CRIMINAL RESPONSIBILITY AND INSANITY.

THE SIGNIFICANCE OF DURHAM v. UNITED STATES* FOR AUSTRALIAN COURTS.

I. A lawyer's comments.

In the heart of the criminal law is to be found the problem of criminal responsibility; in the heart of our tentative formulation of criminal responsibility is to be found the problem of the defence of insanity.

In September, 1953, the Royal Commission on Capital Punishment, under the chairmanship of Sir Ernest Gowers, presented its report to Parliament.[1] Three chapters and two appendices of this report were devoted to an excellent legal, psychological, historical and comparative analysis of the defence of insanity. The Commission advised, with one dissentient, that "the test of responsibility laid down by the M'Naughten Rules is so defective that the law on the subject ought to be changed", and urged that an accused should be allowed this defence if it could be shown that he was "unable to prevent himself from committing" the criminal act. Then, with three dissentients, the Commission went further and recommended, in preference to the above extension of the M'Naughten Rules, that those Rules should be abrogated entirely and that it should be left to *"the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."*[2]

All this is in the great tradition of English Royal Commissions—no mealy-mouthed quibbling concerning the *status quo;* but fine, fundamental suggestions. It has, likewise, met a traditional reception from the Government and from the Judges—a firm and immediate rejection on traditional grounds.

Recently the Government expressed in the House of Commons its belief in the wisdom of some (unspecified) proposals of the Gowers Commission and its intention to do nothing about them at present. This operates, presumably, on the "Principle of the Wedge" made

* (1954) 214 F. 2d 862.

1 Cmd. 8932.

2 *Ibid.,* at 116.

famous by F. M. Cornford,[3] by which "you should not act justly now for fear of raising expectations that you may act still more justly in the future—expectations which you are afraid you will not have the courage to satisfy." The Gowers Report thus begins to moulder on the shelves in England. Meantime, in the United States of America, it receives unexpected acceptance.

In July, 1954, in *Durham v. United States*,[4] the Court of Appeals for the District of Columbia (Judges Edgerton, Bazelon, and Washington), in a judgment read by Judge Bazelon, adopted the more far-reaching suggestion in the Gowers Report and held that

> *"an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."*[5]

Before amplifying and discussing this formulation of the defence, some mention of the facts of the case itself and a brief survey of the existing concepts that the court built into its judgment may be appropriate.

Monte W. Durham had a bad criminal record and a long history of mental illness. In 1945, aged 17, he was discharged from the Navy, after psychiatric examination, on the ground that he "suffered from a profound personality disorder." Between 1945 and the conviction for housebreaking from which the instant appeal was taken, there lay an uninterrupted cycle of criminal offence, punishment, treatment in mental hospital, discharge from mental hospital, criminal offence, prison, mental hospital, and so on. His mental abnormality was diagnosed as "psychosis with psychopathic personality" on two occasions and as "without mental disorder, psychopathic personality" on another. He committed the housebreaking two months after his last discharge from mental hospital. He was immediately recommitted to mental hospital by civil proceedings, treated there for sixteen months, and then released to stand trial for the housebreaking on the certificate of the superintendent of the mental hospital that he was "mentally competent to stand trial." The jury rejected Durham's defence of insanity and he was convicted.

On appeal it was contended that the trial judge had erred in his direction to the jury on the burden of proof of the defence of insanity and, further, that Durham's conviction should be quashed "because existing tests of criminal responsibility are obsolete and should be superseded."

[3] F. M. Cornford, "Microcosmographia Academica: Being a Guide for the Young Academic Politician", (Cambridge; 3rd ed., 1933) at 29.

[4] (1954) 214 F. 2d 862.

[5] *Ibid.*, at 875.

To meet this fundamental challenge to the validity of the rules concerning the defence of insanity, Judges Edgerton, Bazelon, and Washington plunged into the extensive literature and case-law on the subject. They cited much of this material, but in particular discussed the writings of Dr. Isaac Ray and Professor Sheldon Glueck, and the Report of the Gowers Commission.

In 1870, in *State v. Pike*,[6] under the direct but unobtrusive personal pressure of Dr. Isaac Ray, Judge Doe of the Supreme Court of New Hampshire formulated, in dissent, a definition of the defence of insanity which was in the following year accepted by the Court of Appeal in New Hampshire in *State v. Jones*:[7] "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Thus, twenty-eight years after Daniel M'Naughten's acquittal, a superior court in the United States devised rules which substantially avoided the criticism by psychiatrists and academic lawyers directed at the M'Naughten Rules; then, over eighty years later, though without any detailed study of the operation of the New Hampshire Rule, the essence of that rule was adopted by an English Royal Commission and by a United States Federal District Court of Appeals.

The District of Columbia had already, in 1929, in *Smith v. United States*,[8] added the irresistible impulse test to the M'Naughten formula as a supplementary ground for acquittal, as had been urged in England in 1923 by the Atkin Committee on Insanity and Crime,[9] and in 1953 by the Gowers Commission.

This, then, was the situation facing Judges Edgerton, Bazelon, and Washington: Durham was clearly of unsound mind, certifiable at times, apparently fit to be at large at other times; Durham probably did not fall within the "right-wrong" test or the irresistible impulse test sufficiently to have a defence within the existing law; that law had been forcefully and widely criticised for over a century; not being statutorily prescribed, it lay within the competence of the Court to vary that law; and the New Hampshire rule and the Gowers Report both suggested a type of rule which might avoid many of the criticisms of the M'Naughten formula.

The structure of the judgment is interesting. In the first part Durham's conviction is reversed and the case remanded for a new trial on the ground that the direction of the trial judge to the jury

6 (1870) 49 N.H. 399.
7 (1871) 50 N.H. 369.
8 36 F. 2d 548.
9 Cmd. 2005.

concerning the burden of proof was erroneous. He had failed adequately to direct the jury that, once the defence raised some evidence of mental disorder, the ultimate burden of proving the accused's sanity beyond a reasonable doubt (within the M'Naughten Rules plus the irresistible impulse test) lay on the prosecution. In this the Court of Appeals followed its own judgment in *Tatum v. United States.*[10] To cast the ultimate burden of proof on the prosecution is, it is submitted, more in accord with the general principles of the criminal law than is the practice accepted in England and Australia, pursuant to *Woolmington,*[11] which casts the proof of this issue on a balance of probabilities on the defence.

The case being thus remitted for a new trial, the Court proceeded to define the test of insanity to be applied at that trial. They marshalled the main criticism of the M'Naughten Rules, especially their concentration on cognition to the exclusion of volition, and referred approvingly to dicta in *Holloway v. United States*[12] to the effect that "the modern science of psychology . . . does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go." The Court then directed that an accused whose "unlawful act was the product of mental disease or mental defect" should be acquitted, and added vague and wide definitions of "disease" and "defect." Concerning the application of this test to individual cases, the Court said:—

> "We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity."

10 (1951) 190 F. 2d. 612.
11 [1935] A.C. 462.
12 (1945) 148 F. 2d. 665.

To the justification of this new defence of insanity, Judges Edgerton, Bazelon, and Washington devoted only a few sentences; but they went to the essence of the matter:—

> "Juries will continue to make moral judgments, still operating under the fundamental precept that "Our collective conscience does not allow punishment where it cannot impose blame." But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognised do not necessarily, or even typically, accompany even the most serious mental disorder.
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> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility. The rule we state in this opinion is designed to meet these requirements."

In that the Court intended the Durham Rules to be worked out, modified, shaped and developed in subsequent cases, it would be inappropriate to criticise them as if they were the finished article. Nevertheless, it is submitted, that though they are an important step in the evolution of this area of law they are too imprecise and loose in their formulation to form the basis of a rule which will assist juries in arriving at a just discrimination of those persons accused of crime who should be subjected to punitive-correctional treatment in prisons from those who may more appropriately be the subjects of medico-custodial treatment in mental hospitals. A jury can be called upon to undertake no harder task than this; and it would seem to be the clear duty of the law to provide some guidance to the jury to assist them to reach justice in this matter. It is insufficient merely to leave the issue to the jury's sense of justice at large.

What meaning is to be given to "product" in these rules? Given that either a mental disorder or a mental defect is shown to exist, what degree of relationship between that condition and the criminal act must be shown? If the prosecution has to *disprove* that the mental condition was a *sine qua non* of the criminal act, then in practice they will never succeed in this disproof. Indeed, it is questionable whether there could ever be a crime committed by one with a mental disorder

or defect where the crime was not to a degree the product of that disorder or defect. If, on the other hand, the prosecution has merely to show that the accused was not entirely and absolutely controlled in his action by the mental condition, then fewer accused persons will fall within these rules than within the M'Naughten Rules, with or without the addition of the irresistible impulse test.

We are thus faced with an intractable problem of causation and of degree of causation. The Durham test, as at present formulated, tends to conceal this difficulty. If we are merely to leave to the jury the task of bringing to bear their innate sense of justice on this matter, our duty is to allow them as much relevant information as we can on each case and further to give them some guidance concerning the degree of causal relationship between the crime and the mental condition that should exculpate a person accused of crime. This does not mean that we should provide a rigid mechanistic formula aiming at automatic and regular results. Indeed, if the ultimate problem is essentially a moral one for the jury, we are unlikely to devise a simple or even a complex formula capable of encompassing the many facets of the problem. If our test is too rigid, juries will do what they did with the M'Naughten Rules—ignore them alike when their sympathy was enlisted for the accused and when their hatred was marshalled against him.[13]

It should always be remembered that allowing too wide an ambit for the operation of the defence of insanity may well not be an act of humanity or kindness to criminals and is not likely by itself to assist in the protection of the community. If the effect of wider rules is to shift a large proportion of the unbalanced and disturbed members of our prisons into mental hospitals this will throw upon the latter a considerable burden which neither by knowledge nor the endowment of staff and facilities are they currently capable of meeting.

We have not reached a stage of social development, if indeed we ever shall or should, when the existence of psychological abnormality will *per se* exculpate from punishment. Insanity is not a clinical entity; it is a matter of the presence of some degree of social dangerousness or aberrance as well as of certain psychological symptoms. The Gowers Commission formula clearly recognises this fact, as does the Durham Rule; but the former is more precise in expressly casting on the jury the task of determining in each particular case whether the accused

13 In *Daniel M'Naughten and the Death Penalty,* (1952-1954) 6 RES JUDICATAE 304, an attempt is made to demonstrate this stretching of the M'Naughten Rules by juries.

was suffering from mental disorder or defect to the extent that it would be unjust to hold him responsible.

Why do we provide such a defence at all? In *Porter*,[14] Dixon J. (as he then was) gave an answer: "It is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds." Some blending of the New Hampshire-Gowers-Durham concept with this type of statement of the purpose of the defence of insanity might give the jury a sufficiently flexible rule to achieve justice, without requiring them to strain their oaths as jurors, and at the same time afford them some guidance as to one purpose they are serving in allowing or denying this defence. There are, of course, purposes other than the futility of deterrence in the law's providing a defence of insanity—the innate and rarely articulated sense of justice of the community being a further explanation of the existence of this defence. But, even though the efficacy of deterrence as a purpose of punishment is relatively untested, both for the sane and the insane, it is a concept which might well be appropriately included in the definition of the defence of insanity.

It may be worth adding that the defence is most frequently fought out around the crime of murder, with its peculiar punishment of death. Once the executioner is removed from the arena, as he was in *Durham,* some of the emotional pressure that has confused this issue and exacerbated generations of alienists disappears.

The Durham Rules and the Report of the Royal Commission surely forebode the ultimate rejection of the M'Naughten Rules in Australia, as elsewhere. The best that supporters of the M'Naughten Rules can say for them is that they work tolerable justice because they are not applied. If they were applied in their rigidity few people indeed would fall within them. Only the most exceptional inmate of a mental hospital does not know the nature and quality of his act, as that phrase has been interpreted, and would not be able to tell you whether it is or is not against the law, if it is an act of any gravity. In England, since *Windle*,[15] the M'Naughten Rules seem to have been applied with unfortunate rigidity. In Australia, since *Stapleton*[16] in the common law States and under the Codes in the other States, a generous

14 (1936) 55 Commonwealth L.R. 182, at 186.
15 (1952) 36 Cr. App. R. 85.
16 (1952) 86 Commonwealth L.R. 358.

interpretation has been given to the Rules by which an accused person who could not reason about his otherwise criminal action with a moderate degree of sense and composure should be found not guilty on the grounds of insanity.

There will be much to gain in Australia from an observation of how the Durham Rules are gradually worked out in those American jurisdictions which come to apply them. Possibly of even more importance to us will be the careful consideration of the defence of insanity which is now being undertaken by the extremely well-qualified subcommittee of the American Law Institute which is preparing a Model Penal Code.

In considering these matters it is of overwhelming importance that the psychiatrists and the lawyers should eschew the bickering that has characterised their discussion of this topic. Psychiatrists must realise that this is not a purely medico-psychological issue. Lawyers must realise that the tests that they formulate must incorporate some of the knowledge concerning mental life that the developing discipline of psychiatry is producing. Ultimately, the question is an ethical and sociological one lying well outside the borders of both law and psychiatry. Even eminent psychiatrists tend to forget this. In the symposium on *Durham v. United States* in the University of Chicago Law Review,[17] Dr. Zilboorg, a leading psychiatrist and authority on forensic psychiatry, wrote: "I have said many times in public and in print, and I shall never tire of repeating, that it is only with regard to mental disease in a criminal case that the law assumes to dictate its formalistic views to medicine. There is no written or unwritten law which presumes to tell us what appendicitis is. The doctor's diagnosis in such a case is accepted, as well as the doctor's method of demonstrating how he made the diagnosis and how he confirmed it. There is not a lawyer in the world who would challenge such a doctor by confronting him with a legal definition of appendicitis and forcing him to prove or disprove the presence or absence of *legal appendicitis,* regardless of the clinical, pathological condition known in medicine as appendicitis."[18] In the succeeding article in the journal, a no less eminent psychiatrist, Dr. Fredric Wertham, castigates this view as "psychoauthoritarian." Surely, psychiatrists cannot wish this matter to be regarded as an entirely psychiatric issue on which, presumably, they would have to give precise and express answers. Lawyers have avoided the problem for centuries by passing it over to the jury. The psychiatrists will be well advised if they do not oppose this avoidance of the

17 (1955) 22 U. CHI. L. REV. 317-404.
18 *Ibid.,* at 331-332.

decision. The matter is one of the key ethical and social problems of our society. We will not produce a rational and completely satisfactory definition of the defence of insanity to a criminal charge until we are clear on the essential basis of criminal responsibility itself. The process can only be one of the gradual striving towards truth; and truth itself in this area can be little more than the satisfactory reconciliation of many conflicting tensions in our society.

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II. A psychologist's comments.

The decision in *Durham v. United States*[1] is merely one of the many historical signs of the changing attitude of society towards criminal responsibility. At the one end of the historical trend is the so-called *lex talionis* in which a person committing a criminal act is held responsible without any regard to his maturity, state of mind or intent; at the other end is the state in which no one is criminally responsible, punishment being replaced by re-education or therapy for erring members of society.[2] These extremes are "ideal" states which probably have never, and will never, be applied ruthlessly by any actual society. Anglo-American law has gradually been moving towards the latter pole of the above dichotomy (Wechsler calls it "psychiatric crypto-ethics"[3]). Its position at present, as embodied in such decisions as *Durham v. United States* and in the British Royal Commission on Capital Punishment,[4] is a mixed one; i.e., there are certain types of persons who are to be held responsible for their criminal actions (whether as retribution or as a protection for society is irrelevant to this argument) while there are others who because of their mental state are not responsible. As we shall see, psychological responsibility and legal responsibility do not necessarily coincide, and our main purpose here is to provide a context in which to consider whether the *Durham* decision brings these two concepts of responsibility any closer together.

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1 (1954) 214 F. 2d 862.

2 de Grazia points out, in (1955) 22 U. CHI. L. REV. at 348 *et seq.*, that therapy under the latter concept may in fact serve as severer punishment than is normally meted out in criminal convictions — for example, life imprisonment in a mental hospital — and thus the prospect of forcible commitment might be just as strong a deterrent as present-day criminal punishments.

3 *loc. cit.* 375.

4 (1953) Cmd. 8932 (H.M. Stationery Office, London).