Guilty But Mentally Ill

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Until recently, disposition of the mentally ill offender found either Incompetent to Stand Trial (IST) or Not Guilty by Reason of Insanity (NGRI) has not posed any particular problem to the courts. Indeterminate commitment to a mental hospital, usually with maximum security, has been the traditional way to remove him from society. The last two decades, however, have seen substantial changes in laws dealing with this miserable creature. No longer can he be incarcerated forever simply because he cannot be sufficiently restored to competency to stand trial. Nor can there be indeterminate commitment of the NGRI on the presumption of continuing mental illness and dangerousness. Recent history of mental health case law and legislation in Michigan typifies what has happened or is happening across the country.

Prior to 1966, Michigan was like most other states. When a mentally ill offender came before the court, if considered "insane" he was often committed on a pretrial basis[1] (as incompetent to stand trial) and more than likely would remain committed for years longer than if convicted. Few went to trial, and NGRI commitments were relatively rare. In 1960, however, the U.S. Supreme Court decision in *Dusky v. U.S.*[2] began better clarification of the difference between incompetency and exculpability, and subsequent lower court decisions increasingly cast doubts on the legality of such practices. In 1966, in an effort to halt the obvious abuses in the Michigan system, a special commission recommended legislation to (1) delineate the criteria for competency to stand trial, (2) change the release provisions for the NGRI patient, and (3) set up the Center for Forensic Psychiatry to implement these changes.

As a result of these new laws,[3] the Ionia State Hospital for the Criminally Insane returned to the custody of the criminal courts several hundred IST offenders. This influx into the court dockets of so many old cases, many of whom had been committed for years, resulted in a sudden increase in NGRI verdicts. The 1966 law, while still retaining the presumption of continuing insanity with automatic commitment by the trial court, provided that such patients could be placed in any Department of Mental Health facility rather than just Ionia and could be released on approval by the Center for Forensic Psychiatry; abolished was the gubernatorial approval previously required.[4] Patients acquitted by the NGRI verdict began to increase sharply in number, jumping from only 12 in 1967 to a total of 203 by mid-1973. Study of these 203 commitments showed less than half of them to be both medically and

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legally appropriate.[5] Complicating matters further at this time was a circuit court case ruling that the automatic NGRI commitment was unconstitutional without a hearing being held on the offender's present mental state. The offender in question, James Chester McQuillan, was thereafter released, and the prosecutor appealed. Because it seemed likely that the trial judge's ruling would be upheld, corrective legislation was suggested[5] but was not totally accepted by the special Legislative Commission on Revision of the Mental Health Laws.

In 1974, the Michigan Legislature passed the completely revised Mental Health Code.[6] Almost simultaneously, the Michigan Supreme Court handed down the decision in the case of *People v. McQuillan.*[7] This decision, citing *Baxtrom v. Herold,*[8] *Specht v. Patterson,*[9] *Bolton v. Harris,*[10] and *Jackson v. Indiana,*[11] declared on the grounds of due process and equal protection that, in effect, an individual found NGRI was acquitted. The only constitutionally allowable difference in treatment between him and one who was being civilly committed (and had not perpetrated a crime) was the imposition of a mandatory initial 60-day period of observation. Thereafter, to be retained, all such offenders would have to meet the civil criteria for commitment, *i.e.,* be mentally ill and by reason of that mental illness dangerous to themselves or others or unable to meet their basic needs;[12] otherwise, they were to be released outright. The Court also added that all previously committed NGRIs were to be evaluated within 60 days of the decision and released forthwith if not civilly committable. If on examination they were considered mentally ill and committable, the prosecution was given 10 days to file a petition for civil commitment. Of the 270 patients that required review, many were released outright, and some others were released after hearings in probate court. The publicity was widespread, and when a murder and two rapes were committed by persons released under the *McQuillan* ruling, the public pressure became very strong on the legislature to take action to protect the public.

Because of the complexity of the situation, drafting of new statutes presented an awesome task. Prior legislation in this area had been written without much input from mental health professionals, and even then usually from academicians who knew little of the practical workings of the law and mental health. Accordingly, the Director of the Department of Mental Health, with approval of the legislature, appointed the author, as Director of the Center for Forensic Psychiatry, to outline the problems and draft new statutes.

One major problem brought to the fore by the *McQuillan* decision was the previously documented abuse of the plea of NGRI. New studies by the Center for Forensic Psychiatry in September of 1974 of close to 350 patients who by then had been acquitted by reason of insanity indicated that only about 20% of these, in retrospect after the trial, were legitimately found to be both mentally ill and, by reason thereof, exculpable. Another 50% were viewed as having some level of neurosis or psychosis; however, no causal relationship between their mental state and the crime was evident. Despite their mental illness, they should have been found culpable. The remaining 30% were seen only as character disorders with no indication that they were in any way mentally ill.[13]

In view of the small number of legitimate NGRI acquittals, the immediate impulse of the legislature was to abolish the insanity defense. Even though this idea previously had been expounded in the literature,[14] review of case law showed that both Washington[15] and Mississippi[16] had had statutes repealing the defense declared unconstitutional as violative of due process. The NGRI defense was therefore retained in the new statute,[17] although procedural and substantive changes were made:

> Sec. 20a. (1) If a defendant in a felony case proposes to offer in his defense testimony to establish his insanity at the time of an alleged offense . . . [he] shall file . . . notice . . . not less than 30 days before . . . trial . . . .
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> (2) Upon receipt of . . . [such] notice . . . a court shall order the defendant to undergo an examination . . . [at] the Center for Forensic Psychiatry . . . .
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> (3) The defendant may, at his own expense, or if indigent, at the expense of the county, secure an independent psychiatric evaluation . . . . The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant shall be entitled to receive a reasonable fee as approved by the court.
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> (4) The defendant shall fully cooperate in his examination by personnel of the Center for Forensic Psychiatry and by any other independent examiners for the defense and prosecution. If he fails to cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant shall be barred from presenting testimony relating to his insanity at the trial of the case.
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> (5) Statements made by the defendant to personnel of the Center for Forensic Psychiatry or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his mental illness or insanity at the time of the alleged offense . . . .[18]

Review of this legislation reveals that evaluation at the Center for Forensic Psychiatry is mandated. The defendant is also allowed to obtain a clinician of his own choice, and the prosecutor is given the same privilege.* The defendant is required to cooperate in all examinations or the NGRI defense can be barred. To avoid the problem of self-incrimination, no statement made during any examination can have any probative value except on the issue of his mental illness and insanity.

To provide for the large group of defendants which the statistics indicated were culpable despite their mental illness, an additional verdict was created:

*The Michigan Supreme Court had already ruled in an earlier case[19] that the prosecution bore the burden of disproving alleged insanity beyond a reasonable doubt once the issue was raised by the defense; to deny the prosecutor a psychiatric examination of the defendant would also deny him the possibility of presenting rebuttal testimony. This, in effect, would result in a directed verdict of NGRI.

the Guilty But Mentally Ill (GBMI).* This new verdict required that a determination be made on three separate issues: (1) commission of the act, (2) presence of mental illness, and (3) exculpability.

In the normal course of a trial in which insanity is the defense, the prosecutor presents his case-in-chief, during which he is barred from presenting any evidence as to the defendant's mental state.[21] The new statute provides that following his presentation, and prior to the taking of expert testimony on the defendant's mental state, the jury is to be instructed on the nature of the evidence they will hear.[22]

> Sec. 29a. (1) If the defendant asserts a defense of insanity . . . the judge shall . . . instruct the jury on the . . . [definitions of mental illness and insanity] . . . .

Despite the fact that the term "mental illness" was used throughout the new Mental Health Code, the drafters were unable to agree on a definition and thus omitted it. The new GBMI legislation therefore required the following to be added:[23]

> 300.1400a. ". . . mental illness means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

The previous definition of insanity,[24] basically a combination of right/wrong and irresistible impulse, was replaced by a modification of the American Law Institute Model Penal Code.[25]

> Sec. 21a. (1) A person is legally insane if, as a result of mental illness as defined in . . . section 330.1400a of the Michigan Compiled Laws . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[26]

The caveat excluding the antisocial personality disorder was omitted,[27] but because of problems with alcohol- and drug-related mental states, a second section was added:[26]

> Sec. 21a. (2) A person who is under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his alleged offense shall not thereby be deemed to have been legally insane.

With these definitions in mind, the jury then hears the psychiatric testimony and that of any other witnesses bearing on the defendant's mental

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*The idea is not new. The inspiration for the GBMI arose from the British "Trial of Lunatics Act" of 1883.[20] Queen Victoria had been shot at by a Mr. McLean, a disgruntled Scottish subject, and she was incensed when the jury found him NGRI. Commenting, "He did it!" she attempted through this act to replace the NGRI with a verdict of Guilty But Insane, but on appeal the act was deemed to have exactly the same effect. The result was a change only in name – a change which continued until the British Revised Judicature Act of 1952.

state. At the end of the testimony, the jury is charged.[22]

> Sec. 29a. (2) At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity and shall also contain instructions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offenses.

The verdict of GBMI is defined in the statute as follows:[28]

> Sec. 36. (1) If the defendant asserts a defense of insanity . . . [he] may be found "guilty but mentally ill;" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:
> a) that the defendant is guilty of an offense
> b) that the defendant was mentally ill at the time of that offense
> c) that the defendant was not legally insane at the time of the commission of that offense

The three decisions enable the finder of fact to distinguish those defendants who are legitimately exculpable from those whose mental illness, if any, was ancillary to the crime.

The statute also provides for accepting a plea to Guilty But Mentally Ill.[29] To ensure psychiatric examination in advance of the plea, the defendant is required first to file intent to plead NGRI so that he will be examined at the Forensic Center.

> Sec. 36. (2) If the defendant asserts a defense of insanity . . . and . . . waives his right to trial . . . the trial judge, with the approval of the prosecuting attorney, may accept a plea of guilty but mentally ill . . . [but not] until, with the defendant's consent, he has examined the report or reports prepared pursuant to Section 20a, has held a hearing on the issue of the defendant's mental illness at which either party may present evidence, and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered . . . .

The remainder of the statute contains provisions for the disposition of the defendant found GBMI. He is given a pre-sentence evaluation and either placed on probation or sentenced to prison. If he is imprisoned, psychiatric evaluation of his mental state and appropriate treatment are mandated.[30]

> Sec. 36. (3) If a defendant is found guilty but mentally ill or enters a plea to that effect which is accepted by the court, the court shall impose any sentence which could be imposed pursuant to law upon a defendant who was convicted of the same offense. If the defendant is committed to the custody of the department of corrections, he shall undergo further evaluation and be given such treatment as is

> psychiatrically indicated for his mental illness . . . [which] may be provided by the dpeartment of corrections or by the department of mental health after his transfer . . . If he is placed on parole . . . his treatment shall, upon recommendation of the treating facility, be made a condition of parole, and failure to continue treatment . . . shall be a basis of the institution of parole violation hearings.

Previously, the imprisoned mentally ill offender remained largely ignored unless his behavior was so grossly disturbed that remaining in the general prison population was impossible. As a GBMI, he is more easily identified. Provision is made for his transfer, as appropriate, to the Department of Mental Health. In practice, however, such transfers have not worked well and have tended to be of the "revolving door" type.* Indeed, the only challenge to reach the appellate court so far on the constitutionality of the statute has been on the basis that it mandated treatment that either could not or would not be supplied. The appellate court affirmed the appellant's GBMI conviction, indicating that the finding referred only to his mental state at the time of the act. The court refrained from going into any "right to treatment" issue, at least at the present time.[32]

If the GBMI defendant is placed on probation, treatment can be made a condition thereof.[33]

> Sec. 36. (4) If a defendant who is found guilty but mentally ill is placed on probation under the jurisdiction of the sentencing court . . . the trial judge, upon a recommendation of the center for forensic psychiatry, shall make treatment a condition of probation . . . Failure to continue treatment, except by agreement with the treating agency and the sentencing court, shall be a basis of the institution of probation violation hearings . . . .

Given the general lay concern about the mentally ill offender, one might suspect that probation as an alternative to imprisonment would be little used. Here, however, lies the real advantage of the GBMI finding. In the case of a defendant who has an NGRI defense which is supported even by the prosecutor's psychiatrist, and who is likely to be released as uncommittable, the GBMI plea allows the prosecutor to offer probation with treatment. The defendant is assured of his disposition, and the public is assured that there will be a five-year period where follow-up and treatment will be mandatory. If the probationer refuses to continue treatment, the prosecutor may institute probation violation proceedings. If the probationer becomes acutely psychotic, he can be civilly committed or may even be induced to enter a mental hospital as a "voluntary" admission by being offered prison as an alternative. The defendant, meanwhile, is not only being treated for his illness, but is able to work and maintain himself in society. Such pre-trial diversion is certainly not uncommon. The GBMI verdict represents a new dispositional avenue for the courts to use with the mentally ill offender.

To date, the author has heard of 21 cases where pleas to GBMI were

*Legislation has now been passed to correct this problem.[31]

offered and accepted in lieu of almost certain NGRI verdicts. The original charges included felonies ranging up to and including murder. As far as is presently known, there has been no recidivism, and only two patients have required hospitalization, both for brief periods.

Despite the practical advantages of the GBMI, an objection frequently voiced is that the jury, in a difficult case, might use it as an intermediate verdict or "escape hatch." Because Michigan law requires that the charge to the jury include the disposition of the defendant,[34] it is argued that the jury's concern about the defendant's being released immediately upon expiration of his 60-day observation could lead them to ensure against this by finding him Guilty But Mentally Ill, even though they actually felt that he was exculpable. Review of those 57 GBMI cases that have been sentenced to prison as of June 1, 1978, however, reveals only two cases in which this possibly may have occurred. Certainly, dire predictions by some lawyers that the NGRI acquittal would fall into disuse have not been borne out. Nor has the new law reduced attempts to use the NGRI defense. In 1974, before the law was passed, there were 49 evaluations for criminal responsibility performed at the Forensic Center. After the law took effect, in the remaining five months of 1975, there were 93 such referrals. By June 1, 1978, after the law had been extant for less than three years, a similar five month period had 271 referrals, for an average of over 50 per month.

Previous abuse of the defense seems to have been reduced by both the new jury instructions and the availability of rebuttal testimony where appropriate. Although the earlier research on the appropriateness of the NGRI acquittals has been discontinued, the rate of NGRI acquittals has dropped, while the percentage of those found to be civilly committable has risen. Much more research into the functioning of this law is needed. It can only be hoped that the Forensic Center, utilizing its unique position, will follow its legislative mandate,[35] and renew the study in this area.

Since the enactment of Michigan's GBMI legislation, bills affecting the insanity defense have been introduced in the legislatures of several other states. In New York, for example, one bill proposes adoption of the GBMI in almost identical form,[36] although another proposes total repeal of the insanity defense and enlargement of the concept of diminished capacity.[37] In Illinois the GBMI has been introduced as a replacement for the NGRI, not as an additional verdict.[38] It can only be speculated, in these changing times, whether such new attempts to abolish the insanity defense will be successful or will, as in the past, promptly be ruled unconstitutional. If society feels generally, as it has in Michigan, that the new mental health and criminal rulings are eroding its protection against crime, a more structured disposition of the mentally ill offender may become commonplace. Whether any concept can improve on or replace six centuries of the Not Guilty by Reason of Insanity verdict remains to be seen. The GBMI statute was an attempt to solve certain problems in Michigan. As other states face similar problems they too will have to create new laws. The active participation of the practicing forensic psychiatrist is strongly recommended to ensure that these laws are consistent with psychiatric practice and are in the best interests of both the mentally ill offender and society.

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