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RECENT CASES

CRIMINAL LAW—RESPONSIBILITY—TEST OF INSANITY AS A DEFENSE IN CRIMINAL CASES—M'NAGHTEN RULE REAFFIRMED AND DURHAM TEST REJECTED

—The defendant was charged with three counts of first degree murder alleging that he shot and killed his mother, father and sister. The defendant was tried and found guilty in the first degree and the jury assessed the death penalty upon each count. The district court approved the verdict and sentenced the defendant to death. On appeal to the Supreme Court of Kansas the defendant introduced testimony to the effect that he was suffering from simple schizophrenia, that he understood the nature of his acts and that they were prohibited by law, and that he was subject to punishment. A psychiatrist had testified that the defendant felt no emotions whatsoever, and that in his own private withdrawn world, it was just as right to kill a person as to kill an animal or a fly. Realizing that such a mental condition would not meet the test of the *M'Naghten Rule*, defendant argued that the rule should be changed and that the court should adopt the test announced in *Durham v. United States*, 94 App.D.C. 228, 214 F.2d 862, 45 A.L.R.2d 1430 (1954), to the effect that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. *Held*, judgment of conviction affirmed; the court concluded that there is no better test, at present, for the protection of society than the *M'Naghten Rule*. In holding that the defendant should be held to be responsible for his criminal acts, the court declared that "We cannot say that one who knows the rules of society and the state, may violate those rules without committing a crime simply because in his warped moral concepts of the world, he conceives it to be right for him to do the proscribed acts." *State v. Andrews*, 189 Kan. 458, 357 P.2d 739 (1960).

The general rule is that the test for determining liability for commission of a criminal act is whether the defendant was capable of distinguishing between right and wrong at the time and with respect to the act committed. 22 C.J.S., Criminal Law, §59, p.124; 14 Am.Jur., Criminal Law, §40, p.796; *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng.Reprint 718 (1843). This rule was stated in Kansas in *State v. Nixon*, 32 Kan. 205, 4 P. 159 (1884), and reaffirmed in *State v. Mendzlewski*, 180 Kan. 11, 299 P.2d 598 (1956). The "irresistible impulse" extension of the "right and wrong test" had been rejected in the same jurisdiction in *State v. Mowry*, 37 Kan. 369, 15 P. 282 (1887) and in subsequent cases. *State v. Arnold*, 79 Kan. 533, 100 P. 64 (1909); *State v. White*, 112 Kan. 83, 209 P. 660 (1922). In arriving at its decision in the *Andrews* case the court followed *State v. Lucas*, 30 N.J. 37, 152 A.2d 50 (1959), where, in a felony murder prosecution of defendant who allegedly set a church rectory fire resulting in deaths, the defendant could differentiate between right and wrong but because of congenital mental retardation and schizophrenia had not "freedom of choice," defendant was held legally sane under the *M'Naghten* rule.

In rejecting the *Durham* test the Kansas court followed a growing number of state and federal courts. "The *Durham* test has been singularly unsuccessful in winning adherents." *State v. Lucas, supra.* at p.67. At least fifteen state supreme courts have specifically repudiated *Durham*. (Cal., Conn., Ill., Ind., Mass., Md.,

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Mont., Nev., N.J., Okla., Pa., Tex., Vt., Wash.) Cf. annotation in 45 A.L.R.2d 1447, at page 1,452 and supplementary service thereto. The *Durham* test was also rejected in *Howard v. U.S.*, 232 F.2d 274 (5 Cir. 1956); *Andersen v. U.S.*, 237 F.2d 118 (9 Cir. 1956); *Voss v. U.S.*, 259 F.2d 699 (8 Cir. 1958); *U.S. v. Kunak*, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954). In *Andersen v. U.S.*, *supra*, the court indicated that it had; ". . . no desire to join the courts of New Hampshire and the District of Columbia in their 'magnificent isolation' of rebellion against *M'Naghten*, even though New Hampshire has been traveling down that lonesome road since 1870." Cf. *State v. Pike*, 49 N.H. 339 (1870).

It is reported that the *Durham* rule has been adopted by statute in the Virgin Islands. Cf. Muller, *Criminal Law and Administration, Capacity*, 1958, *Annual Survey of American Law*, 34 N.Y.U. L. REV. 83, 84. In *State v. Kirkhen*, 7 Utah 2d 108, 319 P.2d 859 (1958), the court approved a jury instruction similar to the *Durham* test.

The attacks on the *Durham* test have taken various forms. The terminology used by the *Durham* court, especially "mental disease and defect" have been criticized by both the courts and psychologists and psychiatrists. *State v. Goyet*, Vt., 132 A.2d 623 (1957); Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATH. U. L. REV. 25 (1955); Nolan, *Freedom of the Will and the Irresistible Impulse*, 5 CATH. U. L. REV. 55 (1955). The causation factor, i.e., that the defendant may be held unaccountable for his criminal act because the act was the "product" or "mental disease or mental defect," has also been criticized. *State v. Lucas*, *supra*; *State v. Goyet*, *supra*. In the *Lucas* case the court stressed that many psychiatrists maintain that all criminals are suffering from some mental disease which can be said to cause their criminal acts. Cf. DeGrazia, *The Distinction of Being Mad*, 22 U. of OHIO L. REV. 339, 343 (1955); Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. of OHIO L. REV. 339, 343 (1955); DeGrazia, *Crime Without Punishment*, 52 COLUM. L. REV. 746 (1952). The *Durham* test has been rejected as not meeting the practical needs of a test to be applied by a jury of laymen, *State v. Collins*, 50 Wash.2d 740, 314 P.2d 660 (1957), and as being too vague and ambiguous. *People v. Carpenter*, 11 Ill.2d 60, 142 N.E.2d 11 (1957).

The major criticism leveled at *Durham* would seem to be the lack of certainty on the part of psychiatry in being able to determine the criminal responsibility of the accused within the meaning of the test. *Revard v. State*, OKL., 332 P.2d 967 (1958). This view as stated in the *Lucas* case is:

"If the question of what is a mental disease or defect is a psychiatric one, then the law has abdicated its function of determining criminal responsibility to the psychiatrist and the jury will have to accept the unopposed psychiatric view of mental disease or defect. The test will differ with the prevailing psychiatric winds of the moment."

Seven years after Judge Bazelon's famous *Durham* decision the test he enunciated has won few, if any, adherents in other courts. The prevailing judicial thinking is aptly summed up by Professor Hall: "Legal controls cannot be abandoned in response to the alleged findings of current science until it is ascertained whether the scientific knowledge necessary for effective operation of the new laws is actually available." Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 762 (1956).

STEVEN P. FRANKINO

TORTS—ABSOLUTE LIABILITY—BLASTING—CONCUSSION DAMAGE—The defendant, while excavating a ditch some 200 feet from plaintiff's residence, detonated an explosive charge which damaged plaintiff's house. Defendant demurred because plaintiff failed to allege: (1) that defendant was negligent; (2) that rocks or debris were thrown onto plaintiff's property; or (3) that the amount of explosives used was excessive. On appeal, *held*: order overruling demurrer affirmed. The complaint did state a cause of action, without alleging any of these, since the South Carolina court, in this case of first impression, has decided to adopt the rule of absolute liability for damage caused by use of explosives, regardless of whether the damage is done by actual physical invasion of plaintiff's property or merely by vibration and concussion. *Wallace v. Guion & Co.*, 117 S.E. 2d 359 (S. Carolina 1961).

This problem involves the conflict between the right to enjoy one's property to the fullest, and the duty to avoid injuring the property of another. By its decision, the South Carolina court is giving priority to the latter duty over the former right. Most jurisdictions agree that when the explosion causes rocks or debris to actually go upon plaintiff's land, that such an invasion is a common-law trespass and thus the defendant is held absolutely liable. *Hay v. Cohoes County*, 2 N.Y. 159 (1849).

A split of authority, however, is found on the question of damages inflicted not by physical invasion, but by either vibrations (through the ground) or concussion (through the air). The New York rule, rejected by the South Carolina court, requires proof of negligence in these latter cases. In *Booth v. Rome, W. and O. Terminal Co.*, 140 N.Y. 267, 35 N.E. 592 (1893), the court held that the imposition of absolute liability would be a "far-reaching" decision, and alluded to the solid-rock nature of the island of Manhattan, of necessity requiring blasting to construct buildings. The Court of Appeals reasoned that to impose absolute liability would be to allow one person to blast, in putting up the first building in an area, and then give him the power to refuse the same privilege to subsequent persons wishing to build in the same area. Therefore, though a high degree of care was to be imposed, still liability would have to be based on negligence.

The South Carolina court, however, prefers the arguments of Judge Augustus Hand in *Exner v. Sherman Power Const. Co.*, 54 F.2d 510 (2d Cir. 1931). This case was strict, much more so than the South Carolina case, since it imposed absolute liability on a defendant who merely stored dynamite. Judge Hand reasoned that explosives are so intrinsically dangerous that one who uses or stores them under such circumstances as to cause others injury should be absolutely liable for such injuries. Having set up this policy, Judge Hand then criticized as invalid the distinction between physical invasion damages and vibration-concussion damages.

The strict trespass-vs.-concussion dichotomy has been justified in New York by saying that while rocks and debris can be controlled, the very nature of vibrations and concussions is such that they cannot be confined within enclosed limits. Therefore, it is held that if these injuries are rightfully caused, they must be remediless. *Stancourt Laundry v. Lamura*, (City Ct.) 47 N.Y.S. 895 (1914).

A leading Maine case in 1950 reviewed extensively the authorities on this subject, and then held that a complaint based on absolute liability was demurrable. The opinion, however, appears to have relied mainly on the line of cases dealing with the flooding of water stored on one's premises. Such a flooding-dynamiting

analogy fails to meet the arguments of Judge Hand in the *Exner* case, which turned upon the intrinsic dangers of explosives. *Reynolds v. Hinman Co.*, 145 Me. 343, 75 A. 2d 802 (1950).

Massachusetts has regulated blasting activities, requiring blasting contractors to post a bond to indemnify possible injured parties, but the Massachusetts courts have held that this statute does not abrogate the common-law need to allege negligence against the contractor, in order to reach the posted bond. *Jenkins v. Tomasello*, 286 Mass. 180, 189 N.E. 817 (1934).

While New York is generally cited as the leading jurisdiction for the negligence-requirement theory, it should be noted that the strict holding of the *Booth* case has been somewhat softened by a liberal application of the nuisance theory in a later case. Here *Booth* was said to be an exception, restricted to its facts, and the defendant quarry operator was held to be absolutely liable. A questionable distinction was made between blasting which is temporary and improves the land, as in *Booth*, and blasting which is repeated and does not improve the land, as in a quarry operation. This holding creates considerable doubt as to the position of New York in this controversy. *Dixon v. New York Trap Rock Corp.*, 293 N.Y. 509, 58 N.E. 2d 517 (1944).

There is considerable impressive authority for the absolute liability rule. It is accepted by RESTATEMENT TORTS §519-520. The *Exner* case is also ruling in Georgia. *Brooks v. Ready Mix Concrete Co.*, 94 Ga. App. 791, 96 S.E. 2d 213 (1956).

Wisconsin does not require allegations of negligence or physical invasion. In a case almost on all fours with the South Carolina case, the Wisconsin court held the defendant liable for concussion damage, regardless of negligence, saying that the New York rule embodied in the *Booth* case is only applicable in the peculiar circumstances of Manhattan island, and should not be extended to ordinary blasting situations. *Brown v. L. S. Lunder Const. Co.*, 240 Wis. 122, 2 N.W. 2d 859 (1942).

A 1951 case in West Virginia held the defendant absolutely liable for his blasting activities, and expressly rejected an attempt to liken the setting off of explosives to the keeping of a wild animal. The analogy failed because explosives endanger persons and/or property beyond the limits of defendant's property, while wild animals do not ordinarily. *Fairfax Inn v. Sunnyhill Mining*, 97 F. Supp. 991 (N.D. W.Va. 1951).

The absolute liability rule prevails also in Pennsylvania. In a 1949 case so holding, the court based its decision on the "ultrahazardous" nature of blasting activities, and cited the modern Workmen's Compensation Laws as examples of the same trend in American law. *Federoff v. Harrison Const. Co.*, 362 Pa. 181, 66 A. 2d 817 (1949).

Analyzing the opinions on both sides in this dispute, the South Carolina choice appears to be wise. The policy arguments in favor of absolute liability for blasting activities are strong and compelling. The arguments for the negligence-requirement viewpoint are either restricted to a particular set of circumstances or else are overly preoccupied with the formalistic differences between common-law trespass injuries and consequential injuries.

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