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Criminal Responsibilty - The Durham Rule - Washington v. United States, __ F.2d __ (D.C. Cir. 1967)

Criminal Responsibility—THE DURHAM RULE. In December 1967, the defendant was convicted by a jury of rape, robbery, and assault with a deadly weapon. On appeal he contended that judgment of acquittal by reason of insanity should have been rendered; however, the conviction was affirmed.[1]

In upholding the conviction, the U. S. Court of Appeals for the District of Columbia held that psychiatrists should be prohibited from testifying whether the alleged criminal act was the "product" of mental illness, since this is part of the ultimate issue to be decided by the jury.[2] In effect, this holding modified the Durham rule[3] of criminal responsibility which this court had phrased in 1954.[4]

There are three major tests of criminal responsibility which have been adhered to at one time or another by the Federal Courts of the District of Columbia. In this jurisdiction once the defendant raises the issue by the presentation of some evidence of insanity, the government has the burden of proving beyond a reasonable doubt that the accused was sane when the act was committed.[5] The first test of criminal responsibility followed by this court was the majority rule[6] established in the *M'Naghten* case.[7] The rationale espoused in the *M'Naghten* test was that an accused would be excused from punishment if as a result of mental disease he did not know the nature and quality of his act, or if he did know it, he did not know the act itself was wrong.[8] In 1929, apparently feeling that the *M'Naghten* or "right-wrong" test was overly harsh in that the accused was exempted from punishment only in cases of extreme insanity involving a total loss of understanding, the U. S. Court of Appeals for the District of Columbia supplemented this rule of insanity with the

1. Washington v. United States, 390 F. 2d 444 (D.C. Cir. 1967).

2. *Id.* at 456.

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

4. It has long been suggested that courts have an inherent power to adopt new doctrines and apply them to parties presently before court or even retroactively. *See* N.L.R.B. v. Guy F. Atkinson Co. 195 F. 2d 141, 148 (9th Cir. 1952); Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932); Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 606-07 (1917); Moore and Oglebuy, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEXAS L. REV. 514, 535 (1943).

5. Tatum v. United States, 190 F. 2d 612, 615 (D.C. Cir. 1951); Wright v. United States, 250 F. 2d 4, 7 (1957).

6. *See*, e.g., Weihofen, *The M'Naghten Rule in its Present Day Setting*, FEDERAL PROBATION 8 (1953).

7. 8 Eng. Rep. 718 (1843).

8. *Id.* at 722.

"irresistible impulse" test.[9] Under this new standard the defendant is immune from the consequences of his criminal act if it is proved that he was "impelled to do the act by an irresistible impulse." [10] That is, if "his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong," [11] he is not criminally responsible.

On July 1, 1954, in *Durham v. U. S.*,[12] the present court formulated yet a third test of criminal responsibility to be applied to all future criminal cases in the District of Columbia. Simply stated, the *Durham* rule holds that an accused is not criminally responsible if his unlawful act was the product of a "mental disease or defect." [13]

Multiple in purpose, the *Durham* rule was designed to: (1) broaden the scope of the pre-existing tests of insanity in conformance with the advancement of medical psychiatry into fields of mental illness heretofore never studied;[14] (2) strengthen the lines of communication between the expert witnesses and the courts;[15] (3) allow the jury to consider psychiatric testimony on all facets of the accused's condition including not only his ability to distinguish right from wrong and his ability to control impulses but also any history of prior mental illness, presence of delusions or imaginary physical pains, and I.Q. score;[16] and (4) the improvement of psychiatric testimony by allowing the expert in his own terms to relate to the jury the many elements upon which his conclusion was reached.[17] Thus the objective of the *Durham* rule was to allow the

9. Smith v. United States, 36 F. 2d 548, 549 (D.C. Cir. 1929).

10. *Id.* at 549.

11. *Id.* at 549.

12. 214 F. 2d 862 (D.C. Cir. 1954).

13. *Id.* at 874-75.

14. "In this jurisdiction the rule as to insanity had become sloganized by many years of use into a combination 'right-wrong and irresistible impulse' test. . . . But 'impulse' carries a connotation of suddenness and we know there are many readily recognizable diseases of the mind which do not involve sudden impulses, slow deterioration, brooding, depressions, constant pressures, etc. . . . The *Durham* case merely extended the established rule to apply the defense to all acts which would not have been committed except for a mental illness of the accused."
Carter v. United States, 252 F. 2d 608, 616 (D.C. Cir. 1960).

15. Krash, *The Durham Rule And Judicial Administration Of The Insanity Defense In The District Of Columbia*, 70 YALE L.J. 905, 928 (1961).

16. Durham v. United States, 214 F. 2d 862, 872 (1954).

17. Washington v. United States, 390 F. 2d 444 (D.C. Cir. 1967).

jury the benefit of adequate explanation of the defendant's mental state at the time of the offense.[18]

Although the *Durham* test has the approval of many psychiatrists,[19] its rationale has been rejected by various federal[20] and state[21] courts. This pattern of rejection has as its source the problems which the *Durham* rule created in actual practice.[22] Due to confusion as to what constituted "mental disease or defect" and because of a general misunderstanding by the trial courts as to the function of expert psychiatric testimony, the purpose of the *Durham* rule was never fully achieved. To clear up the first point of confusion, the court in *McDonald v. U. S.*,[23]

18. Carter v. United States, 252 F. 2d 608, 617 (D.C. Cir. 1960).

19. *See,* Roche, *Criminality and Mental Illness—Two Faces of The Same Coin,* 22 U. CHI. L. REV. 320 (1955); Zilborg, *A Step Toward Enlightened Justice,* 22 U. CHI. L. REV. 331 (1955); Guttmacher, *The Psychiatrist as an Expert Witness,* 22 U. CHI. L. REV. 331 (1955).

20. *See, e.g.,* Anderson v. United States, 237 F. 2d 118, 127 (9th Cir. 1956); Voss v. United States, 259 F. 2d 699 (8th Cir. 1958); Sauer v. United States, 241 F. 2d 640 (9th Cir. 1957); United States v. Hopkins, 169 F. Supp. 187, 189 (D. Md. 1958); Howard v. United States, 229 F. 2d 602 (5th Cir. 1956). *See also,* United States v. Smith, 5 U.S.C. M.A. 314, 17 C.M.R. 314 (1954); United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954).

21. The courts of twenty-three states have declined to follow the *Durham* formula. Arizona: State v. Crose, 357 P. 2d 136 (Ariz. 1960); Arkansas: Downs v. State, 330 S.W. 2d 281 (Ark. 1959); California: People v. Ryan, 140 Cal. App. 2d 412, 295 P. 2d 496, (Dist. Ct. App. 1956); Colorado: Early v. People, 352 P. 2d 112 (Colo. 1960); Connecticut: State v. Davies, 146 Conn. 137, 148 A. 2d 251 (1959); Florida: Picott v. State, 116 So. 2d 626 (Fla. 1959); Illinois: People v. Carpenter, 11 Ill. 2d 60, 142 N.E. 2d 11 (1957); Indiana: Flowers v. State, 236 Ind. 151, 39 N.E. 2d 185 (1956); Kansas: State v. Andrews, 357 P. 2d 739 (Kan. 1960); Maryland: Cole v. State, 212 Md. 55, 128 A. 2d 437 (1957); Massachusetts: Commonwealth v. Chester, 337 Mass. 702, 150 N.E. 2d 914 (1958); Minnesota: State v. Finn, 100 N.W. 2d 508 (Minn. 1960); Missouri: State v. Goza, 317 S.W. 2d 609 (Mo. 1958); Montana: State v. Kitchens, 129 Mont. 331, 286 P. 2d 1079 (1955); Nevada: Sollars v. State, 73 Nev. 248, 316 P. 2d 917 (1957); New Jersey: State v. Lucas, 30 N.J. 37, 132 A. 2d 50 (1959); New York: People v. Johnson, 169 N.Y.S. 2d 217 (Westchester County Ct. 1957); Ohio: State v. Robinson, 168 N.E. 2d 328 (Ohio Ct. App. 1958); Pennsylvania: Commonwealth v. Novak, 395 Pa. 199, 150 A. 2d 102 (1959); Utah: State v. Kirkham, 17 Utah 2d 108, 319 P. 2d 859 (1958); Vermont: State v. Goyet, 120 Vt. 12, 132 A. 2d 623 (1957); Washington: State v. Collins, 50 Wash. 2d 740, 314 P. 2d 660 (1957); Wisconsin: Kwoseh v. State, 8 Wis. 2d 640, 100 N.W. 2d 339 (1960).

22. Aside from the difficulties inherent in possibly differing legal and medical definitions of the terms "insanity" or "mental disease or defect" it is apparent that even the doctors have difficulty in classifying patients whose mental disorder is on the fringe area which separates the sane from the mentally deranged. *See* Waelder, *Psychiatry and the Problem of Criminal Responsibility,* 101 U. PA. L. REV. 378, 384 (1952).

23. "Mental disease" or "mental defect" which will excuse defendant from criminal responsibility for unlawful acts ". . . includes any abnormal condition of the mind

gave mental disease a legal definition to ensure that the views of the psychiatric experts would not be binding on the fact finder, thereby hopefully providing a basis upon which the jury could make its own decision as to the accused's mental state. Legal definitions, however, were not a solution to the more significant problem of conclusory psychiatric testimony. This problem is exemplified in *Rollerson v. U. S.*[24] where an expert witness testified that the defendant had a "paranoid personality," that this was a mental disease, and that in his opinion the crime was a product of the disease. This testimony is conclusory in two senses: first of all the witness gave a legal conclusion that the accused is criminally responsible for his acts, rather than stating a medical opinion; secondly, the witness stated that the defendant had a mental disease known as "paranoid personality" without any underlying explanations as to how he reached such a conclusion.[25] Thus, one of the main objectives of the *Durham* rule, the broadening of expert testimony, was thwarted by the trial court's permitting expert witnesses to testify as to whether the criminal act was a "product" of the accused's mental disease. As a result of this development the testimony became extremely narrow, conclusory, uninformative, and of little aid to the jury in deciding the criminal responsibility of the defendant.[26]

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which substantially affects mental or emotional processes and substantially impairs behavior controls." Hawkins v. United States, 310 F. 2d 849, 851 (D.C. Cir. 1962). McDonald v. United States, 312 F. 2d 847, 851 (D.C. Cir. 1962).

24. 343 F. 2d 269, 272 (D.C. Cir. 1964).

25. In United States v. Amburgey, 189 F. Supp. 687 (D.D.C. 1960), the court held that ". . . if the trier believes they [the experts' opinions] are logically arrived at, they are accepted; if not, they are rejected. It is precisely because the conclusions of the experts must be weighed in this fashion that it is necessary to probe their bases." *Id.* at 695.

26. *See, e.g.*, Wright v. United States, 250 F. 2d 4, 8 (D.C. Cir. 1957); Hopkins v. United States, 275 F. 2d 155, 157 (D.C. Cir. 1959); Martin v. United States, 248 F. 2d 217 (D.C. Cir. 1960); Jackson v. United States, 336 F. 2d 579, 582-85 (D.C. Cir. 1964). *See also*, Watson, *Durham Plus Five Years: Development of the Law of Criminal Responsibility in the District of Columbia*, 116 AM. J. PSYCHIATRY, 289-90 (1959). In this article the writer compared the trial transripts of cases adhering to the M'Naghten rule and post-*Durham* decisions in the District of Columbia to measure the impact of the *Durham* rule and concluded:

> "The most striking feature of the post-*Durham* insanity cases is the failure by nearly all psychiatric experts to utilize the new rule for its intended purpose. . . . The testimony of most of the psychiatric experts continued to list classical symptoms of psychiatric syndromes, without discussing them from the standpoint of how they motivated or were related to the alleged criminal act. The records are replete with such words as 'insanity', 'psychosis', 'schizophrenia', and 'irresistible impulse', the peculiar clichéed idiom of this

Here, in *Washington v. U. S.*,[27] the court recognized a need for judicial supervision at the trial court level[28] and attempted to solve the existing difficulties by issuing standardized explanatory instructions for use in all trials involving an insanity defense.[29] These instructions advise the psychiatrist as to what kind of information they are expected to provide; moreover, to ensure that counsel and the jury are also advised, the trial judge will read the instructions before any expert testimony is given. Quite obviously the instructions are designed to advise the psychiatrist not to express his opinion on whether or not the alleged criminal act was a product of a mental disease.

By its holding in *Washington*, the U. S. Court of Appeals for the District of Columbia has modified the application of the *Durham* rule which previously allowed psychiatrists to testify in terms of product and causation. Although the court now seeks to limit expert testimony, the *Durham* rule itself has not been altered, for the basis of jury determination of criminal responsibility will still be whether or not the criminal act was the product of a mental disease. It would appear that this restriction on expert testimony may be conducive to highly informative fact analyses of the accused's mental condition as opposed to limited testimony concentrated on product and causation, but its effectiveness and value as a rule of evidence will only be ascertained by its practical application at the trial court level.

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kind of case for more than 100 years. We find prosecution and defense counsel frequently utilizing psychiatric language they obviously do not comprehend. Likewise, psychiatrists glibly use expressions like 'incompetent', 'unsound mind', and 'insane'; legal words with no psychiatric or medical meaning. In short, discussions between psychiatrists and lawyers remained at the pre-*Durham* level, where stereo-typed language, long since isolated from the roots of its legal or medical meaningfulness, continued as the principal vehicle for communication. Little if anything comprehensible or useful was conveyed to jury or judge in this manner, and their fact-finding about sanity surely was due to impulse and chance as often as it was to reason."

27. 390 F.2d 444 (D.C. Cir. 1967).

28. "The ultimate responsibility—and power—to prevent witnesses from violating rules of evidence lies with judges." Campbell v. United States, 307 F. 2d 547, 614 (D.C. Cir. 1962).

29. In the present case explanatory instructions are set out in the appendix of the decision and are entitled, "Courts Instruction to Expert Witness in Cases Involving the Insanity Defense". Washington v. United States, 390 F. 2d 444 (D.C. Cir. 1967).