counsel who expressed those wishes known to the Judge in the absence of the jury. On appeal, James J (with whom Barr J and Carruthers AJ agreed) observed:

[54] I do not consider that the Act provides that a respect in which a special hearing is not to be conducted as if it were an ordinary trial, is that all decisions about the conduct of the accused person's defence at the special hearing are to be made by the counsel or solicitor of a legally represented accused, to the exclusion of the accused. If an accused person at a special hearing is able to communicate and communicates that he wishes to give evidence (or make a statement), then I do not consider that the judge at the special hearing makes an error of law, if he permits the accused person to give evidence (or make a statement), even though counsel for the accused person is opposed to such a course.

Issues: Raising NGMI defence at a Special Hearing contrary to accused's wishes…

Counsel entitled to raise mental illness defence in a special hearing over objection of client:

Dezfouli [2007] NSWCCA 86 at [44]-[46] In that case Counsel for the accused raised the defence of NGMI over his client's objection, and in his closing address said:

[45] …..What I will be saying to you are things Mr Dezfouli would not like me to say, but have to be said. He doesn't think he is insane and what I am saying to you is that there is no doubt that he is (T 427.11)

[46] The scheme of the Act is designed to ensure that an accused person's interests are protected in circumstances in which it is recognised that because of mental illness or incapacity he or she lacks the capacity to make reasoned forensic decisions. The special hearing was conducted by Mr Toner in an endeavour to advance the appellant's interests as he perceived them to be. Counsel was not required to follow the appellant's instructions.

‘penalties’ on qualified finding of guilt

If a person is found on the limited evidence available to have committed the offence the Court must indicate whether, if it had been a normal criminal trial, a sentence of imprisonment would have been imposed: S23 MHFPA.

If ‘yes’, imprisonment would have been imposed, the court must nominate a ‘limiting term’, being the best estimate of the sentence the court would have imposed if a sentence after trial: s23(1)(b). The limiting term is not divided into a minimum and additional term akin to a non-parole period.

Periods of custody or detention related to the offence may be taken into account: s23(4)

The term can be back dated or future dated to run consecutively or partially concurrently with another limited term: s23(5)

If ‘no’, imprisonment would not have been imposed, the court may impose any other penalty it considers appropriate under the (Crimes Sentencing Procedure Act) 1999, although not for example terms home detention etc, because it only arises after a determination imprisonment would have been imposed.

If there is a breach of non-custodial option, the matter is dealt with under the MHFPA: *R v Smith* (2007) 1969 A Crim R 265; [2007] NSWCCA 39, where a limiting term was imposed after a breach of a S9 bond. .

Consequence of Nominating a Limited Term

S24 MHFPA - Consequences of nomination of limiting term

(1) If in respect of a person a Court has nominated a limiting term, the Court:

(a) must refer the person to the Tribunal, and

(b) may make such order with respect to the custody of the person as the Court considers appropriate.

(2) If a Court refers a person to the Tribunal, the Tribunal must determine whether or not:

(a) the person is suffering from mental illness, or

(b) the person is suffering from a mental condition for which treatment is available in a mental health facility and, where the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility.

(3) The Tribunal must notify the Court which referred the person to it of its determination.

NB. A person subject to an order under S24 becomes a *'forensic patient'*: Section 42 MHFPA

Q: Is a ‘limiting term’ a bar to further proceedings? A: No

s28 MFPA provides that if at a special hearing, on the limited evidence available, the accused committed the offence charged (or an alternative offence), that constitutes a bar to further criminal proceedings for the same offence or substantially the same offence **IF** such proceedings are not commenced before the expiration of any limiting term nominated, **OR IF** the person has been released from custody as a prisoner or discharged from detention as a forensic patient.

S29 provides that if a person found unfit is found by the MHRT to have become fit (whether before or after a special hearing), it is to notify the court which then obtain DPP advice as to whether further proceedings will be taken. If they are, a further fitness inquiry will be held.

If the DPP take no further proceedings they must notify the Minister for Health and the MHRT and he must be released from detention.

If there are further proceedings, any sentence or other disposition of the matter must take into account any periods of detention referrable to the offence.

Becoming a ‘forensic patient’ before and/or after a Special Hearing

The MHFPA provides as follows:

1. Where a person is found “unfit to be tried” for an offence at an inquiry by a Judge (S11) the Court must refer the matter to the MHRT (S14) who must review the case as soon as practicable, and determine on the balance of probabilities whether the person is likely to become fit to be tried within the next twelve months (S16).
2. If the MHRT determines the person is not likely to become fit within twelve months, the matter will proceed to a Special Hearing, unless the ODPP decides that no further proceedings will be taken, and in those latter circumstances the person is released: S19. .
3. Where a person was unfit to be tried and then found guilty **on the limited evidence** at a Special Hearing and a limiting term set, the MHRT must review the person’s case as soon as practicable. The Tribunal must inform the Court as to whether the person is suffering from a mental illness, or from a mental condition which can be treated in a hospital. The Tribunal also continues to monitor the person's fitness to stand trial.
4. A person on a limiting term will be released from the forensic order at the end of their limiting term unless released earlier by the Tribunal.

The ‘Forensic Patient’ & the role of the MHRT

Prior to March 2009 determinations were made by the Minister for Health and Governor for the treatment, care, detention and release of persons found NGMI or unfit for trial. Now the MHRT, constituted by a special Forensic Panel determines such matters.

A **forensic patient** is a person who the Court has:

1. Found unfit to be tried and in detention. (If on bail they are not a forensic patient)
2. Found guilty on the limited evidence at a special hearing and a limiting term nominated.
3. Found not guilty by reason of mental illness.
4. Found not guilty by reason of mental illness and released into the community subject to conditions.

The MHRT is responsible for deciding:

• where a forensic patient should be detained,

• whether the patient can have any leave from the hospital (i.e. go outside of the hospital),

• if a patient is ready to be released into the community with conditions [in these cases the MHRT can vary the conditions including increasing the time period of the conditional release ordered by the court: *Attorney General of NSW v X and Another* [2013] NSWC 1392].

• if a patient is ready to be unconditionally released (so free to resume life in the community without conditions).

References:

- Dan Howard & Bruce Westmore, *Crime and Mental Health Law in New South Wales,* (3rd Edition) Lexis Nexis

- John Feneley (Deputy President MHRT), '*Applying the Amended Mental Health (Forensic Provisions) Act 1990 and Rethinking the Defence of Mental Illness'* July 2009 https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_applyingamended_mentalhealthrethinkingdefence.aspx

- Sophia Beckett (Public Defender), *'Appearing for the mentally impaired: Not guilty mental illness'*, Conference to in-house solicitors Legal Aid NSW February2018 https://www.publicdefenders.nsw.gov.au/Documents/Not%20guilty%20mental%20illness.pdf

- Chris Bruce SC (Public Defender), *Ethics And The Mentally Impaired*, Public Defenders Conference 2011 https://www.publicdefenders.nsw.gov.au/Documents/Ethics%20and%20the%20Mentally%20Impaired.pdf

- Craig Smith (Public Defender), *'Mental Health and the Criminal Law' 2013* *https://www.publicdefenders.nsw.gov.au/Documents/mental%20health%20and%20the%20criminal%20law%20jan%202013.pdf*

Thank You