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INSANITY AS A DEFENSE — *McNAGHTEN* RULE REPUDIATED BY DISTRICT OF COLUMBIA

Durham v. United States[1]

By MATHIAS J. DE VITO*

Defendant was convicted of housebreaking by the United States District Court for the District of Columbia. The only defense asserted at the trial was that the accused was of unsound mind at the time of the offense. The defendant had a long history of imprisonment and hospitalization. From the time of his discharge for psychiatric reasons from the Navy in 1945 until May of 1951, two months before the offense, the defendant had been committed and released from a mental hospital three times after having been found insane at insanity inquiries. After the commission of the housebreaking offense he was admitted to a mental hospital for the fourth time for sixteen months

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[1] 214 F. 2d 862 (D. C. Cir., 1954). This decision has been followed by a great deal of discussion in periodical literature. A partial list follows: 54 Colum. L. Rev. 1153 (1954); 68 Harv. L. Rev. 364 (1954); 40 Va. L. Rev. 799 (1954); 28 So. Calif. L. Rev. 86 (1954); 40 Cornell L. Q. 135 (1954); 23 Geo. Wash. L. Rev. 225 (1954); 43 Geo. L. J. 58 (1954); 22 Chic. L. Rev. 317.

when he was released to stand trial on certificate of the superintendent of the mental hospital that he was " 'mentally competent to stand trial and . . . able to consult with counsel to properly assist in his own defense'."[2] At the trial, a psychiatrist testified that at the time of the offense, defendant was suffering from a mental disease. The lower court found defendant guilty and rejected his plea of insanity on the ground that it had not been established that at the time of the offense the defendant did not know the difference between right and wrong or if he did, that he was subject to an irresistible impulse by reason of a deranged mind. The trial court also ruled that the normal presumption of sanity prevailed since no evidence of insanity was shown at the trial sufficient to shift the burden of proving sanity to the Government.[3] The defendant, on appeal to the United States Court of Appeals, District of Columbia Circuit, urged the reversal of the conviction on the grounds (1) that the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity and (2) that the existing tests of criminal responsibility are obsolete and should be superseded.

The Court reversed on the first contention, holding that the testimony of the psychiatrist was "some evidence" so that the presumption of sanity was no longer absolute. The Court then, in *obiter dictum* "overruled" the existing tests in the District of Columbia for determining criminal responsibility, *i.e.*, the "right and wrong test"[4] supplemented by the "irresistible impulse" test,[5] thereby repudiating the rule in *McNaghten's Case*[6] which is the only test of criminal responsibility in twenty-nine states and the main test in the remainder of jurisdictions, save New Hampshire.[7] In

[2] *Ibid*, 864. Maryland has a similar procedure to commit a defendant insane at time of trial until he recovers sufficiently to aid in his own defense. Md. Code (1951), Art. 59, Sec. 6.

[3] This rule was established in the District of Columbia in Tatum v. United States, 190 F. 2d 612, 615 (D. C. Cir., 1951), where the court quoting GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925), 41-42, states that all people accused of a crime are sane, but as soon as " 'some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecutions case beyond a reasonable doubt'."

In Thomas v. State, 112 A. 2d 913 (Md., 1955), the Court of Appeals approved an instruction of the trial court that "the burden of proof of insanity lies upon the defendant".

[4] Guiteau's case, 10 Fed. R. 161 (1882).

[5] Smith v. United States, 36 F. 2d 548 (D. C. Cir., 1929).

[6] 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

[7] For a complete list of the test for criminal responsibility in all the jurisdictions in the United States, see WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954), 129-173.

overruling the existing tests the Court stated that the right-wrong test "does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. . . . the 'irresistible impulse' test . . . gives no recognition to mental illness characterized by brooding and reflection . . .".[8] In short, the existing tests were inadequate and too limited in their coverage. The Court then ruled that the test to be applied in the retrial of the instant case and in future cases is that the question of insanity is a question for the jury and that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect".[9]

The right-wrong test as a criterion of criminal responsibility became established in English and American law through the famous *McNaghten case*.[10] The rule as expressly stated in the opinion is:

> ". . . 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 disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[11]

This right-wrong test has been severely criticized both by psychiatrists and medico-legal authorities on the grounds that as a sole test for criminal responsibility it fails to take cognizance of proven medical facts but proceeds on

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[8] *Supra*, n. 1, 874.

[9] The court explained that it used the word "defect" in the sense that it is a condition that would not be capable of improving or deteriorating and "disease" in the sense that it is a condition that would be capable of improving or deteriorating. *Ibid*, 874-5.

[10] *Supra*, n. 6. The importance of this case can be traced to the notorious facts that surrounded the case. Daniel McNaghten shot and killed the private secretary of Sir Robert Peel, thinking him to be Sir Robert. The defendant suffered from insane delusions that his enemies were plotting against him and that Peel was one of them. Defendant pleaded insanity and the medical evidence indicated that the delusions affected McNaghten in such a way that he lost control over his acts and had lost the perception between right and wrong as to any act connected to his delusion. The jury found him "not guilty on the ground of insanity". Because of the prestige of Sir Robert, the question of the test of criminal responsibility was put to the Judges of the House of Lords. The issue was put in the form of five questions. The answers to these questions agreed upon by fourteen of the fifteen judges, are the basis of modern day tests of criminal responsibility.

[11] *Supra*, n. 6, 210, 722. For a complete statement concerning the facts and a profound criticism of the McNaghten case see STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), Vol. II, 135-186.

outdated and erroneous beliefs regarding insanity. Glueck summarizes these criticisms thusly:

> ". . . this test abstracts, unscientifically, but one element of mental life and proceeds upon the following erroneous assumptions: (1) that lack of knowledge of right and wrong is the sole symptom of mental disease; (2) that, further, such knowledge is the sole instigator and guide of conduct, or the most important element therein, and consequently, the sole criterion of criminal responsibility; and (3) that capacity of knowing right from wrong can be intact and functioning perfectly even though a defendant is otherwise mentally unsound."[12]

From the standpoint of the psychiatrist appearing in the role of expert witness, the right-wrong test poses an important problem. When asked if the defendant knew the difference between right and wrong, it is felt that the psychiatrist is forced to answer in a language foreign to him as a medical practitioner, since such judgments are without his experience in that field. Of course, as a member of the community, he cannot help but share the community's "moral" or "value" judgments on what is right or wrong. But the presence of the psychiatrist in court is for the purpose of conveying technical information, a purpose which cannot be accomplished within the framework of the right-wrong test. Because of the dual role forced upon him in court, the use of his experience as a psychiatrist is minimized to a great degree.[13]

A large minority of states have recognized the inadequacy of the right-wrong test as the sole criterion of criminal responsibility and have attempted to broaden the test so as to include not only the person who, at the time of the act, did not have the perception to distinguish between right and wrong, but also the one who does not have the freedom of will to resist the impulse to commit a criminal act. These jurisdictions have supplemented the right-wrong test with the addition of what is commonly known as the "irresistible impulse" test.[14] Thus, under such a broadened concept, where a person acting under the influence of a

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[12] GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925), 226.

[13] GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952), 406-407; Committee on Psychiatry and Law of the Group for Advancement of Psychiatry, Report No. 26 (1954), *Criminal Responsibility and Psychiatric Expert Testimony*, 5.

[14] For a discussion of historical origin of the irrestible impulse test see WEIHOFEN, *op. cit., supra*, n. 7, 85, *et seq.*

mental disease committed a criminal act though he knew the difference between right and wrong, yet he could not resist the impulse to commit the act, he would nevertheless be found irresponsible. Of those jurisdictions that refuse to adopt the irresistible impulse test, the majority base their refusal to do so on a number of grounds:

> ". . . (1) The belief that no such disorder is in fact possible; (2) if it does exist, it is too difficult to prove to be allowed as a defense to crime; (3) it is a defense dangerous to society; and (4) statutes setting forth the right and wrong test as the only criterion of responsibility prevent courts from adopting any other tests."[15]

The grafting of the "irresistible impulse" test to the "right-wrong" test is looked upon as an advance since it does provide for judicial recognition of the volitional as well as the cognitive element of the criminal act. But even the combination of "irresistible impulse" with the "right-wrong" test is criticized by most psychiatrists as an unsatisfactory rule of criminal responsibility. The expanded test neglects the fundamental idea that the mind is a totally integrated mechanism and that the mental processes function in relation to one another so that a "disturbance in the cognitive, volitional or emotional sphere, as the case may be, can hardly occur without its affecting the personality as a whole and conduct flowing from the personality".[16]

The single jurisdiction in the United States, before the decision in the instant case, that ignored the limitation of the "right-wrong" and the "irresistible impulse" test was New Hampshire. As far back as 1870 and 1871, in *State v. Pike*[17] and *State v. Jones*,[18] New Hampshire set down the rule that has been substantially adopted in the instant case, *i.e.*, that there is no single test of criminal responsibility and that the question is not one of law, but one of fact for the jury. This rule which has become known as the New Hampshire rule, provides that if the jury finds the criminal act to be a product of a mental disease, the defendant should be acquitted on the ground of insanity. The New Hampshire court fully recognized that criminal intent, a necessary element of a criminal act, could be absent though the actor had knowledge of right or wrong and was not impelled by an irresistible impulse. Until the principal case,

[15] *Ibid*, 95.
[16] GLUECK, CRIME AND CORRECTION (1952), 150.
[17] 49 N. H. 399 (1870).
[18] 50 N. H. 369 (1871).

the courts have uniformly ignored or rejected the New Hampshire view, consistent as it may be with modern medical thought on the subject and have continued to apply the earlier tests of criminal responsibility.

Maryland stands with the majority of the jurisdictions on the test for criminal responsibility, having adopted the "right-wrong" test in *State v. Spencer*[19] in 1888. In this case the defendant was convicted of murder. The trial court refused to admit evidence of the defendant's mental condition before the committing of the crime unless such testimony was followed with proof that the defendant was insane and therefore irresponsible at the time of the murder. On appeal the lower court's ruling was affirmed, the Court of Appeals setting out the test that should be applied in cases where insanity was pleaded as a criminal defense. The Court said:

> ". . . if, at the time of the commission of the alleged offense, he (defendant) had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act, as applied to himself, he is a responsible agent, and amenable to the criminal law of the land for the consequences of his act."[20]

In addition, the Court then specifically rejected the "irresistible impulse" test as a supplement to the "right-wrong" test. The Court acknowledged that the expanded test was accepted in some jurisdictions and was advocated by writers in medical jurisprudence, but held that it had no place in Maryland, stating that:

> "All crime is committed from bad motives or impulses, and it is the great object of the law to compel people to resist and restrain their vicious criminal impulses; the law giving no impunity to their indulgence."[21]

There has been little case law dealing with the test for criminal responsibility following the *Spencer* case. Subsequent to this 1888 decision only two cases have been found,

[19] 69 Md. 28, 13 Atl. 809 (1888).

[20] *Ibid*, 37. It should be noted that the wording of the Maryland right-wrong test differs in some respects from the wording of the test as set out in *McNaghten's Case*. Maryland uses the words "nature and consequences" while the phrasing in the *McNaghten Case* is "nature and quality". The Maryland test, however, is seen to be substantialy the same as the McNaghten rule, regardless of the slight difference in wording. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1951), 71.

[21] *Supra*, n. 19, 40.

viz., *Deems v. State*[22] and the more recent case of *Taylor v. State*,[23] both of which directly affirm the test of the *Spencer* case as Maryland's sole criterion of criminal responsibility. Thus, in Maryland if the defendant knows the difference between right and wrong, yet is otherwise mentally disordered he is not considered insane under the Maryland test and is treated as a responsible agent.[24]

Recently local interest has been aroused in the case of *State v. Salinger*[25] where the defendant, a psychopath,[26] was acquitted of armed robbery and assault with intent to rob by a jury in the Criminal Court of Baltimore City on the ground of insanity. In reporting the case, the Baltimore Sun declared that the verdict ignored legal precedent and indicated that it marked a reinterpretation of the legal test of insanity that prevailed in Maryland.[27] It was stated that since Salinger was the first psychopath to be found insane by a jury in Maryland, and since psychopaths traditionally were not considered insane under the Maryland test, this case marked a change in the Maryland insanity law.[28]

Upon a closer examination into the facts surrounding the trial, it becomes evident that no such change or reinterpretation resulted. Both the Court Medical Officer and the three unpaid experts employed by the defense agreed that Salinger was a psychopath, but they differed in their interpretation of the definition of a psychopath. The Court Medical Officer testified that "under the legal definition of insanity, Salinger was a responsible person accountable to the law, despite medical recognition of Salinger's inability to control his emotions. 'Technically', . . . Salinger knew the difference between right and wrong and the nature and consequences of this act."[29] Other psychiatric testimony

[22] 127 Md. 624, 96 Atl. 878 (1916).

[23] 187 Md. 306, 49 Atl. 2d 787 (1946).

[24] Maryland has indirectly alleviated the harsh results that are bound to occur under the strict right-wrong test for insanity by the provision for the Patuxent Institution for defective delinquents which took effect June 1, 1954. Md. Code (1951), Code Art. 31B. Under this provision, a person who has been found guilty under the *Spencer* test, but who might be considered insane under the modern medical view, can be cared for at the Patuxent Institution. Application for a medical examination of the defendant may be made by the state, the defendant himself, or by the court on its own initiative.

[25] See Daily Record, Nov. 24, 1950. For the tests to be applied on a petition for release from the mental institution, see Salinger v. Superintendent of Spring Grove State Hospital, 112 A. 2d 907 (Md., 1955).

[26] A psychopath is usually defined as a person who intellectually knows the difference between right and wrong, but is unable to control the emotional urges that lead to crime. WEIHOFEN, *op. cit., supra*, n. 20, 122-123.

[27] Baltimore Sun, Nov. 15, 1950, 38.

[28] *Ibid.*

[29] *Ibid*, 25.

was introduced, however, to the effect that "because Salinger lacked the emotional control to act on his intellectual apprehension, he did not really 'know' the difference between right and wrong."[30] The trial court, Sherbow, J., in his advisory charge to the jury explained that the law applicable in the case was laid down in *Spencer v. State*[31] and gave the test that was to be applied in the case in the express language of the *Spencer* case.[32] Following this the jury, after being informed by the trial court that the defendant, if acquitted, would be committed to a state mental institution, brought in a verdict of not guilty by reason of insanity, apparently accepting the view that a psychopath, because of his lack of emotional control, does not "really know" the difference between right and wrong.[33]

It seems obvious, therefore, that this case marked no change whatsoever in the Maryland test for criminal responsibility, but rather it illustrates an acceptance by the jury of one of two divergent views held by the psychiatric expert witnesses themselves on the question of whether a psychopath has the knowledge of the difference between right and wrong.[34] The test that was applied by the jury is precisely the same test that has been always applied. They were asked to determine whether the defendant knew the difference between right and wrong. They found that the defendant did not, accepting a different and somewhat broader interpretation of what the *knowledge* of right and wrong is. Hence, their verdict was reached within the framework of the *Spencer* case and marked no change or reinterpretation of the *legal* test for insanity in Maryland. The *Salinger* case, then, remains an isolated *nisi prius* case. It is not improbable that in the future, a psychopath, similar to Salinger, will be found sane under the Maryland test, if the jury, which is the judge of the law as well as fact in this state,[35] should accept the more traditional definition of a psychopath. Until there is a legislative enactment or a definitive Court of Appeals ruling to the contrary[36] the

[30] Baltimore Sun, Sept. 30, 1953, 25.

[31] *Supra*, n. 19.

[32] Daily Record, Nov. 24, 1950.

[33] GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952), 98-99 reviewed, 14 Md. L. Rev. 107 (1954); Baltimore Sun, *supra*, n. 30.

[34] *Ibid.*

[35] Md. Const., Art. 15, Sec. 5.

[36] The Court of Appeals, in Thomas v. State, 112 A. 2d 913 (Md., 1955), despite an argument based on the Durham case, specifically refused to apply the New Hampshire rule, *supra, circa*, ns. 17, 18, although it pointed out in passing that there was no evidence of a mental disease or defect to satisfy the New Hampshire rule, "which we do not here adopt".

test that must still be applied in future cases is that of the *Spencer* case, — the right-wrong test.

The decision in the *Durham* case, herein noted, has added to the controversy that has existed about the problem of criminal responsibility since the pronouncement of the *McNaghten* rule over a century ago. As expected, the psychiatrists greet the *Durham* decision as a substantial step toward more scientific legal procedure.[37] Certainly, the decision, if followed, will give the psychiatrist-witness more latitude in explaining to the court his scientific judgment of the defendant's mental condition, free from the necessity for making the "moral" or "value" judgments that the psychiatrist experienced under the right-wrong test. As a result, the court and the jury will be able to make more effectual use of his scientific experience as a psychiatrist than was achieved under the right-wrong rule. But those more concerned with the legal ramifications of the decision are not so unanimous in their approval of the *Durham* case rule as the new rule for criminal responsibility.[38] Inherent difficulties are seen in that by choice of some unfortunate language by the Court, the test is beclouded in ambiguity. It is clear under the decision that the jury must not only determine whether a disease or defect existed at the time of the act, but also whether there was a causal connection between the act and the disease or defect. The question arises, not answered by *Durham,* — must the disease or defect be the only cause, or will a disease or defect which is one of many causes, be sufficient to acquit the defendant? It seems certain that some case law must follow to clear up this aspect of the question so as to make more definite what the trial judge must instruct the jury regarding causality. Another fundamental problem that the case presents is: If one concedes that the jury is the proper body to determine criminal responsibility, what will be the practical effect of placing this burden on that body, in view of the fact that it will be required to interpret much more abstract and scientific data than was required under the right-wrong test? Will this have the effect of throwing the ultimate determination of the responsibility question into the hands of the testifying psychiatrists? Will the jury be more prone to accept verbatim the opinion of a testifying psychiatrist without attempting to make further observations, since the question may prove too involved for the

[37] See *Insanity and the Criminal Law — A Critique of Durham v. United States* in 22 Univ. of Chic. L. Rev. (1955), 317; particularly Roche 320; Guttmacher, 325; Zilboorg, 331; Weihofen, 356.

[38] *Ibid,* de Grazia, 339; Wechsler, 367; Hill, 377.

jury's immediate understanding? If this be the case, will the responsibility of limiting the application of this broad doctrine be, in effect, entrusted to the psychiatrists instead of to the court? Though an answer in the affirmative to these questions is not necessarily an indictment of the decision, such considerations are important in evaluating the case as a new criterion of criminal responsibility.[39]

The case, of course, is little more than persuasive authority in Maryland and other jurisdictions in the United States. In view of an aversion of the courts toward change in the medico-legal field, coupled with an underlying lack of confidence in the psychiatrist by the legal profession,[40] it seems unlikely that there will be any immediate widespread adoption of the *Durham* view. At the most, the practical application of the *Durham* case in the District of Columbia will be carefully observed before any deviation from the old and more conservative tests of legal responsibility may be expected.

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[39] A practical aspect of the Durham rule may be an increase in the number of acquittals on the ground of insanity. This may conceivably result in excessive overcrowding of mental institutions or a too liberal release of anti-social individuals. Dr. Winfred Overholzer, Superintendent of St. Elizabeth's Hospital in Washington, D. C., and author of THE PSYCHIATRIST AND THE LAW (1953), reviewed 14 Md. L. Rev. 390 (1954), approves of the decision, but expresses some concern over this aspect of the problem in an interview quoted in U. S. News & World Report, Feb. 11, 1955, 62-64. He warns:

> " 'If you widen the door at one end, you must narrow it at the other for the protection of society'."

It is interesting to note that upon a retrial Durham was found guilty.

[40] See OVERHOLSER, *ibid*, 111; ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954), 34 *et seq.*; GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW (1952), 3 *et seq.*