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State v. Noble, 384 P.2d 504 (Mont. 1963)

David Niklas

Since the murderer was entitled to half of the joint property before the killing, he could retain the benfits of this interest. However, the doctrine that a man cannot benefit by his own wrong prevents the murderer from acquiring not only the victim's half-interest, but also the victim's survivorship right. This view differs from the instant case because there is no division of the joint property into inheritable interests; the victim's estate inherits all of the property.[36]

It is submitted that the Montana court adopted a solution which compromises conflicting considerations raised by the murder and suicide of joint owners.[37] On the one hand, the murderer is not permitted to benefit his estate by acquiring the victim's half-interest. On the other, the victim's estate is not deprived of property by the enforcement of the murderer's survivorship right. In addition, the decision does not punish the murderer's innocent heirs by denying their right to inherit all of the joint property, but pragmatically states that justice and fairness are best served by allowing the victim's heirs to take half of the joint property.[38]

JOSEPH E. REBER

DETERMINATION OF INSANITY—OLD PROBLEM REQUIRES A NEW APPROACH.—In 1962 the defendant shot his wife and another woman, killing his wife. Upon an information for first degree murder, he pleaded the defense of insanity. The plea was based upon two grounds: (1) a history of serious mental illness which dated from 1944; and (2) that the alleged crime was the result of mental illness inasmuch as the defendant was suffering from the delusion that his wife and the other woman were carrying on illicit relations. The jury, under instructions from the court, pronounced the accused legally sane at the time of the act and convicted him. On appeal by the defendant to the Montana Supreme Court, *held,* affirmed. The instructions of the trial court containing the right-wrong and irresistible impulse tests presented the jury with the correct standard for determining insanity. *State v. Noble,* 384 P.2d 504 (Mont. 1963). (A dissent by Mr. Justice Doyle condemned these tests as being outdated.)

Although a perfect test for insanity may never be developed, both society and the courts have struggled to establish an adequate standard to separate "criminals" from persons who are mentally irresponsible for

[37]Where a murderer does not commit suicide, the Montana court may be asked to impose a constructive trust on all of the joint property, and permit the murderer to retain only a life-interest in his half. The reasoning of the instant case would not support this solution. It recognizes that a murderer cannot benefit by his felonious act and thereby acquire the deceased's share of the property held jointly. This benefit entails only the "half-interest" of the victim, and does not entend to the victim's survivorship right.

[38]In the absence of clear proof of which tenant died first it is unrealistic to enforce the survivorship right. The facts of the instant case indicate that there was a nominal time gap between the murder and the suicide. A lapse of several minutes should not result in exclusive heirship. Under such circumstances the same result could have been reached in the instant case by presuming that the deaths were simultaneous. As provided in R.C.M. 1947, § 91-425, the joint property would descend to the heirs of the respective tenants.

their acts. The following four rules constitute the more significant standards which have been developed to test legal sanity:

(1) The *M'Naghten* or *right-wrong test.*[1] A person is legally insane if at the time he commits the particular act he does not know the nature and quality of that act; or if he does, cannot distinguish whether it was right or wrong.[2]

(2) The *irresistible impulse test.* A person is relieved of criminal responsibility even though he knows his act to be wrong, if he is able to prove that, at the time of the act, he could not choose the right being compelled by an "irresistible impulse" to do the wrong.[3]

(3) The *Durham Rule.* A person is pronounced legally insane if the act committed is a "product" of a mental disease or defect.[4]

(4) The *Currens test.* A person is declared legally insane if, at the time the act was committed, he lacks substantial capacity due to a mental disease or defect, to conform his conduct to the requirements of the law.[5]

The diagnosis of mental illness is exceedingly complex. However, since the determination of insanity is a jury function, an adequate test must serve not only as a guide so that, as far as possible, the exact condition of the accused's mind is exposed, but also must be simple enough for the jury to utilize. This conflict between the simple and complex cannot be resolved without criticism of old rules and development of new. The criticisms presented below serve to illustrate the problems involved in the formulation of an adequate standard.[6]

Of the four rules mentioned, the *M'Naghten* rule, on its face, presents the simplest test of insanity. However, its application by a jury may lead to confusion. Usually, as in the instant case, the preponder-

[1]This test became firmly established in England by the decision of the M'Naghten case, 8 Eng. Rep. 718 (1843).

[2]The *M'Naghten* rule has become the sole test for insanity in the majority of American jurisdictions, approximately thirty states accepting it. See Annot., 45 A.L.R.2d 1447, 1452 (1956).

[3]The *irresistible impulse* test is seldom used by itself, but has been adopted as a supplement to the right-wrong standard in fourteen states, this being the minority rule in the United States. Although the *irresistible impulse* standard, if used as a supplement to the *right-wrong* test, would seem to offer a more inclusive test for determining insanity, there is no general trend toward its adoption, and it has been rejected by several states in recent cases. *Id.*, 1453-54.

[4]Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1945).

[5]United States v. Currens, 290 F.2d 751, 773 (3rd Cir. 1961). The *Currens* test is strikingly similar to, and for the most part has been adopted from the American Law Institute test which states:

> "1. A person is not responsible for the criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial 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."

MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[6]It should be noted that the criticisms presented in this article are designed to primarily consider the four rules from the standpoint of the jury's reaction. Criticisms based upon the reaction of judges, lawyers, or psychiatrists will not be considered by this article.

ance of evidence relevant to the issue of insanity, pertains to the individual's history of mental illness. Yet an instruction couched in terms of the *M'Naghten* rule confines the jury to a consideration of the defendant's ability to know right from wrong *at the time of the act.* If the accused can distinguish, the jury must conclude that he is sane. Realistically then, either the jury gives the person's past history of mental illness little weight, or must, of necessity, disregard the instructions completely and view the total mental picture exposed by the evidence presented.

Furthermore, the *right-wrong* test, by making no reference to the volitional or emotional functions of the mind, implies that no regard is to be given these capacities when making a determination of insanity. Thus, by adhering to the instruction, the jury could disregard serious defects of the defendant's volitional or emotional faculties, and declare the person sane because he intellectually realized right from wrong.[7] For this reason, there is a real question whether the *M'Naghten* rule does aid in separating the "criminal" from those who are mentally irresponsible for their acts. The emphasis of the rule should only be considered as one element in the jury's determination of the sanity question. However, in spite of these criticisms, the simple terminology used in the right-wrong test renders it fairly understandable to a lay jury.

Because of the failure of the *M'Naghten* rule to consider the element of control at the time of the act, several courts have supplemented the rule with the *irresistible impulse* test. By this combined test, although the accused knows his act to be wrong, he may still be adjudged insane if he was unable, because of impulse, to choose the right. The major emphasis, as with the *M'Naghten* rule alone, is placed upon circumstances surrounding the commission of the act, and little weight seems to be given to an individual's history of mental illness, or the over-all picture of the mind. The jury could still convict the defendant without denying the existence of mental illness which may have been associated with the criminal conduct.

Due to the terminology used in the *irresistible impulse* test, it is further quite possible that a jury will interpret *impulse* to mean an act motivated only by a spontaneous urge.[8] However, a person may also lose the ability to control his actions because of brooding and reflection. While the courts no doubt would agree with this supposition, inadequate instructions may cause the jury to overlook uncontrolled actions caused by the "slow burn."[9]

Both the *Durham* and *Currens* rules are attempts to present to the jury the total mental condition of the accused rather than confining that body to a determination based on the defendant's ability to know or choose.[10] By directing the attention of the jury to the defendant's whole

[7]Guttmacher, *The Psychiatrist as an Expert Witness,* 22 U. CHI. L. REV. 325, 326 (1955).

[8]See note 4 *supra.*

[9]The court in the instant case avoided the problem of interpreting "irresistible impulse" because the term was not used in the instructions. Instant case at 508.

[10]*Durham v. United States,* note 4 *supra* at 875, 876. See also *United States v. Currens,* note 5 *supra* at 772.

personality, both tests resulted in expanding the jury's discretion in deciding the ultimate question of insanity.[11] Although the two tests are similar in these respects, the emphasis of each is considerably different.

The emphasis of the *Durham* test is placed upon the causal connection between the mental illness and the act.[12] The jury must determine whether the act was the "product" of the mental disease. No real definition of the term "product" has been given although one case has stated that the facts must justify the inference that the act would not have occurred if it were not for the illness.[13] As interpreted, the *Durham* rule seems to offer a "but for" test which is generally considered a troublesome standard wherever used.[14]

The emphasis of the *Currens* test, on the other hand, is placed upon the determination of mental illness, and whether the accused has sufficient mental control to conform his conduct to the requirements of the law. Many have feared that under such a rule, the jury's preoccupation with establishing the mental illness and lack of substantial capacity could detract from a consideration of the causal connection between the mental illness and the act. Hence, the argument goes, the jury could satisfy itself that the accused is substantially incapacitated by mental illness, and since little attention would be given to the causal relation, the habitual criminal, or psychopath would be granted an effective lever which could result in the freeing of many enemies of society.[15]

This contention may be answered by reference to the policies underlying the need for an insanity standard. The basic goal of any test for insanity is to separate those who are responsible for their acts from those who are not. Consequently, the defendant's "habit of crime" should not of itself defeat the possibility of declaring him insane. Rather, the *reason* behind the habit should be investigated to determine whether it is the result of mental illness. Those who criticize the acquittal of the psychopath should instead turn their efforts to the development of appropriate legislation whereby persons, adjudged insane at trial, are required to undergo psychiatric treatment in mental institutions.[16]

Since 1899 and the decision of *State v. Peel*,[17] the *M'Naghten-irresistible impulse* rule has been generally accepted as the controlling

[11] *Ibid.*

[12] *Durham* has been attacked for its failure to establish an adequate causal connection between the illness and the act. See *United States v. Currens*, note 5 *supra* at 774. This criticism is based primarily on the use of the word, "product," which is considered vague and subject to many interpretations. However, it is not believed that the jury will labor with the theoretical meaning of this term. "Product of" should simply be interpreted to mean "cause of" or "result of."

[13] Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957).

[14] PROSSER, TORTS § 44 at 220 (2d ed. 1955).

[15] Note, *Criminal Law: Insanity: A New Test of Criminal Responsibility*, 9 U.C.L.A. L. REV. 516, 518-19 (1962).

[16] Although psychiatric treatment for all persons manifesting mental disorder would be the ideal, it is recognized that inavailability of funds and trained personnel present tremendous obstacles to such an undertaking. These problems are no doubt more acute in Montana than in other states due to this state's sparse population. Nevertheless, the problems must be faced squarely in order to provide help for those with mental disorder.

[17] 23 Mont. 358, 59 Pac. 169, 173 (1899).

criterion for the determination of insanity in Montana. However, the road has not always been smooth. In *State v. Keerl*,[18] the court seriously questioned the utility of a jury instruction under the rule, and stated that the *M'Naghten* rule seemed irreconcilable with the concept of *irresistible impulse*. Nevertheless, the court did not overrule the holding of the *Peel* decision. This apparent contradiction in *Keerl* evidently has not posed a difficult problem to the court, since the combined rule has been applied in subsequent decisions.[19]

The court in the instant case approved the combined rule, but at the same time, recognized its shortcomings. Mr. Justice Harrison, writing the majority opinion stated:

> This court has never determined whether by the application of the right-wrong test, insanity is determined, or whether insanity must first be determined, and the right and wrong test applied to measure the degree of insanity which renders a man subject to "irresistible impulse."
>
> Since the Peel case the court has labored with this two-headed monster in vain to bring it into proper focus.[20]

Every test of insanity is subject to criticism on some basis. This is no doubt one reason most courts have adhered to the test previously established in their jurisdiction. By so doing, emphasis could be placed on articulating the adopted rule rather than continually searching for a new standard, a procedure which seems justified in such a complex field of law.

In the instant case one of the instructions included elements of both the *M'Naghten* rule and *irresistible impulse* test. Another instruction, although purporting to present the *irresistible impulse* standard, did not use the words "irresistible impulse."[21] Nevertheless, the court held that the two instructions together reflected the true meaning of the rule.[22]

If the concern of the court is to clarify the use of the adopted rule, every instruction on insanity should be subjected to careful analysis on appeal. The court should initially require the instruction to be concise. Verbiage saps an instruction of any value which it may otherwise have. The better instructions should rely on terms used in the rules although cautious use of further instructions for purposes of emphasis or clarity may be advisable. When a rule is paraphrased, it must properly reflect the emphasis of the standard. Any major violation of these particulars should constitute reversible error.

In the instant case, if the emphasis had been placed on examining the defendant's total personality, he might have been acquitted. He was obviously suffering from serious mental illness, having been diagnosed a

[18]29 Mont. 508, 75 Pac. 362, 365 (1904).

[19]State v. Crowe, 39 Mont. 174, 102 Pac. 579 (1909); State v. Colbert, 58 Mont. 584, 194 Pac. 145 (1920); State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932); State v. Simpson, 109 Mont. 198, 95 P.2d 761 (1939).

[20]Instant case at 509.

[21]*Id.*, at 508.

[22]*Id.*, at 510.

schizophrenic by at least four different psychiatrists over a ten year period; shortly after his arrest, he was declared incompetent to stand trial.[23] A mere 43 days later he was considered able to properly defend himself. As was pointed out in the dissent, it was highly improbable, if not impossible, for him to have been cured by the short period of treatment before trial.[24] If the jury had been clearly instructed to consider the seriousness and long history of the defendant's illness, hopefully he would now be undergoing psychiatric treatment designed to rehabilitate him rather than serving a life sentence in the state prison.

It is submitted that the courts, as yet, have not met the challenge of treating a complex problem in a simple and understandable fashion. At the base of the problem are the difficult communication barriers that exist between psychiatrists, attorneys, and lay jurors. Furthermore, many proponents and critics of the tests have allowed their logic to be clouded because of their less than unanimous accord on how to treat persons once they have been adjudged insane. Until these difficulties are overcome, no real development can take place in this field of the law.

DAVID NIKLAS.

GENERAL ADMONITIONS TO JURY NOT TO READ NEWSPAPER ACCOUNTS OF TRIAL HELD SUFFICIENT TO COUNTERACT ADVERSE PUBLICITY.—The defendant was indicted in the District Court of Park County for first degree burglary. A motion for change of venue was granted and the case removed to the District Court of Yellowstone County, where the defendant was convicted of the crime charged. Fifteen counts of error were specified. Included therein were the denial of the defendant's challenge to a member of the jury panel for having formed an opinion as to the guilt or innocence of the defendant and the denial of his motion for a mistrial. The motion for mistrial was founded upon the alleged misconduct of the prosecutor who, at such time as the case was ready for submission to the jury, filed a charge against a third party for embracery of a juror trying the defendant. The charge was headlined in the local newspaper and broadcast over radio and television. Prior to his arrest, the defendant had been the Chief of Police of Livingston, Montana. This factor probably contributed to the widespread publicity which his arrest and trial received. On appeal to the Supreme Court of Montana, *held,* affirmed. There was no showing that the trial court abused its discretion or that there was error prejudicial to the defendant. *State v. Moran,* 384 P.2d 777, (Mont. 1963).[1]

[23] *Id.,* at 507.
[24] *Id.,* at 517.

[1] Because indictment by grand jury is rarely used in Montana, it is significant to note that the defendant in the instant case was so indicted. The last time a reported Montana case dealt with a grand jury was in 1950, in the case of State *ex rel.* Porter v. Dist. Ct., 124 Mont. 249, 220 P.2d 1035 (1950). This case contains an excellent discussion of the grand jury in respect to its history, purpose, and application.