

Appearing for the mentally impaired: Not guilty mental illness

Conference to in-house solicitors Legal Aid NSW

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Any criminal lawyer practicing in New South Wales knows that a significant proportion of the people we represent suffer from some sort of mental illness or impairment. Whilst there is no institutional data available that I am aware of as to the proportion of people with cognitive and mental health impairments involved in the NSW criminal court system generally, unsurprisingly, the figures gathered by Correctives indicate that such persons are overrepresented in the NSW prisons population.¹ Recent studies indicate that the number of forensic patients continues to increase markedly.²

The mental health condition of your client may raise issues as to whether they are to be dealt with by way of criminal Court proceedings at all, taking into account the application of s. 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) ('MHFPA') within the Local Court of NSW. In higher Courts issues of fitness to plead may be raised, and issues of cognitive or mental health may be relevant to the criminal responsibility of the accused, for example, in relation to the defence of not guilty by reason of mental illness ('NGMI'), or issues concerning non-insane automatism, or as a partial defence of substantial impairment in murder cases, open to them pursuant to 23A of the *Crimes Act 1900* (NSW)

The purpose of this paper is not to address all of the above avenues that may need to be considered by a practitioner appearing for a client with such a condition, but to address the tests and parameters of the defence of not guilty by mental illness alone. Many excellent papers have been written on this same area, including Chris Bruce SC, Public Defender's paper "Ethics and the Mentally impaired" (2011) available on the Public Defender's website, which additionally covers the area of fitness, and ethical issues that may arise where a client refuses to run NGMI when it is available on the evidence.³ Much assistance has been gained from the chapter "The Defence of Mental Illness" in the text *Crime and Mental Health Law in New South Wales* authored by Dan Howard and psychiatrist Dr Bruce Westmore.⁴

¹ NSW Law Reform Commission Report 135 (2012) 'People with cognitive and mental health impairments in the criminal justice system: Diversion' at para 4.109 and 4.56

² As at June 2017, there were 566 forensic and correctional patients in NSW, an increase of 21% from 2015-2016: Mental Health Review Tribunal ('MHRT') 2016/2017 Annual Report for the period 1 July 2016 to 30 June 2017.

³ The cases dealing with this issue include *R v JH* (2009) NSWSC 551 and *R v Hold* 9 DCLR (NSW) 97; *R v Smith* (1999) NSWCCA 126; *R v Williams* (2004) NSWCCA 224 and *R v Dezfouli* (2007) NSWCCA 86.

⁴ Dan Howard and Dr Bruce Westmore *Crime and Mental Health Law in New South Wales* (Lexis Nexis Butterworths 2nd Ed, 2010). I note that a new edition of this valuable text is due out during 2018.

To raise the defence of NGMI or not? And by whom?

This is a fraught issue and one that no doubt causes much worry for the criminal trial lawyer. The decision as to whether to rely on this defence may be complicated by a number of ethical and forensic issues some of which will be apparent from an examination of the consequences of being made a forensic patient, as are set out towards the end of this paper.

As will become apparent however, control over the availability of the defence may simply be taken out of the control of the accused's representative due to the application of s. 37 MHFPA. This provision requires an explanation as to the availability of the defence to be put to the jury if the question of mental illness 'is raised', regardless of whether it is embraced as a defence by the accused at trial.

37 Explanation to jury

If, on the trial of a person charged with an offence, a question is raised as to whether the person was, at the time of commission of the offence, mentally ill as referred to in section 38, the Court must explain to the jury the findings which may be made on the trial and the legal and practical consequences of those findings and must include in its explanation:

- (a) a reference to the existence and composition of the Tribunal, and
- (b) a reference to the relevant functions of the Tribunal with respect to forensic patients, including a reference to the requirements of this Act that the Tribunal may make an order for the release of a person detained in accordance with section 39 only if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

Historically, the right of a trial judge to raise the issue of mental illness was considered and confirmed by the Court of England and Wales, in circumstances where there was sufficient evidence of it before the Court: *R v Dickie* [1984] 3 All ER 173. It was nonetheless considered that the circumstances in which a judge would do so would be 'exceptional and very rare' (*Dickie* at 178). The Court found however that there was no such precedent upon which they could rely to assume that the Crown had such a right, rather the Court found it had the power to rebut the issue if raised by the defence, and the obligation to make any evidence in its possession of insanity available to the defence so that they may exercise their discretion as to its proper use (*Dickie* at 178). In *R v Damic* [1982] 2 NSWLR 750; (1982) 6 A Crim R 35 the judge in a trial in which the accused was unrepresented required a psychiatrist to be called to give evidence in order to confirm that the applicant had schizophrenia at the time of the offences (after confirming that the accused had no objection). He then invited the Crown Prosecutor to ask questions as *amicus curiae*.⁵ Street CJ, with whom Slattery J and Miles JJ agreed, expressed the need for caution in the exercise of a judge's power to call a witness, but in the circumstances of the case noted (at [765E]):

⁵ See also *R v Issa* (SCNSW, 16 October 1995, unreported) and *Lo Tin* [1964] Crim LR 135 (Supreme Court of Hong Kong).

The trial judge was, as he reported to this Court, gravely concerned at the implications from the point of view of justice of permitting a man suffering mental illness to be convicted of murder for which there were strong grounds for doubting his true criminal responsibility. If the judge had not intervened by calling the psychiatrist this is the result which would very likely have ensued. He was, in my view, acting entirely properly in taking this course, notwithstanding that the accused man did not in fact, and did not wish to, set up a defence of mental illness. Indeed, if the judge had refrained from taking this course of his own motion, an unjust conviction could well have resulted.

The present position, in accordance with s. 37, is that the trial judge is obliged to leave insanity to the jury where there is reasonable evidence of it, notwithstanding that it is not relied upon by the defence: *Hawkins v R* (1994) 179 CLR 500; 72 A Crim R 288 at 299; *R v Foy* (1922) 29 WN (NSW) 20; and *R v Shields* [1967] VR 706. In some cases directions on finding specific intent will necessarily involve the giving of directions concerning whether specific intent could have been informed in the context of evidence of mental illness: *R v Minani* (2005) 63 NSWLR 490; [2005] NSWCCA 226 per Hunt AJA at [31]-[32].

In *R v Hilder* (1997) 97 A Crim R 70, the Court set out the reasoning behind the giving of an explanation to the jury as to the ramifications of making a finding of NGMI in accordance with s 37. The Court held that the trial judge was obliged to explain the legal and practical consequences of the findings so as to emphasise the contrast between punishment of the accused for his criminal conduct if found guilty, and treatment for his mental condition if there is a special verdict. In that way the jury would know that the accused would go free if found not guilty, but be detained until there was no longer any threat of danger to the public, following a special verdict. Hunt CJ at CL at 81:

...The point of explaining to the jury the legal and practical consequences of a guilty verdict is to emphasise the contrast between punishment of the accused for his criminal conduct if found guilty and treatment for his mental condition if there is a special verdict, just as the point of explaining to the jury the consequences of a not guilty verdict is to emphasise the contrast between going free if found not guilty and being detained until there is no longer any threat of danger to the public if there is a special verdict.

It was also argued that it was both unnecessary and prejudicial to tell the jury in this case that, if found guilty, the prisoner would go to gaol. I do not see why. Not only does it deal specifically with the question which was asked by the jury, it again emphasises the contrast between punishment and treatment. Even if I am wrong in my interpretation of s 37, I see no prejudice to an accused provided that the trial judge makes it clear to the jury, as the judge did here, that the only way in which the accused will certainly receive treatment for his mental condition is if they give the special verdict. That is no doubt why counsel then appearing for the appellant did not object to the direction which was given.

Ordinarily, it would also be necessary (or at least desirable) for the judge as well to make it clear to the jury that all this information is being given to them so that they understand what happens according to the verdict which they give, but that they should not let those consequences affect their consideration of which verdict they give.

Although the Court of Appeal of England and Wales in *Dickie* (at 178) held that the Crown could not raise the insanity defence, the same is not the law in New South Wales, consistent with the terms of s. 25. In *R v Ayoub* [1984] 2 NSWLR 511 the Court of Criminal Appeal

considered that, whether the issues is raised by the defence, the prosecution or the Court, the standard of proof is the same (Street CJ, Slattery J agreeing) at [515.E]:

In my view there is only one onus of proof to be applied in a criminal trial when an issue arises whether the accused should be found not guilty on the ground of mental illness. Whether that contention be advanced by the accused, by the Crown, or put by the judge of his own motion to the jury, the onus in each case is one of proof on the balance of probabilities.

Procedure for the defence of mental illness

The threshold question

Prior to the consideration as to the application of the test for NGMI, the act or omission forming the *actus reas* of an offence must first be proved beyond a reasonable doubt: *Stiles v R* (1990) 50 A Crim R 13 at 22. After that, the onus shifts to establish that due to mental illness the accused did not know what they were doing: *R v S* [1979] 2 NSWLR 1 at 6, and at 39-40, as to the order in which the jury must assess its task.

The procedure for the consideration of the defence of mental illness was considered by the CCA in *R v Minani* (2005) 154 A Crim R 349; [2005] NSWCCA 226. Hunt AJA (with whom Spigelman CJ and Howie J agreed) held at [32]:

Proof of the specific intention which the Crown must prove in such a case is not always an easy one where there is an element of mental illness involved. In *Hawkins v The Queen* [1994] HCA 28; (1994) 179 CLR 500 (at 510, 512-514, 517), the High Court held that, contrary to what had previously been thought to be the law in this State, evidence of mental illness is relevant to the question as to whether the accused's act was done with the specific intent charged. The High Court held that the order in which the issues should be determined in a case where there is evidence of mental illness is: (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? (3) Was that act done with the specific intention required? The second question is resolved by a finding that mental illness had been established. The third question arises only if the second question is answered adversely to the accused and, in those circumstances, the evidence of mental illness (even though insufficient to make out the defence) is relevant to the issue of specific intent. That evidence is not, however, relevant to the issue as to whether the act of the accused was a deliberate one. The High Court said (at 515) that there was no necessary inconsistency between mental abnormality and the existence of a specific intent, but nevertheless the evidence of mental illness must be taken into account in determining whether there was that specific intent. As the judge found in the present case that the defence of mental illness had been established, it was unnecessary for him to make any finding of specific intent (emphasis supplied).

Mental Illness – The Legal Test

Section 38(1) of the MHFP Act provides that:

If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.

The provision recognises by the delivery of a ‘special verdict’ that the accused is found to have been responsible for committing the relevant deed, but due to insanity, is to be dealt with differently and is ‘not guilty by reason of mental illness.’

“Mental illness” is not defined for the purposes of the MHFP Act. At common law, it has long been accepted that the insane should not be held criminally responsible for their actions.⁶ The issue arose in the prosecution of M’Nagthen who had shot and killed the private secretary to the then Prime Minister of England, Sir Robert Peel. The jury found him not guilty on the grounds of insanity on the basis that he suffered from persecutory delusions. The controversial verdict resulted in Parliament posing a number of questions about the law concerning the insanity defence to the House of Lords, Judges of the Supreme Court: *R v M’Naghten* (1843) 8 ER 229 in which the Court laid down three rules to be determined by a jury: at 233-234.⁷

Every man is presumed to be sane; and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proven...; that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the quality and nature of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong.

M’Nagthen’s case is accepted in NSW as the base for the relevant rule where there is evidence of defect of reason: *R v S* [1979] 2 NSWLR 1 at 61. In summary, in order to sustain a verdict of NGMI, the jury must be satisfied that the accused was:

- a. Labouring under a defect of reason, from a disease of the mind, and
- b. Due that this disease of the mind, the accused either:

⁶ *R v Hadfield* (1800) 27 St Tr 1281: Mr Hatfield murdered King George III in an attempt to have himself killed, thinking it was a necessary act to save his soul. He was acquitted by reason of his insanity. *M’Naghten’s Case* (1843) 4 St Tr (NS) 847; 8 ER 718. Later, the *Trial of Lunatics Act 1883* (UK) was introduced which incorporated the first provision of close equivalence to today’s s 38 of the MHFPA providing that a person found not guilty by reason of insanity would be kept in ‘such place and in such manner as the Court shall direct at the pleasure of the Crown’. In accordance with that Act Mr Hatfield was kept in prison until his death, 41 years after the death of the King.

⁷ See also *R v Oxford* (1840) 9 Car & P 525; 173 ER 941.

- i. Did not know the quality and nature of the act they were doing, **or**
- ii. Did not know that what they were doing was wrong.

In *R v Rodriguez* [2010] NSWSC 198, Johnson J encapsulated the defence of mental illness, citing the test as it currently stands, in the following succinct way at [33]:

If it appears that the Accused was mentally ill at the time when he committed the relevant acts, a Court must return a special verdict that he is not guilty by reason of mental illness: s.38(1) *Mental Health (Forensic Provisions) Act 1990*. The defence of mental illness is to be determined in accordance with the *M'Naghten* rules laid down in *R v M'Naghten* (1843) 8 ER 718. Those rules provide that every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proven. To establish the defence of mental illness, it must be proved upon the balance of probabilities that at the time of committing the acts causing death, the Accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of his act, or if he did know it, that he did not know what he was doing was wrong. A person does not know what he was doing was wrong when he does not know that it is wrong according to the ordinary standards of right and wrong adopted by reasonable persons, or when he cannot reason with some moderate degree of calmness in relation to the moral quality of what he is doing: *The King v Porter* [1933] HCA 1; (1933) 55 CLR 182 at 189-190.⁸

Coincidence of act and omission with mental illness

As with any other crime there must be a coincidence of the active disease of the mind with the act or omission.

Onus

The onus of proof for mental illness is on the accused on the balance of probabilities: *Mizzi v The Queen* (1960) 105 CLR 658, cited in *R v Pratt* [2009] NSWSC 1108 per Hulme J. As stated above, where it is the Crown (or judge) who raises the defence, the test does not alter: the Court in *R v Ayoub* [1984] 2 NSWLR 511 rejected the defence submission that if the Crown raised the defence they must establish it beyond reasonable doubt (at 515).

First Limb: Defect of Reason due to a Disease of the Mind

In *R v Porter* (1933) 55 CLR 182, Dixon J referred to 'the prisoner's faculties' being 'disordered' in reference to the M'Naghten's rules. What is required is some diminution or malfunction of the normal capacity for rational thought.⁹ A disease of the mind refers of any disease which is capable of affecting the mind, whether mental or physical in origin, and

⁸ Cited with approval in *R v PCB* [2012] NSWSC198.

⁹ Howard & Westmore, above n 4, [6.25].

whether the defect of reason is temporary or permanent. In *R v Radford* (1985) 42 SASR 266, 274, which was cited with approval in *Falconer v The Queen* (1990) 171 CLR 30, it was described as some ‘underlying pathological infirmity of the mind... which can properly be termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli’. Devlin J in *R v Kemp* [1957] 1 QB 399 held that the term referred to the mind and not the brain: to reason, memory and understanding (at 407). Any mental disorder which manifests itself in violence and is prone to recur may be a M’Naghten disease of the mind: *Bratty v AG (Northern Ireland)* [1963] AC 386 at 412. The question as to what is a ‘disease of the mind’ is a question of law, and not a medical term: *R v Falconer* (1990) 171 CLR 30 at 50-51, 60. In *R v Falconer*, at 51, Mason CJ, Brennan and McHugh JJ referred with approval to the following passage in the judgment of Martin JA in the Canadian case of *Rabey v R* (1977) 79 DLR (3d) 414 at 430 as to meaning of ‘disease of the mind’:

In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind that is the transient effect produced by some external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a ‘disease of the mind’ if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of ‘disease of the mind’.

It is irrelevant if the condition is curable, incurable, transitory or permanent. The majority in *Falconer* held that a malfunction of the mind that was prone to recur revealed ‘an underlying pathological infirmity’ (at 54).

The term ‘disease of the mind’ has been held to include a number of major mental disorders, including schizophrenia and severe mood disorders, but also has extended to physical diseases, such as psychomotor epilepsy and arteriosclerosis when they affect the soundness of the mental faculties.¹⁰ However, an anti-social personality disorder was not considered a mental disease by the Court in *R v Hodges* (1985) 19 A Crim R 129. It is noted that the condition of post-traumatic stress disorder has been found to be an *abnormality* of mind in cases involving substantial impairment per s 23 A *Crimes Act*, but I am yet to find this condition argued to be a *disease* of the mind.¹¹ As cited at Howard and Westmore, a personality disorder may not be necessarily irrelevant to the mental illness defence as there may be evidence of additional features which, in combination with a personality disorder, may amount to mental illness.¹²

¹⁰ These cases were cited by King CJ in *R v Radford* (1985) SASR 266 at 274-5, approved by the majority in *R v Falconer*, at 53, and 60.

¹¹ *R v Mawson* [2007] NSWSC 1473; *R v Tarrant* [2016] NSWSC 1155; *R v Jenbare* [2016] NSWSC 1317.

¹² Howard & Westmore, above n 4, [6.35]-[6.36], with reference to the NSWLRC Consultation Paper 6 (2010).

The term ‘disease of the mind’ however, has said to exclude the transitory effects of some application of violence, or drugs or alcohol, upon an otherwise healthy mind: *R v Quick* [1973] QB 910. Also excluded are the ‘mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness’ per *Porter* at 188. In *R v Fang (No 3)* [2017] NSWSC the defence of mental illness was not left to the jury in a murder trial where it was said that the accused person was suffering from a psychosis induced by his use of methylamphetamine, and not from any psychiatric illness. This was in keeping with the stated principle in *R v Quick ; Radford v The Queen* (1985) 42 SASR at 274; *R v De Souza* (1997) 41 NSWLR 656; 95 A Crim R 1. See also *R v Meddings* [1966] VR 306; and *R v Bedelph* (1980) 1 A Crim R 445.

However alcohol, and inferentially other drugs, can *induce* disorders that are considered to be a disease of the mind. The condition of alcoholic pellagra encephalopathy, permanent damage caused by substance abuse, was found to fit the categorisation in *R v Davis* (1881) Criminal Law Cases 563. Slightly more recently, *R v Kina* (NSWSC; Allen J 23 May 1996, unrep) the Court held that a psychosis induced by alcohol withdrawal could possibly amount to a disease of the mind.

Second Limb (i): The accused did not know the quality and nature of act

A person does not know the quality and nature of their act if they do not appreciate the physical nature of the act they were doing. This encompasses such situations as where a person may have so little capacity for understanding the nature and destruction of life that to kill another is “*no more than breaking a twig or destroying an inanimate object*”: Dixon J in *R v Porter* at 188.

OR

Second Limb (ii): The accused did not know that what they were doing was wrong

In determining whether a person knew ‘that what they were doing was wrong’, the second limb poses the question as to whether the accused knew that what they were doing was wrong according to a test based upon the ordinary principles of reasonable people, not whether they knew it was wrong *as contrary to law*.

In the Trial of *James Hadfield at the Bar of the Court of Kings bench, for High Treason* (1800) 27 State Tr 1281, Hadfield believed that he was Jesus Christ, that the world was coming to an end, and that he must sacrifice himself for the world’s salvation. He planned to achieve that sacrifice by assassinating the King so that he could be hanged for treason. Because of his delusions he believed that assassinating the King was the right thing to do, although he knew, indeed intended, that it be illegal. Hadfield was acquitted on account of “insanity”.

Ordinary principles of reasonable people

In *R v Porter* the accused in a state of ‘uncontrolled emotionalism’ attempted to kill both himself and his one month old son with strychnine. In that case Dixon J said, at 190:

..what is meant by ‘wrong’? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think at the time ...he had such a mental disorder or disturbance or derangement that he was incapable of reasoning about the right or wrongness, according to ordinary standards, of the thing which he knew he was doing, not that he reasoned wrongly, ..but that he was quite incapable of taking in to account the considerations which go to right or wrong then you should find him not guilty...

....whether you are of the opinion that at the stage [of the act] ..the man..had such mental disorder or diseased intelligence at that moment that he was disabled from knowing that it was a wrong act to commit in the sense that ordinary reasonable men understand right and wrong and that he was disabled from considering with some degree of composure and reason what he was doing and its wrongfulness.

In *Sodeman v R* (1936) 55 CLR 192, the Court emphasised the requirement for the nexus between the act and the lack of knowledge, particularly in a context of “rapid changes in the condition of a man’s understanding”: Dixon J said at 215:

In general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing what he is doing, he is prevented from knowing what he does is wrong. The conditions of irresponsibility must exist at the time when the prisoner commits the acts with which he is charged..It may..be desirable to add that when, under the influence of derangement or instability of mind, there are rapid changes in the condition of a man’s understanding as he proceeds in or towards the commission of the act charged, the law would appear to be that he establishes his irresponsibility only if no intention to do it exists in his mind at the time when he is both capable of understanding the nature and quality of his act and knowing that it is wrong.

The legal principles were more recently summarised in *R v Pratt* [2009] NSWSC 1108 by RA Hulme J, and applied in *Da-Pra v R* [2014] NSWCCA 211 at [9]-[10] per Emmett JA; RA Hulme and Bellew JJ. RA Hulme J in *Pratt* said:

[20] As to whether the accused did not know the acts to be wrong, the question is whether the accused could be said to know, in the sense of appreciating or understanding that the acts were wrong, if through a disease, disorder or disturbance of the mind she could not think rationally of the reasons which, to ordinary people, would make that act right or wrong.

[21] A final matter to observe is that if through a disordered condition of the mind the accused could not reason about the matter with a moderate degree of sense or composure it could be open to find that she did not know that what she was doing was wrong.

Legal vs moral wrongfulness

Consideration must be given to an accused's knowledge of legal versus moral wrongfulness. In *Western Australia v Strabach (No. 2)* [2012] WASC 227, the accused, who suffered from chronic paranoid schizophrenia, killed a man who she believed to be a paedophile. There was psychiatric evidence to the effect that she believed it was her purpose to save children from paedophiles, and that although she knew her actions were legally wrong, her actions were not morally wrong. The judge was satisfied that immediately prior to the killing, the accused had formed delusional beliefs that the victim was a paedophile, posed a danger to her, and the right thing to do was to kill him, and this was consistent with the accused's history of having a psychiatric illness.

In *Stapleton v R* (1952) 86 CLR 358, at 375, the High Court held after a review of numerous English authorities, that the expression "that he did not know that he was doing wrong" in the *M'Naghten Rules* refers to the knowledge that the act was wrong according to the ordinary principles of reasonable people, not whether the act was unlawful. A person may be aware that an action is illegal, without knowing that it is wrong according to the standards of ordinary people, in the sense of moral wrongfulness (at 375).

A similar issue arose in *Skelton v R* [2015] NSWCCA 320 where the Crown relied upon the knowledge by the accused in a murder matter that it was illegal to carry a knife as an illustration of consciousness of guilty (being knowledge of the legal and moral wrongfulness of the act). At [103]-[104], Beazley P and Davies J cited the evidence of the psychiatrists Drs Allnutt, Westmore and Nielsens who all accepted that passing a knife to another person could be consistent with the appellant knowing that what he was doing was wrong, however as they each explained, a mentally ill person might commit an act of violence knowing it was legally wrong but not necessarily wrong in a moral sense. Westmore in that case said '... paranoid people usually know that if they harm somebody ... you know that you'll get into trouble if you hurt them but because of your perception of them, your misinterpretation and misunderstanding, you don't actually care ... the capacity to think about it morally is compromised'.

Therefore, accused persons who are aware that what they do is against the positive laws of the land, but who are unable to appreciate with a moderate degree of composure that what they are doing is wrong by the ordinary standards of reasonable people, may rely on this defence. *Hadfield* was the perfect example of this.

Questions of degree

In *The State of Western Australia v Siddique [No 2]* [2016] WASC 358 Jenkins J acknowledged that the test (in that State) as to knowledge of wrongfulness must be balanced with the degree of rational capacity to reason (at [207]):

Applying the principles of [*Stapelton and Evans*] ... I conclude that the accused's mental state at the time he killed the deceased prevented him from reasoning with any degree of rationality or clarity. I accept that he may well have known that killing someone was regarded as wrong, whether morally or legally. However, in my view the accused's mental illness and the delusional belief system it produced so governed the faculties at the time the accused stabbed the deceased that he was 'incapable of reasoning with some moderate degree of calmness as to the wrongness of his acts or of comprehending the nature or significance of the act of killing'.

Wrongfulness and the evidence of planning, rationality and lies

A degree of planning or pre-meditation, or even lying about conduct, is not necessarily inconsistent with the accused suffering from a mental illness, and indeed the logic of an accused's behaviour may be wholly consistent with their delusions.

The case law confirms that evidence of planning or post-event concealment is not necessarily inconsistent with a finding of mental illness, but it will depend on the circumstances of the case.

- c. In *Devaney v R* [2012] NSWCCA 285, the accused had entered a gym at Sydney Star Casino and shot his ex-girlfriend. He absconded from the scene, donned a disguise (fake moustache and beard) and attempted to evade police. The backpack carried by the accused was later found in the shower cubicle of the Casino containing the firearm and various bullets. The evidence of careful planning did not distract from the unanimous finding by all (three) psychiatrists in the case that he was psychotic at the time of the event.¹³
- d. In *R v Barbieri* [2016] NSWCCA 295, involving the killing of a police officer, the majority of the CCA, found that indicators of planning for an attack by intruders (collecting weapons, deciding to desist from firing arrows at the neighbours), being accepted as evidence of rational decision making, did not prevent the offenders from relying upon their significant mental health status on sentence.¹⁴
- e. In *Da-Pra v R* [2014] NSWCCA 211, the accused killed his father, placed the body in the boot of his father's car, and drove it to a nearby shopping centre. He

¹³ This case did not involve a not guilty by mental illness defence, but the illness was relied upon on sentence.

¹⁴ This case also did not involve a not guilty by mental illness defence, but the Crown had conceded that the accused had significant cognitive impairment per s 19B of the *Crimes Act 1900* NSW.

returned home, and subsequently went to a neighbour's house, armed with a hunting knife, where he ultimately killed one inhabitant of the house and severely injured another. The accused had schizophrenia, which included delusions that he was being targeted by bikies and that he and his parents were going to suffer a terrible fate. The appellant argued that the jury finding of substantial impairment (as opposed to not guilty by mental illness) ought be set aside as unreasonable. The Crown contended on appeal that the jury's rejection of the mental illness defence was open for a number of reasons, which included (at [107]) that the appellant had "*acted in a calculated and rational manner after killing his father, by cleaning the house and garage, hiding the body away from the premises, and staging a robbery at his parents' house, with a view to avoiding detection by the police.*" At [371]-[372], Hulme and Bellew JJ observed (emphasis added):

[371] Further, and in light of the evidence of what the Crown submitted were "calculated and rational" acts committed by the appellant after he had killed his father, *there was psychiatric evidence which overwhelmingly supported the conclusion that a person suffering a mental illness, even to the point of being unable to reason with a moderate degree of sense and composure about one thing, is not rendered incapable of any rationality:* for example, Dr Allnutt at T395.50; Dr Nielssen at T450.32; Dr Reutens at T469.5

...

[374] We are satisfied on the balance of probabilities that at the time of killing his father the appellant was suffering from a defect of disease of the mind such that he did not know that he was doing was wrong in the sense that he was unable to reason about the matter with a moderate degree of sense and composure. It follows that we are find that the jury ought to have been satisfied that the defence was made out."

- f. In *Western Australia v Strabach (No. 2)*, as stated previously, the accused, suffering from chronic paranoid schizophrenia, killed a man who she believed be a paedophile, because she believed it was her purpose to save children from paedophiles. After the killing, she proceeded in trying to remove incriminating evidence, including cutting off the genitals and big toes of the victim (which she believed would have her DNA on them), and disposing of a bag with 'the evidence' within it. The expert evidence, which the judge agreed with, noted that her actions in removing incriminating evidence were consistent with psychotically driven actions, rather than "normal judgement, logic and actions" (at [79]). In discussing the impact of relevant psychiatric evidence on the conclusion that the accused was not guilty by reason of mental illness, the Court observed at [74]-[75]:

When considering these matters it must be taken into account that both Dr Schineanu and Dr Hall stated that in their opinion the accused was aware of what she was doing at the time of the killing. Further, both Dr Schineanu and Dr Hall

stated that a psychotic person, such as the accused, lives in two worlds at the same time: one world is based on the person's correct interpretation of reality and the other world is based on the person's psychotic interpretation of reality. Dr Schineanu in his report dated 12 January 2012 at [84] gave an example of a person who is under the effect of a persecutory delusion and believes that his life is in danger. The person may jump into his car and drive away to escape from his imaginary persecutors. His psychosis does not prevent him from knowing how to start the car and how to drive the vehicle through busy traffic..

- g. In *R v SP* [2017] NSWSC 1579 the accused had drowned her child during a period of psychosis. She had provided false information to the hospital about various matters which she conceded to police was due to the fact that she knew she could end up in gaol because of what she had done. Justice Hidden noted that knowing the legal wrongfulness of your actions was ‘not the test...the focus is upon her capacity at the time she drowned her child to reason that what she was doing was morally wrong, that is, contrary to community standards of behaviour’.

Rapid changes of condition

As was noted by Dixon J in *Sodeman v R* (at 215) above, a mental state might have rapid fluctuations between intensity of hallucinations and delusions and acts of rationality. In *Strabach (No 2)*, Commissioner Sleight noted with reference to the psychiatric evidence at [75]:

Dr Schineanu also stressed that a psychotic person can have rapid fluctuations in his or her mental state. There can be continuous changes in the intensity of their affected cognitive and emotional domains of the mind, in the intensity of the auditory hallucinations and delusions, and the consequent actions of the person. All this makes the psychotic patient's behaviour unpredictable.

Evidence of insanity

Medical experts may give evidence of their opinion as to whether the accused could appreciate the nature and quality of their act, or if they could reason as to whether they were right or wrong: *Thomas v R* (1960) 102 CLR 584. Evidence of insanity is not limited to the medical evidence, other evidence may be adduced from which the inference of insanity may arise, however the jury cannot reject unanimous medical evidence unless there is evidence found within the conduct of the accused, which casts doubt upon the medical evidence: *R v*

Lucas (1970) 120 CLR 171; *R v Jenkins* [1964] NSW 721 and *Taylor v R* (1978) 22 ALR 599.

In *R v Rodriguez* [2010] NSWSC 198 at [45], Johnson J confirmed the following:

Although medical evidence is not essential to prove the defence of mental illness (*Lucas v The Queen* [1970] HCA 14; [1970] 120 CLR 171 at 174), it is the invariable experience of criminal Courts in this State that medical evidence is adduced on this issue. Juries (and Judges sitting alone) are not bound to accept and act upon expert evidence, but they are not entitled to disregard it capriciously: *R v Hall* (1988) 36 A Crim R 368 at 370; *R v Klamo* [2008] VSCA 75; (2008) 18 VR 644 at 655 [44]. A jury (or Judge sitting alone) ought not reject unanimous medical evidence unless there is evidence which can cast doubt upon the medical evidence: *Hone v Western Australia* [2007] WASCA 283; (2007) 179 A Crim R 138 at 146-148 [124]-[126]; *R v Klamo* at 644-645 [44]-[50].

Whether there is sufficient evidence to put NGMI to the jury is a question of law for the judge: *R v Falconer* at 49.

What happens after a special verdict of not guilty by reason of mental illness is made?

39 Effect of finding and declaration of mental illness

(1) If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

(2) The Court is not to make an order under this section for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

(3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Tribunal of the terms of the order.

The Court may order that the person be detained in a place and in a manner as the Court thinks appropriate. The Court may also order that the person be released from custody. The Court may elect to attach conditions of care and treatment to the release. However, before the person is released, the Court must assess public endangerment and in the majority of cases a period of care and treatment is required (either while the person is detained, or while the person is in the community).

A person who has been found not guilty by reason of mental illness and who is detained or under conditional release becomes a forensic patient and remains so until they are released unconditionally (per s 42(a)(i)). Following a finding of NGMI the matter is referred to the

Mental Health Review Tribunal who must review the person as soon as possible, and at least every 6 months thereafter.

The tension that exists between the powers of the Court (under s 9) versus the powers of the Tribunal (Part 5) were considered in *Attorney-General of NSW v X* [2013] NSWSC 1392. The Court noted that an order for conditional release under s 39 of the person still rendered the person a forensic patient and fell under the jurisdiction of the Tribunal. In other words, only those persons released unconditionally from detention, might escape such a classification (and its ramifications). The Court noted that the purpose of conditions was not to contain any element of punishment but was rather only to be considered in light of the necessary protections of others and the community and welfare of the person ([87]-[92]). See also *R v Line* [2004] NSWSC 1148 at [17]-[18].

Order for detention

Mostly, the reported data indicates that the Court orders the person to be detained in a secure psychiatric unit in a hospital. In NSW some of these secure units are situated within the correctional centres.

Conditional release

Where the person is released to the community on conditions, there are a range of conditions available which may include compulsory treatment, abstinence from alcohol or other substances and restrictions on travel and movements. The Courts must consider the safety of the community and the patient when ordering release.

Unconditional release

A person may be released into the community without care or treatment conditions in circumstances where the Court is satisfied that the patient poses no significant risk of harm to themselves or the community after assessment of public endangerment.

It is noteworthy, that whilst the Tribunal exercises the release power, the executive still may play a role in the process, with the Minister for Health and the Attorney General having a right of appearance before the Tribunal and a right of appeal in relation to the release of forensic patients (see ss76A(2); 77A of the MHFPA).

Movements from custodial settings to Forensic Hospital and into the community.

As stated above, as at 30 June 2017, the latest Annual Report of the Tribunal indicates there were 566 forensic and correctional patients in NSW, an increase of 21% from 2015-2016. Of the 425 forensic patients, about 35% live in the community under conditions of release approved by the Tribunal. About 50% of the forensic patients are detained in a mental health facility and about 15% remain in custody. Whilst the Tribunal agrees that forensic patients should not be detained in a custodial setting, the lack of forensic health beds remains a concern to the Tribunal, acknowledging one forensic patient had recently waited 3.5 years in

custody after being referred for admission to the Forensic Hospital, 2.5 years after a Court had determined that the person was not guilty of an offence by reason of mental illness. The situation appears to have worsened. As at 30 June 2017, there were 25 forensic patients waiting in custody for an admission to the Forensic Hospital, an increase of 20 patients from the 12 months before.¹⁵ The Tribunal noted the following:

Those who have been found not guilty of committing an offence because of a mental illness have not been convicted. They are not serving a sentence. They are only eligible to begin to access the community once the Tribunal is satisfied that neither they nor the public would be serious (sic) endangered if community access is granted. It is difficult for a forensic patient to satisfy this test if the patient has not engaged in a rehabilitation program. Unfortunately, there is limited (or no) access to appropriate programs in custody. Therefore, whilst in custody, forensic patients are treading water. They have no end to their detention in sight. The Tribunal hears regularly about the difficulty of maintaining hope in this context.¹⁶

The problems also continue further along the system, with significant shortages in beds in medium or low secure forensic units in Cumberland, Bloomfield, Morisset or Concord Hospitals.¹⁷

Anecdotal information to hand from those within Legal Aid NSW practicing regularly in this area indicates that as at early 2018, it can be up to a 2 year wait for a male person on remand to be moved out of the custodial sentence into a Forensic Hospital from the time of the finding of NGMI (noting that it can take many years to sometimes get a matter to trial). The wait is shorter for female inmates. Another solicitor reported seeing her client, found NGMI, back in custody over 10 years after the original incident by virtue of his forensic patient status and arising from his breach of conditions whilst in the community.

Appeals

Power of the CCA to enter a verdict of not guilty on grounds of NGMI

S 7(4) of the *Criminal Appeal Act 1912* (NSW) allows for an appeal court to quash a conviction and sentence passed at trial and order detention in such manner as the Court thinks fit, if it appears that the appellant committed the act and they were mentally so as not to be responsible according to law for their actions or omission. As noted in *R v Jenkins* (1963) 64 SR (NSW) 20, at 29, such appeals are rare for the reason that ‘the evidence, although strong in favour of the accused’s case, is yet such that a jury, acting reasonably, could fail to be satisfied that it was established, it will rarely happen that an appellate Court, acting merely upon a transcript of evidence, will feel satisfied that a different view will be taken..’

¹⁵ MHRT 2016/2017 Annual Report for the period 1 July 2016 to 30 June 2017, page 7.

¹⁶ Ibid, page 7.

¹⁷ Ibid, page 7. As at 30 June 2017, there were 17 patients assessed as ready to leave the Forensic Hospital and move to a medium or low secure forensic unit, and increase of 7 patients from 12 months prior.

Appeals against acquittals based upon NGMI

In *Peterson v R* [2007] NSWCCA 227 the CCA dismissed the application to appeal against the acquittal by way of NGMI. The applicant argued that he had been unwell at the time and had been solicited by his lawyer to plead NGMI. The CCA said that they did not have jurisdiction under s 5 of the *Criminal Appeal Act* 1912 as there had been on conviction on indictment. S 5(2) states that:

For the purposes of this Act a person acquitted on the ground of mental illness, where the mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

Given that the applicant had run a successful defence of mental illness advanced at trial by his legal representative, no jurisdiction existed allowing his appeal against his acquittal (and the ramifications that flowed by virtue of his becoming a forensic patient): see also *R v Foy* (1922) 39 WN (NSW) 20; *R v Greig* (1996) 89 A Crim R 254.

In *R v Foy* (1922) 39 WN (NSW), the Court considered the jurisdiction to entertain an appeal conferred by s. 5(2) of the *Criminal Appeal Act*. In that case counsel appearing for the appellant had not set up the defence of insanity in evidence. The accused had given evidence that the incident was an accident. Evidence was led by the Crown that the accused had been detained in the Callan Park Asylum shortly before the subject events. The accused's counsel addressed the jury on accident, but he also made submissions in support of the defence of mental illness. Cullen CJ (with whom the other members of the Court concurred) considered that insanity had been set up as a defence within the meaning of the subsection given counsel had addressed the jury upon it and therefore the CCA had no jurisdiction to interfere on appeal. See also *R v Logan* [2004] NSWCCA 101.

In *R v Riddell* [2003] NSWCCA 251 the appellant appealed against the special verdict returned at trial. The Crown and counsel appearing for the accused led expert evidence that the accused had been mentally ill at the time of the offence. Greg James J (Hidden and Bergin JJ concurring) noted that although the defence of mental illness had been set up by the appellant's counsel at trial, one of the grounds raised by the appellant on appeal was that his counsel had acted against instructions in so doing. Greg James J observed:

[22] In the present case the issue having been raised as to fitness and mental illness in my view the Court should not simply deal with the present appeal without inquiring into the substance of the defence of mental illness, and in particular as to the course the Court might take in the event that the appeal were to be upheld, at least where it might be upheld under s 5(2), but purely upon procedural grounds which after all is what is asserted here.

Greg James J noted the power conferred by s 7(4) of the *Criminal Appeal Act*, but found that it (also) appeared to that Court that the appellant was mentally ill at the time so as not to be responsible in law for his actions. They agreed that the order that the appellant be kept in strict custody until released by due process of law was appropriate. His Honour considered that if the appeal were to proceed, and the special verdict were to be set aside, the Court

would be constrained to make an order in the same terms as that made by the trial judge, and dismissed the appeal.

Similarly, in *Dezfouli v R* [2007] NSWCCA 86, consideration was given as to the question of jurisdiction and the scope of ss 6A and 7(4) of the *Criminal Appeal Act* (at [41]). The circumstances involved the applicant's claim that he had not instructed his counsel or solicitor to pursue such a defence (there earlier being a finding of unfitness and a special hearing). The Court stated that it had proceeded upon the basis that s 5(2) may confer jurisdiction to entertain an appeal from a verdict under s 22(1)(b) of the Act returned at a special hearing in a case in which the accused person did not set up the defence.¹⁸ The Court nonetheless dismissed the appeal on the basis that the evidence did not disclose that the verdicts were unreasonable or could not be supported by the evidence, nor that there had been any wrong decision of any question of law or a miscarriage of justice, at [56]. See also: *R v Williams* [2004] NSWCCA 224; *R v Greig* (1996) 89 A Crim R 254.

The relevance of mental health on sentence where the NGMI defence is not run

In *Elturk v R* [2014] NSWCCA 61 the Court of Criminal Appeal found that the trial judge was in error when he stated that the 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]). Although Mr Elturk's plea of guilty precluded his mental illness from absolving him of criminal responsibility, the Court nonetheless considered that his mental illness was a causal factor in the commission of his crime, and so relevant to the assessment of his moral culpability and the objective seriousness of the offence.

Some evidential matters

As in any case where mental health is to be relied upon, attending to the gathering of evidence early in the piece is vital. The collection, or viewing, of material from various sources may include the following:

- The images, or visual recording of any forensic procedure process;
- Custodial records, particularly on arrest;
- Justice Health records;
- Medicare records to ensure all medical attendances are known;

¹⁸ In this case Mr Toner SC, appearing for the accused, had frankly told the Court of the difficult position he was in: that he was not acting in accordance with his client's instructions, but was nonetheless acting in the best interests of his client.

- Medical records; and
- Records of prescriptions filled by chemist dispensing medication.

Sophia Beckett

Public Defender