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RECENT DECISIONS

Causal Element in the Durham Test of Criminal Responsibility

The defendant was convicted upon a charge of first degree murder. *Held*: conviction reversed, with significant dictum wherein the Court of Appeals of the District of Columbia undertook to explain the casual element in the *Durham* test of criminal responsibility. *Carter v. United States*, 26 U.S.L. WEEK 2202 (D.C. Cir. Oct. 24, 1957).

The majority of jurisdictions including the federal courts adhere to the *M'Naghten* rules as laid down in *The M'Naghten Case*, 10 Cl. & Fin. 200 (1843), which in some instances is coupled with the irresistible impulse doctrine. Under the *M'Naghten* rules, the accused is not criminally responsible if he was laboring under such a defect of reason as not to know the nature and quality of the act he committed; or if he did know it, he did not know the act was wrong, e.g. N. Y. PENAL LAW §1120. The defendant, therefore, is not amenable to the punishment ordinarily visited upon his actions by the law if, by the weight of evidence, it can be shown that a defect of reason has so affected his cognitive or intellectual faculties that he did not know the nature and quality of the act or that the act was wrong.

To overcome certain inadequacies of the *M'Naghten* rules, the Court of Appeals of the District of Columbia dethroned the *M'Naghten* rules from their exclusive preeminence and declared that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. *Durham v. United States*, 214 F.2d 862 (D.C.Cir. 1954). This rule embodies two elements: (1) that the accused was suffering from a mental disease or defect, and (2) that the act was a product of such a disease or defect.

Before either the *M'Naghten* or *Durham* rules become operative, however, the existence of a defect of reason or a mental disease or defect must be established. It is to be noted, however, that the distinguishing factor in the *Durham* rule is that it asserts the unlawful act must be a product of that mental disease or defect. The *Durham* rule, therefore, suggests the necessity of a causal relationship between the disease and the act, but it gives no further elaboration. The *Carter* case has attempted to clarify this causal relationship that must exist between the act and the defendant is to evade responsibility for his unlawful act.

In the *Carter* case, the court said that the relationship between the disease and the act must be critical in its effect in respect to the act. That the act be a direct emission, or a proximate creation, or an immediate issue of the disease is not necessary. The *Durham* rule is meant to encompass cases or diseases that so affect areas of the mind that some or all of the mental element requisite to

criminal liability under the law are lacking. The short phrase "product of" is not intended to be precise, as though it were a chemical formula. The casual relationship promulgated by the *Durham* rule is that the facts concerning the disease and the facts concerning the act must be such as to justify reasonably the conclusion—*but for* this disease the act would not have been committed.

The court went further in its elaboration. It said that if the trier of facts is to make a reasonable inference concerning the relationship between a disease and a certain act, it necessarily follows that the trier of facts must be informed with some particularity; this must be done by testimony. The medical witness, therefore, will be allowed to give his full opinion concerning the disease and its dynamics, i.e. how it occurred, developed, and affected the mental and emotional processes of the defendant. The *Durham* rule will not restrict the evidence to proof of particular symptoms but will permit as broad an inquiry into mental health as may be found necessary. The latest accepted scientific criteria will be readily available to the jury as admissible evidence. *Douglas v. United States*, 239 F.2d 52 (D.C.Cir. 1956).

The *Durham* rule is flexible enough to include many forms of mental disease; and some fear that if any number of minor mental deviations are allowed to come within the rule, there will be a breakdown of the whole legal attitude toward crime. This objection is rebuttable by the presence of two forceful checks: (1) the expert witness who will articulate in meaningful communications the nature of mental illness and its relationship to unlawful behavior, and (2) the jury who will make the conclusions and inferences from the facts and in the last analysis decide the limitations of the causal concept. *Stewart v. United States*, 214 F.2d 879 (D.C.Cir. 1954). However, before the jury weighs the evidence, the trial judge must clearly explain the applicable rules of law and the duties of the jury in respect to the case at hand. *Wright v. United States*, 250 F.2d 4 (D.C.Cir. 1957). By such lucid instructions, the jury may reach sound results and also establish a stable and consistent treatment in their application of the *Durham* rule.

The *Durham* rule has been extolled because it provides for an adequate introduction of evidence. On the other hand, the *M'Naghten* rules have been objected to as based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive faculties, but affects the whole personality of the patient, including both the will and the emotions. OVERHOLSER THE PSYCHIATRIST AND THE LAW 22 (1953). In other words, the *M'Naghten* rules do not allow an adequate introduction of evidence. Strict adherence to the letter of the law may have just that effect. *People v. Berry*, 44 Cal.2d 426, 282 P.2d 861 (1955); *People v. Carlin*, 194 N.Y. 448, 87 N.E. 805 (1909); *Harrison v. State*, 44 Tex. Crim. 164, 69 S.W. 500 (1902). If, however, a liberal attitude is taken in the application of the *M'Naghten* rules, this

objection can be overcome. Knowledge should be deemed to be coextensive with the will and the emotions. The *M'Naghten* rules should, therefore, consider whether the defendant had the ability to emotionally and intellectually conceive and value, as an integrated personality, the nature and consequence of his actions. Hall, *Mental Diseases and Criminal Responsibility*, 45 COLUM. L. REV. 677 (1945); Gausewitz, *A Lawyer Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 25 (1954); Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 41 (1954). This will allow a presentation of the complete mental health of the defendant to the fact finding body.

The "but for" standard, while emphasizing the proposition that something less than total incapacity of self-control will relieve a defendant of responsibility, is not precise; but it is not meant to be. Courts cannot attempt to deal with cause and effect in any absolute degree, but only in such a limited way as is practical and as is within the scope of ordinary human understanding. The "but for" standard as laid down in the *Carter* case is as effective a standard in the determination of criminal responsibility as the reasonable man and proximate cause standards are in the determination of civil liability. Therefore, while the standard laid down by the court has not accomplished any revolutionary transition in the application of the *Durham* rule, it is workable. This standard is not, however, the ultimate. The substantive and procedural law of insanity must be constantly adjusted to meet the needs of our growing society.

Richard Brocklebank

*Wiretap Evidence: Excluded in Federal Court Under Federal
Communications Act Although Acquired by State Officers*

New York State officers in the belief that defendant was dealing in narcotics in violation of state law, tapped defendant's telephone conversation in accordance with the provisions of Article I of the New York Constitution and New York Code of Criminal Procedure, section 813-a, which permit wiretapping by police officers. Although no violation of state law was discovered, defendant was found to be transporting distilled spirits without tax stamps attached, in contravention of federal law. The accused was then turned over to federal authorities for prosecution. At the trial, defendant's counsel made a motion to suppress the wiretap evidence, in that it had been obtained in violation of section 605 of the Federal Communications Act, 48 STAT. 1103 (1934), 47 U.S.C. §605 (1952), which provides *inter alia*:

... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person ... (emphasis supplied).