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Chapter 12: Criminal Law, Procedure, and Administration

J. Edward Collins

CHAPTER 12

Criminal Law, Procedure, and Administration

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§12.1. Criminal responsibility and insanity. In July 1954, the United States Court of Appeals for the District of Columbia Circuit decided *Durham v. United States,*[1] which declared that the proper test for criminal responsibility requires that a determination must be made as to whether the crime was the product of a mental disease or defect. The opinion thus rejected the almost universally accepted test of insanity based upon the ability of the accused to differentiate between right and wrong, and its widely accepted corollary, the irresistible impulse test. Prior to *Durham,* the law in the District of Columbia was susbtantially the same as that prevailing in Massachusetts, where both the rule of *M'Naghten's Case*[2] and the "irresistible impulse" test have been long employed.[3]

Durham enunciated no new criterion for the determination of legal insanity but was merely a restatement of the so-called "product rule" formulated and followed by the New Hampshire courts for over eighty years.[4] Because of the general and articulate dissatisfaction

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§12.1. 1 94 App. D.C. 228, 214 F.2d 862 (1954).

2 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

3 In Durham it is pointed out that the rule in M'Naghten's Case was adopted in the District in 1882, and the irresistible impulse test in 1929. In Massachusetts both tests were included in the famous jury charge given by Chief Justice Shaw in Commonwealth v. Rogers, 7 Metc. 500 (Mass. 1844). The Massachusetts cases subsequent to Commonwealth v. Rogers have explained rather than deviated from the criterion established in that case. See Commonwealth v. Johnson, 188 Mass. 382, 74 N.E. 939 (1905); Commonwealth v. Cooper, 219 Mass. 1, 106 N.E. 545 (1914); Commonwealth v. Stewart, 255 Mass. 9, 151 N.E. 74, 44 A.L.R. 579 (1926); Commonwealth v. Trippi, 268 Mass. 227, 167 N.E. 354 (1929); Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943).

4 State v. Jones, 50 N.H. 369 (1871); State v. Pike, 49 N.H. 399 (1870). There has been no widespread acceptance of the New Hampshire rule. To the contrary, with the exception of State v. Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579 (1904), which appears to adopt the rule (although State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932), raises doubts as to its status in Montana), and Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193 (1886), which speaks favorably of it, no cases have been found sympathetic to the New Hampshire insanity test.

of the medical profession with the traditional insanity tests employed in the courtrooms, however, and a general awareness of judges and attorneys that the law in this area has not been completely adequate nor reflective of the advances made in the medical sciences, *Durham* has been widely publicized and commented upon,[5] and has resulted in a broad re-examination by the legal profession of the existing criteria for the determination of legal insanity.

During the 1958 SURVEY year, the Supreme Judicial Court of Massachusetts was invited to follow *Durham* and to substitute the test therein enunciated for those long established in the Commonwealth. In *Commonwealth v. Chester*[6] the invitation was declined and the *Durham* doctrine unequivocally rejected.[7] The Court gave a number of reasons for its rejection. The *Durham* decision has been severely criticized for leaving undefined the meaning of the words "product," "disease," and "defect" and, since these are not only essential words found in the test but essentially the test itself, the test is basically undefined. The *Durham* doctrine has also been rejected by the American Law Institute in the formulation of its Model Penal Code, has not been followed by any other court, and has been repudiated by at least two.[8] The Court also was not convinced that *Durham* offers a better standard for the guidance of the trier of fact in the determination of the issue of insanity than is offered by the two older tests.

A further cogent reason for the rejection of *Durham,* although not mentioned in the *Chester* case, is that the test, in practical operation, has not worked particularly well in the District of Columbia. Instructions given by trial judges have been approved in three instances[9] and found to be erroneous in two cases;[10] two cases have been reversed, in

5 See, e.g., Symposium: Insanity and the Criminal Law — A Critique of Durham v. United States, 22 U. Chi. L. Rev. 317 (1955); Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761 (1956). For a pre-Durham bibliography on insanity as a defense to crime, see 7 Record of the Association of the Bar of the City of New York 158 (1952).

6 1958 Mass. Adv. Sh. 995, 150 N.E.2d 914.

7 The doctrine was not rejected, however, with the majestic disdain of the Court of Appeals for the Ninth Circuit. "This court has no desire to join the courts of New Hampshire and the District of Columbia in their 'magnificent isolation' of rebellion against M'Naghten." Andersen v. United States, 237 F.2d 118, 127 (9th Cir. 1956).

8 The Court made mention of the fact that Durham had been rejected by the Court of Appeals for the Ninth Circuit in United States v. Andersen, 237 F.2d 118 (9th Cir. 1956), and by Maryland in Thomas v. State, 206 Md. 575, 112 A.2d 913 (1954). Although not mentioned, the case was also rejected by Montana in State v. Kitchens, 129 Mont. 331, 286 P.2d 1079 (1955); Vermont in State v. Goyet, 120 Vt. 12, 132 A.2d 623 (1957); and Washington in State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957). Also rejecting the Durham rule without mention of the Durham decision have been California in People v. Berry, 44 Cal. 2d 426, 282 P.2d 861 (1955); and Indiana in Flowers v. State, 236 Ind. 151, 139 N.E.2d 185 (1956). See also Howard v. United States, 229 F.2d 602 (5th Cir. 1956).

9 Kelley v. United States, 236 F.2d 746 (D.C. Cir. 1956); Bailey v. United States, 248 F.2d 558 (D.C. Cir. 1957); Bradley v. United States, 249 F.2d 922 (D.C. Cir. 1957).

10 Stewart v. United States, 214 F.2d 879 (D.C. Cir. 1954); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1958).

one for failure on the part of the trial judge to amplify correct instructions,[11] and in the other for failure to receive evidence relating to the pre-*Durham* right and wrong and irresistible impulse tests.[12] In the most recent case before the appellate court a dissenting judge strongly urged that ". . . the best way to deal with the rule which requires such elaborate explanation is to discard it in favor of the pre-existing rule . . . which did not generate so much confusion." [13]

It is unfortunate, however, that the Supreme Judicial Court in the *Chester* decision should make an extended reference to the insanity definition proposed by the American Law Institute in its Model Penal Code,[14] and its favorable recommendation by the Judicial Council, only to dismiss this definition with the comment that no judgment with respect to its desirability should be made, it not having been properly presented in the case. One is left with the impression that the Court, as presently constituted, does not look unfavorably upon the Model Penal Code test and might, in a proper case, be persuaded to substitute it for the *M'Naghten* and irresistible impulse tests. At present the trial judges must continue to send cases to the jury based upon evidence and instructions relating to the traditional tests for insanity used in Massachusetts since 1844.

§12.2. Right of indigent defendant to assistance of counsel. In recent years, the question of the right of an indigent accused to the assistance of court appointed counsel has been a matter of frequent concern to the courts of the Commonwealth.[1] During the 1958 SURVEY year it has been a subject of judicial cognizance, not only in criminal proceedings but also in the exercise by the Supreme Judicial Court of its rule-making powers.

11 Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957).

12 Douglas v. United States, 239 F.2d 52 (D.C. Cir. 1956).

13 Catlin v. United States, 251 F.2d 368, 373 (D.C. Cir. 1957). The confusion referred to is exemplified by the Catlin case and Douglas v. United States, 239 F.2d 52 (D.C. Cir. 1956). In Douglas it was held that the trial court should permit the jury to consider the criteria of the right and wrong and irresistible impulse tests and testimony given in terms of these tests should not be excluded. In Catlin, the appellant urged that the trial court's charge was erroneous for failure to include a requested instruction to the effect that if the jury should find the accused was suffering from a mental disease to which the crime was attributable it should find him not guilty by reason of insanity, even though the jury should also find that he was able to distinguish right from wrong and did not act upon an irresistible impulse. The appellate court disposed of this contention by finding no evidence of accused's ability to distinguish right from wrong, or action under irresistible impulse, thereby leaving open the question as to the validity of the appellant's contention as a matter of law.

14 Section 4.01 of the Model Penal Code of the American Law Institute reads: "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks susbtantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

§12.2. 1 See 1957 Ann. Surv. Mass. Law §23.2.

In 1957, for the first time in Massachusetts, the Supreme Judicial Court reversed a non-capital criminal case for failure of a trial judge to assign counsel for an indigent defendant.[2] In reaching its decision the Court followed the rule established by the United States Supreme Court,[3] although the defendant's right found to be violated was deemed to be grounded in the Declaration of Rights of the Massachusetts Constitution rather than in the due process clause of the Fourteenth Amendment. As a result of this decision, and that in a similar case,[4] the rule has been established in this jurisdiction that, even in non-capital felony cases in which there is an absence of any statutory provision requiring that counsel be furnished to an indigent defendant, if the accused, because of his youth, inexperience or incapacity, or due to the complexity of the legal issues, or great prejudice or disadvantage in standing trial unassisted by counsel, stands in the need of legal assistance in order to secure the fundamentals of a fair trial, a conviction in the absence of such assistance will be reversed as a denial of his right not to be deprived of his liberty "but by . . . the law of the land." [5]

During the 1958 SURVEY year the facts of two cases were held not to require assignment of counsel. *Commonwealth v. Hanley*[6] involved a defendant found to have been under no physical or mental disability. In addition, the Court found no prejudicial error of a type that the presence of counsel would have probably obviated. In *Commonwealth v. Drolet* [7] counsel was appointed by the trial court approximately a month prior to trial but was rejected by the defendant, purportedly because of the attorney's failure to identify himself to the satisfaction of the accused. More probably the accused actually rejected the assigned counsel because he believed the counsel specialized in civil rather than criminal matters. At the trial, a second request for counsel was made and denied. The denial was held not to be error, the defendant being regarded as a person not so incapacitated as to qualify for counsel. There was no suggestion that the trial was other than fair.

The criteria that have been established by the cases for the determination of when counsel must be made available to an indigent accused in a non-capital case, are not particularly difficult to understand. The problems arise in application of the criteria. While the trial judge

2 Pugliese v. Commonwealth, 335 Mass. 471, 140 N.E.2d 476 (1957). See also Brown v. Commonwealth, 335 Mass. 476, 140 N.E.2d 461 (1957).

3 Betts v. Brady, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942), is followed by a line of decisions, including Uveges v. Pennsylvania, 335 U.S. 437, 69 Sup. Ct. 184, 93 L. Ed. 127 (1948); Gibbs v. Burke, 337 U.S. 773, 69 Sup. Ct. 1247, 93 L. Ed. 1686 (1949); and Massey v. Moore, 348 U.S. 105, 75 Sup. Ct. 145, 99 L. Ed. 135 (1954).

4 Brown v. Commonwealth, 335 Mass. 476, 140 N.E.2d 461 (1957).

5 Mass. Const., Declaration of Rights, Art. XII.

6 1958 Mass. Adv. Sh. 653, 149 N.E.2d 608.

7 1958 Mass. Adv. Sh. 665, 149 N.E.2d 616. See also earlier decision in the same case, 335 Mass. 382, 140 N.E.2d 165 (1957), commented upon in 1957 Ann. Surv. Mass. Law §23.2.

may, if the matter is brought to his attention at the appropriate time, determine whether the accused is so incapacitated as to need counsel, he may nevertheless experience great difficulty in attempting to predict whether a nonincapacitated defendant will receive a trial in which there will be no error of a type that the presence of counsel could probably obviate. In addition, as a practical matter, lack of mental capacity of the accused may not become apparent until the trial is well under way or even, conceivably, until after the trial is ended. Similarly, unfair conduct of public authorities, complexities of issues, or special prejudices or disadvantages to which the accused has been exposed may not be disclosed until a later date. Although the trial judge may make the most honest and conscientious efforts to control or eliminate these problems, they may still arise. What the consequences of such developments would be is not explicitly stated in the cases, but there is certainly room for contending that under such circumstances due process will be held to be denied ab initio.

Drolet raises an additional troublesome problem. When, as in that case, an accused has been assigned counsel and rejects him for reasons best known to himself, or for no reason at all, he is thereby deemed to have waived his right to legal assistance. Has he also waived any right he may have to a trial free from unfair conduct by public authority? May he be prejudiced to an extent that would be said to constitute a violation of the fundamentals of a fair trial if counsel had not been assigned originally?

Without attempting to answer these questions which it has not been called upon to decide, the Supreme Judicial Court has taken a progressive step by adopting a new rule of court applicable to the Superior Courts. By Rule 10,[8] the trial judge is required, when an unrepresented defendant appears before him in a non-capital case, to advise the accused of his right to counsel, and to assign counsel unless the defendant elects to proceed without counsel or is able to secure his own attorney. Since by statute counsel must be assigned to an unrepresented defendant in a capital case,[9] the result is that now all indigent felony defendants may have counsel. The rule has provisions for waiver of counsel and contains forms appropriate therefor.

The rule is most desirable and serves generally to conform the Massachusetts practice to that prevailing in the federal courts.[10] The result of the rule will be that henceforth a great many more assignments of counsel will be made than has been the case in the past. Since there is no statutory provision for compensation for attorneys assigned under the rule, as there is for those assigned in capital cases, an opportunity

[8] The text of the rule is to be found in 43 Mass. L.Q. No. 2, pp. 2-3 (1958).

[9] G.L., c. 277, §47.

[10] Fed. R. Crim. P. 44, unlike the Massachusetts rule, requires the appointment of counsel without distinction between the more and less serious crimes. It also differs in that no consent to, or certificate of, waiver need be executed by the defendant or the judge respectively, although waiver of counsel is, of course, permissible under Rule 44. Lipscomb v. United States, 209 F.2d 831 (8th Cir. 1954), *cert. denied,* 347 U.S. 962 (1954).

is presented to the legal profession to perform a real public service. Perhaps it would not be amiss to suggest that the Supreme Judicial Court keep a supervisory eye on the manner in which assignments are made and carried out to assure itself that each indigent so represented receives the benefit of reasonably competent and conscientious counsel.

§12.3. Right of persons arrested for misdemeanor to use telephone. Both the Massachusetts[1] and United States Constitutions[2] guarantee to every arrested person the right to be represented during trial by counsel of his own choosing. It is doubtful, however, that an arrested person has any constitutional right to the assistance of counsel prior to trial. One case has stated that "[t]here is nothing in the statutes of Massachusetts giving a person accused of a capital crime or any other crime a right to counsel before being brought into court." [3] The Court, therefore, held that the police may, during the period of arrest prior to trial, secure a confession which will not be inadmissible at the trial because the arrested person was not advised, prior to its procurement, that he could secure counsel.

In a very limited area, however, a semblance of a pre-trial right to legal assistance has been recognized. Since 1945 the police officer in charge of the station in which a person arrested for a misdemeanor is held in custody, is obligated to permit the arrestee to use a telephone to communicate with his family or friends or to engage the services of an attorney.[4] In 1946 the law was amended to require the arrestee to bear the expense of the call,[5] and during the 1958 SURVEY year it was again amended to provide that the arrestee not only be informed of his right to use the telephone immediately upon being booked, but in addition that he be permitted its use within one hour thereafter.[6]

The statute is puzzling. On three occasions it has been considered by the legislature and yet its scope continues to be confined to persons arrested for misdemeanors. While many persons arrested and charged with misdemeanors have no particular need for legal assistance, the same cannot generally be said for those arrested for the more serious crimes. The individuals having the lesser need for legal counsel are the ones to whom the right has been given.

The most recent amendment would also appear to indicate that arresting officers have not been overly conscientious in complying with the statute. Even now no sanction exists for failure to abide by it, save the distinctly questionable liability in a civil action for false imprisonment. The existence of legislation such as this serves to focus attention on the extreme need in the Commonwealth of a law revision

§12.3. 1 ". . . And every subject shall have a right . . . to be fully heard in his defense by himself, or his counsel, at his election." Mass. Const., Declaration of Rights, Art. XII.

2 "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const., Amend. V.

3 Commonwealth v. McNeil, 328 Mass. 436, 438, 104 N.E.2d 153, 155 (1952).

4 Now found in G.L., c. 276, §33A.

5 Acts of 1946, c. 277.

6 Acts of 1958, c. 113.

commission to assist the General Court in the enactment of laws intelligently conceived and formulated.

§12.4. Effect of avoidance of sentence on consecutive sentence. Occasionally a case is presented to an appellate court in which the alternatives involve either following established legal principles to reach a result which, in the judgment of the court, would be unjust, or of following the conscience of the court and allowing the legal principles to fall where they may. When the latter course is pursued, the decision is generally dismissed as one of those hard cases that make bad law. Somewhat rarer is the case wherein the alternatives are not justice versus principles, but rather principles versus the establishment of a precedent which if followed in future cases of this nature will lead to consequences other than just.

The 1957 ANNUAL SURVEY commented on the case of *Brown v. Commonwealth*,[1] in which a conviction was set aside almost five years after the defendant had been sentenced to a minimum term of five years.[2] The sequel appears during the current SURVEY year in *Brown v. Commissioner of Correction*.[3]

The decision is hard to justify. No injustice would have been suffered by Brown if his contention had been rejected. The original Middlesex indictments were for armed robbery and assault and battery with a dangerous weapon arising out of three taxicab operator robberies. His conviction for these offenses was reversed not because of lack of guilt but because he was not represented by counsel during the trial. His lack of innocence of the crimes charged is apparent from his subsequent plea of guilty. In paroling him the trial judge took into account, as is acknowledged in the decision, the time he served under the original indictments. Despite this, the Supreme Judicial Court, by directing that the time served shall be applicable to the Suffolk indictments, in effect says that Brown shall, for the two separate series of crimes he committed, be charged only for the price of one.

The Court discussed in its decision two motivating considerations. The first is that a person who has served time under a sentence that has been reversed should have the right to insist that consideration be given to this fact upon his subsequent conviction on retrial or guilty plea. This is believed to be a sound and just proposition. The application of the proposition in this case, however, gives very unfortunate results.

The second factor discussed in the decision is that the rule sought by the criminal defendant is supported by two recent federal cases that represent the better view. An analysis of the cases regrettably shows them to be inapposite. In *Youst v. United States*[4] the defendant was convicted on two counts of an indictment for conspiracy to violate the Mann Act, and shortly thereafter he was convicted for violation of the

§12.4. [1] 355 Mass. 476, 140 N.E.2d 461 (1957).
[2] 1957 Ann. Surv. Mass. Law §23.2.
[3] 336 Mass. 718, 147 N.E.2d 782 (1958).
[4] 151 F.2d 666 (5th Cir. 1945).

act itself. Under each count of the first indictment consecutive sentences of two years were imposed, and under the second indictment defendant was sentenced to two terms of two years each, these sentences to commence upon the termination of those under the first conviction. On appeal of the initial conviction some four years later, the Court of Appeals for the Fifth Circuit found there was only one conspiracy, and the sentence on the second conspiracy count being illegal, null and void, the defendant had the right to insist that the aggregate of the several sentences be reduced from eight to six years and the time served applied to the legal sentence.

In the second case, *Ekberg v. United States*,[5] the defendant was convicted under a three count indictment, and received a separate sentence of three years on each count, the terms to be concurrent. On appeal the Court of Appeals for the First Circuit found the first count did not charge an offense so the time served under the sentence on that count became legally referable to the concurrent sentences on the other two counts.

In both cases there were defects in indictments and no retrials were necessary to determine guilt. In both cases the defendants had received double punishments for a single crime. In the *Brown* case, on the contrary, no double punishment was ever imposed and when the dust settled the defendant received only a single punishment for two series of crimes. On occasion cases which strive for an abstract principle of justice reach other than just results.[6]

[5] 167 F.2d 380 (1st Cir. 1948).

[6] Brushed lightly aside by the Court as dicta is the language of Chief Justice Shaw in Kite v. Commonwealth, 11 Metc. 581, 585 (Mass. 1846): "The court are all of opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. If the previous sentence is shortened by a reversal of the judgment . . . it then expires; and then, by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence will take effect." Following the Kite decision as "the leading case upon the subject" the Supreme Judicial Court of Maine has reached a conclusion contrary to the Brown case in Smith v. Lovell, 146 Me. 63, 77 A.2d 575 (1950). Also citing and following the Kite case is the Superior Court of Pennsylvania in Commonwealth ex rel. Holly v. Claudy, 171 Pa. Super. 340, 90 A.2d 253 (1952). Both the Smith and Holly cases were considered by the Supreme Judicial Court in reaching its decision in Brown v. Commissioner.