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# NOTES AND COMMENTS

## THE DURHAM DECISION: A RECOGNITION OF MEDICAL CONCEPTS IN THE DETERMINATION OF CRIMINAL RESPONSIBILITY

### INTRODUCTION

“An over-organized civilization requires, apart from individualistic virtues, a sense for coordination and order; and although the traditional ideals need not be abandoned, they must be modified and adjusted to new conditions . . . The ‘land of the free and the home of the brave’ is in process of becoming a home of order.”<sup>1</sup>

Dr. Alexander’s augury of social order advancement is the statement of an ideal by a psychiatrist toward the attainment of which it is the primary business of the law to strive. The statement further represents the necessary common ground upon which the legal and medical professions must meet in order that mutual problems may find satisfactory solution.

The profound effect upon the social structure brought about by the problem of insanity, a legal term, and its treatment in the administration of criminal law demands an enlightened cooperative effort between medicine and law: a recognition of deficiencies of approach, a candid evaluation of the efficacy of existing practices, and an integrated presentation of modes of improvement. It is in the light of this common purpose that the *Durham*<sup>2</sup> decision must be viewed.

### PRE-DURHAM: M’NAGHTEN AND THE IRRESISTIBLE IMPULSE

Prior to the fourteenth century insanity was not treated as a defense to crime in England,<sup>3</sup> and until the seventeenth century, authorities are so vague in their writings concerning insanity as a legal problem that even their historical value is limited.<sup>4</sup> The reason for this, in large part, was the emphasis in lunacy law upon the property rights of “moon-gazers” and idiots.<sup>5</sup> Insane persons without property were thus given little consideration in cases of criminal behavior<sup>6</sup> and in some sections of Europe in medieval times, the defense of insanity in a criminal proceeding was specifically prohibited.<sup>7</sup> It was not until the seventeenth century<sup>8</sup> that

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1. ALEXANDER, M. D., *OUR AGE OF UNREASON*, 257 (1951).

2. *Durham v. United States*, 214 F. 2d 862 (D. C. Cir. 1954).

3. DEUTSCH, *MENTALLY ILL IN AMERICA*, 388 (1937).

4. 3 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, 150 (1883).

5. DEUTSCH, *op. cit. supra* note 3, at 388.

6. *Lunacy and Idiocy—the Old Law and its Incubus*, 18 U. OF CHI. L. REV. 361 (1950).

7. DEUTSCH, *op. cit. supra* note 3, at 389.

8. *Ibid.*

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tests were evolved to aid in the determination of the degree of insanity required in order that one might be free from criminal responsibility.<sup>9</sup> Sir Matthew Hale considered only total insanity sufficient to a defense in criminal cases.<sup>10</sup> In *Arnold's Case* Judge Tracy laid down the "Wild Beast" test whereby the insane person was thought of as not far removed from those natural denizens of the forest.<sup>11</sup> At the turn of the eighteenth century the *Hadfield Case*<sup>12</sup> evidenced a test which was a departure from that of total insanity as set forth by Hale, and established that the single symptom of delusion constituted sufficient mental abnormality to relieve one of criminal responsibility.<sup>13</sup> Late in the eighteenth century, however, Hawkins described a test for irresponsibility which has influenced the classical definition of legal insanity known as the *M'Naghten Rule*: the ability to distinguish between "good and evil".<sup>14</sup> Just prior to the *M'Naghten* case, however, an unsuccessful assassin of Queen Victoria, one Oxford, was afforded a charge to the jury by Lord Denman suggestive of the test known today as the "irresistible impulse" test;<sup>15</sup> but such did not become a test in England.<sup>16</sup>

*The Right and Wrong Test*: Daniel M'Naghten, a paranoic suffering from delusions of persecution, was acquitted of homicide in 1843 "by reason of insanity."<sup>17</sup> The verdict caused such a public stir that debate in the House of Lords ensued, and it was there

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9. *Ibid.*

10. 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 30 (1678). Hale stated that "the best measure for total insanity" is whether the accused has the mental capacity of a child of fourteen years due to an affliction of "melancholy distempers." This test for insanity was later strongly criticized by Sir James Fitzjames Stephens, an eminent legal writer of the times, in 1889:

Surely no two states of mind can be more unlike than that of a healthy boy of fourteen and that of a man laboring under melancholy distempers. The one is healthy immaturity, the other diseased maturity and between them there is no sort of resemblance. 2 Stephens, *History of the Criminal Law in England* 150-1 (1883).

11. *Arnold's Case*, 16 How. St. Tr. (1724): "It is not every kind of frantic humor or something unaccountable in a man's actions, that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment . . . ."

12. 27 How. St. Tr. 1282 (1800). Perhaps the most remarkable thing about the *Hadfield Case* was the grandiloquence of counsel for the defendant, Lord Erskine. See also, WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 56-58 (1954).

13. *Ibid.*

14. "Those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots (*sic*) and lunaticks (*sic*), are not punishable by any criminal prosecution whatever. 1 Hawkin's, *Pleas of the Crown* 1 (1824).

15. *Regina v. Oxford*, 9 Car. & P. 525 (1840).

16. WEIHOFEN, *op. cit. supra* note 12, at 59.

17. *M'Naghten's Case*, 10 Clark & Fin. 200 (1843).

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decided to take the advisory opinion of the judges on the status of the law governing such a case.<sup>18</sup> Of the fifteen judges deliberating on the problem, fourteen decided upon two major rules to guide the court in future cases which involved the issue of criminal insanity: (A) “. . . it must be clearly proved that, at the time of the committing of the act, the party accused was laboring 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” (B.) “. . . if he did know it, that he did not know he was doing what was wrong.”<sup>19</sup>

Justice Maule delivered a separate opinion in which he established the knowledge of right and wrong as the sole criterion of responsibility.<sup>20</sup> It was the further opinion of the judges that “partial delusions” were insufficient to relieve a man from responsibility as long as he was “not in other respects insane.”<sup>21</sup> The judges commented that the right and wrong referred to was specifically with respect to the act charged; and that moral right and wrong as well as legal right and wrong was embraced in their definition.<sup>22</sup> The right and wrong test has remained the sole test of criminal responsibility in England<sup>23</sup> and has been adopted as such in twenty-nine states in America.<sup>24</sup> The Victorian prose with which the M<sup>c</sup>Naghten judges handed down their advisory opinion has caused abundant confusion in interpretation and application,<sup>25</sup> and the test of insanity which evolved therefrom has been strongly criticized by legal<sup>26</sup> and medical<sup>27</sup> authorities alike.

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18. *Id.* at 202.

19. *Id.* at 203-4.

20. *Id.* at 205.

21. *Ibid.*

22. *Ibid.* See also *People v. Schmidt*, 216 N. Y. 324, 110 N. E. 945 (1915).

23. WEIHOFEN, *op. cit. supra* note 12, at 51.

24. Arizona, California, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin. In six of the states (Louisiana, Minnesota, New York, North Dakota, Oklahoma, and South Dakota) the right and wrong test is established by statute. *Id.* at 51, 69-72, 129 *et seq.*

25. Overholser, *The Psychiatrist and the Law*, 575 quoting professor Glueck's concise statement as to the confusion that exists concerning the meaning of “right and wrong” and the “nature and quality”: “Some (states) cite the nature and quality elements in the test disjunctively with the right and wrong feature, some conjunctively.”

26. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 153 *et seq.* (1883); Note, *A Proposal for a Fountainhead of Rationality in the Jurisprudence of Insanity*, 5 CATHOLIC UNIV. L. REV. 63, 75-83 (1955).

27. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW, 166 (1925); ZILBOORG, MIND, MEDICINE AND MAN (1943); Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COL. L. REV. 933 (1932); Menninger, *Medico-Legal Proposals of the American Psychiatric Association*, 19 J. CRIM. L. & CRIMINOLOGY 367 (1928); see also, GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW, c. 17, 18 (1952); Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 724 (1917).

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*The Irresistible Impulse Test:* Apart from the *Oxford* case, England has been completely disassociated from the so-called Irresistible Impulse standard for the determination of irresponsibility.<sup>28</sup> In at least fourteen states and the federal courts in America, however, the irresistible impulse is a second test of irresponsibility.<sup>29</sup> Under this test, even though the accused may be able to distinguish right from wrong, yet if he suffers from such mental disease that he cannot control his will power in consequence of the disease, then he is not responsible for his criminal acts.<sup>30</sup> The legal problems presented upon attempted application of this test are manifold,<sup>31</sup> the most recent medical opinion available emphatically denies the validity of the assumptions upon which it is based;<sup>32</sup> the rule has absolutely no philosophical foundations;<sup>33</sup> and its value as a standard has been characterized charitably as adding “. . . very little to the usual consideration of responsibility in mental illness.”<sup>34</sup>

*New Hampshire's Solitary Stand:* In the case of *State v. Pike*,<sup>35</sup> and its better-known ally, *State v. Jones*,<sup>36</sup> New Hampshire eliminated any legal test for the determination of legal insanity: the jury first determines as a question of fact whether or not the accused is suffering from a mental disease, or was at the time of the alleged commission of the crime, and if so, whether the disease was of such quality or degree as to incapacitate him from forming the necessary criminal intent (*mens rea*).<sup>37</sup> The dominant issue in criminal cases involving insanity is thus “intent”, and to the determination of that issue medical and psychiatric evidence is admitted “unfettered” by concomitant conclusions concerning de-

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28. WEIHOFEN, *op. cit. supra* note 12, at 59. But see *Case of Ronald True*, 16 Cr. App. R. 164, 169 (1922). After this decision, the Lord Chancellor appointed a commission to investigate prevalent tests of insanity as a criminal defense. The Commission did not approve the recommendation submitted by the British Medical Association to this effect: “The legal criteria of responsibility express in the rule in M’Naghten’s case should be abrogated and the responsibility of a person should be left as a question of fact to be determined by the jury on the merits of the particular case.” Rep. Comm. on Insanity and Crime, Cmd. No. 2005, 4 (1923). See also note 36 *infra*.

29. Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Utah, Vermont, Virginia, and Wyoming. The irresistible impulse test may also be recognized in Montana, New Mexico, and Ohio. WEIHOFEN, *op. cit. supra* note 12, at 52, 129 *et seq.*

30. Keedy, *Irresistible Impulse in the Criminal Law*, 100 U. OF PA. L. REV. 961 (1952).

31. E. g., Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC UNIV. L. REV. 25, 41-45 (1955).

32. *Ibid.*

33. Nolan, *Freedom of Will and the Irresistible Impulse*, 5 CATHOLIC L. REV. 55-62 (1955).

34. Cavanagh, *op. cit. supra* note 31, at 49.

35. 49 N. H. (1 Shirley) 399 (1870).

36. 50 N. H. (2 Shirley) 369, 398 (1871).

37. *Ibid.*

gree of responsibility compelled by the "right and wrong" test.<sup>38</sup> It was eighty-four years, however, before New Hampshire was followed by another jurisdiction in the establishment of a "no test" test for criminal responsibility.<sup>39</sup> Finally, it appears that in Rhode Island the court has never passed on the question of a settled legal test;<sup>40</sup> and in Montana the court has so vacillated between the right and wrong test, the irresistible impulse test and the New Hampshire rule that the situation is quite unclear.<sup>41</sup>

#### THE DURHAM DECISION AND A SHIFT OF JUDICIAL EMPHASIS

In 1954 Monte Durham was convicted by the District Court in the District of Columbia of housebreaking.<sup>42</sup> Durham had a long history of imprisonment and hospitalization, and his only defense was that he was of unsound mind at the time of the crime. After his indictment and prior to conviction he had been adjudged of unsound mind by the affidavits of two psychiatrists and committed to St. Elizabeth's Mental Hospital. Following sixteen months of commitment, he was released on certificate of St. Elizabeth's that he was mentally competent to stand trial and participate in his own defense. The lower court decided (defendant waived his right to a trial by jury) the defense of insanity had not been satisfactorily established under either the right and wrong test or the irresistible impulse test.

The decision was reversed by the Court of Appeals (A.) because the lower court was in error in not finding that the defendant had fulfilled the requirement of introducing "some evidence" of insanity<sup>43</sup> thus shifting the burden to the government to prove defendant's sanity beyond a reasonable doubt, and (B.) because both the right and wrong test and the irresistible impulse test as exclusive criteria for the determination of criminal responsibility are inadequate in view of existing medical knowledge.<sup>44</sup> Invoking its inherent power, the court then established the "new" test: "The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire courts since 1870.<sup>45</sup> It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."<sup>46</sup> The court then defined the terms

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38. See WEIHOFEN, *op. cit. supra* note 12, at 113.

39. See note 2 *supra*.

40. See WEIHOFEN, *op. cit. supra* note 12, at 52.

41. *Ibid.*

42. See note 2 *supra* at 864.

43. *Ibid.*

44. *Ibid.*

45. *Id.* at 874.

46. *Ibid.*

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“mental disease” and “mental defect”: “We use ‘disease’ in the sense of a condition which is considered capable of either improving or deteriorating. We use ‘defect’ in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.”<sup>47</sup> Before edifying the new test, the court made an exhaustive study of the existing standards for the determination of criminal insanity, and concluding that advancement in psychiatric knowledge and skill had shown the old tests outmoded and ill-fitted to modern standards of scientific inquiry adopted the now well-known *Durham Rule*. Thus the genesis of the new test, and thus an important shift in judicial emphasis from purely socio-legal concepts in regard to criminal insanity, to recent medico-psychiatric standards the substantial validity of which is yet to be determined.<sup>48</sup>

### QUO VADIMUS?

Before an evaluation of the *Durham* test is attempted, it might be well to consider some of the barriers to mutual understanding which clearly exist between the medical and legal professions.

Certainly the problem of communication, caused by technical language in both professions, represents a major obstacle to cooperative action.<sup>49</sup> In particular, psychiatrists are disdainful of accepting legal terminology,<sup>50</sup> and although the point is well taken in some instances, it has been stated that certain areas of disagreement are quite superficial.<sup>51</sup>

The difference in training and education is also upsetting to plans of joint enterprise; and yet it has been recognized that the all-important link between medicine and law is, after all, the welfare of the human being.<sup>52</sup>

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47. *Id.* at 875.

48. See RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 34-47 (1st ed. 1838); ZILBOORG, *LEGAL ASPECTS OF PSYCHIATRY, 100 YEARS OF AMERICAN PSYCHIATRY, 1844-1944*, 507, 552 (1944).

49. *Criminal Responsibility and Psychiatric Expert Testimony*, Comm. on Psychiatry and Law of the Group for the Advancement of Psychiatry, Rep. No. 26 (1954).

50. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 125 (1954): “The psychiatrist . . . qualified to be a forensic psychiatrist . . . would act against the ethical principles of the profession if he accepted the concept of *legal insanity*; for clinical psychiatry does not know of such a condition, never saw it, and after almost two hundred years of clinical investigation seriously doubts its existence.”

51. Cavanagh, *op. cit. supra* note 31 at 26: “Some of this difficulty is understandable, but certain words such as *insanity* and *unsoundness of mind* have real meaning and should not be rejected because they are not ‘medical terms and have no medical meaning.’”

52. *Ibid.*

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Finally, and perhaps the least justifiable of all the difficulties existing between the two professions, a fundamental egotism in both medicine and law unnecessarily befogs issues and prevents mutual progress.<sup>53</sup> Undoubtedly, a not prodigious amount of patience exercised by both would ameliorate the situation considerably.

*Durham Rule Under Scrutiny:* Although long in arriving and auspiciously regarded, the *Durham Rule* has already been the subject of much scrutiny and some criticism.<sup>54</sup> It has been conjectured that the effect on society might be negative in that the defense becomes too easily available and too difficult to disprove.<sup>55</sup> Further, it has been stated that the jury, who will now have the task of determining responsibility without medical or psychiatric opinion necessarily addressed to that point, will be confused by psychiatric testimony based and admitted on multiple theories, many of them conflicting in nature.<sup>56</sup>

The court in the *Durham* decision has been criticized for attempting to do what it recognized a court cannot do: define insanity.<sup>57</sup> Further, the court has defined insanity in such a way that most psychiatrists themselves will be confused as to its meaning.<sup>58</sup>

On the other hand, it is almost universally agreed that a time for some change had arrived, that the right and wrong and irresistible impulse tests as *exclusive* criteria for the determination of criminal insanity were clearly inadequate.<sup>59</sup> What the future holds in store for the further acceptance, and possible development of the inherent salutary potential of the *Durham Rule*, or for a continued rejection of its principles in favor of some new rule or the retention of the old as modified and variously applied in the jurisdictions other than New Hampshire and the District of Columbia, is a matter of crystal-gazing, not analysis.<sup>60</sup>

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53. See, e. g., Lowrey, *Psychic Determinism and Responsibility* 561, reprinted from 27 *PSYCHIATRIC QUARTERLY* 543-562 (1953): "I have been told by judges, even recently, that they hear psychiatric testimony only because it is the law, but do not allow the testimony to influence their own decisions." But see Werthan, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BFLD L. REV.* 41, 49-50 (1953). See also note 51 *supra*.

54. For an excellent critique of the *Durham* decision, see 5 *CATHOLIC L. REV.* 25-87 (1955).

55. *Id.* at 53-54.

56. *Id.* at 53, 75-78.

57. *Id.* at 53. "In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no competence." See note 2 *supra*, at 872.

58. *Id.* at 55, 63, 86.

59. *Ibid.*

60. But cf. note, 59 *DICK. L. REV.* 169, 171 (1955).



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Yet it may not be too presumptuous to conclude that no test truly superior to those already devised will be forthcoming until the various schools of psychiatry reach substantial agreement among themselves as to the meaning of their own terminology so that laws and decisions made in recognition thereof will become capable of practical and efficient administration.

*J. A. Guzzetta*

### INCOME TAXATION OF COLLAPSIBLE CORPORATIONS

#### INTRODUCTION

“Collapse” concerns the practice whereby the dissolution of a corporation or partnership is availed of as a means to the transformation of ordinary income into long term capital gain. The technique would be inconsequential but for the attractiveness of the capital gain provisions of the Internal Revenue Code. Desire to convert ordinary income into long term capital gain with resultant preferential tax treatment has been almost boundless.<sup>1</sup> Development of the concept of collapse was but the outgrowth of the discovery of defects in the tax structure of the 1939 Code which paved the way for such conversions. Subsequent additions and amendments to the 1939 Code served in some measure to plug the existing loopholes in the area of corporate taxation. The 1954 Code has to a degree strengthened the collapsible corporation provisions of the prior law, and in addition, has introduced loophole plugging provisions aimed at the prevention of the use of the collapsible partnership as a device to attain the same end.<sup>2</sup> Although the effectiveness of such provisions awaits judicial expression, interim analysis of the statute would not be inappropriate.

#### EARLY DEVELOPMENT OF COLLAPSE

Prior to the effective date of Section 117(m) of the 1939 Code, a corporation holding appreciated property, but which had not yet realized taxable gain, had available two procedures whereby it could benefit its stockholders at capital gain rates by the amount of the appreciation without incurring to itself adverse tax consequences. The corporation could distribute to its shareholders

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1. Murphy, *Sale of a Sole Proprietorship—An Irrationale in Three Parts*, 9 TAX L. REV. 309, 310 (1953).

2. S. REP. No. 1622, 83d Cong., 2d Sess. 98 (1954). Space limitations prevent consideration of the collapsible partnership; but note herein INT. REV. CODE OF 1954, §§ 741 and 751, in effect supplanting G. C. M. 26379, 1950-1 CUM. BULL. 58.