

on directed verdict for failure to carry its burden of proof beyond a reasonable doubt. The rule that the defendant is required to raise the issue by showing "some evidence" of mental disease does not apply to the second prong of the responsibility test. Under the rule of *Frigillana v. United States* "some evidence" of causal connection or "product" is not necessary.⁹

Of course, there is a presumption of sanity in the District of Columbia, as elsewhere, but under the case law of which *Frigillana* was the most recent expression, that presumption is overcome by a showing of "some evidence" of mental disease. Thereafter, the government must prove beyond a reasonable doubt the absence of mental disease or that the act was not a product of the disease. The latter element cannot be proved in the typical case in which the psychiatrist will not or cannot express an opinion on the question. And so, as a practical matter, every case must be fought by the prosecution on the absence of mental disease, or not fought at all. "Product" is thus read out of the *Durham* rule in practice, by the automatic, trap-like operation of the presumption of a causal connection. The irony of this is particularly biting when one recalls that one of the chief arguments advanced for the *Durham* standard was that it took account of "psychic realities and scientific knowledge."¹⁰

Naturally, the presumption of causal connection has produced many situations in which either a verdict is directed against the government, or it is forced to go to trial before a judge, on a waiver of jury trial, and take an uncontested judgment of acquittal by reason of insanity. An interesting example of a directed verdict situation is the state of the record on the "product" question in *Wright v. United States*.¹¹ Eleven psychiatrists testified, all called by the defendant. No opinion was elicited by defendant from five. The opinions the others expressed on the "product" issue were in various shades of doubt. Two witnesses stated they had "insufficient data to support an opinion"; one said that it was "likely" there was a causal connection; another said there "could very well be" a causal connection and another that it was "surely possible"; one of the eleven answered "Yes" to a hypothetical question. The court of appeals, on this state of the record, held that the government failed to sustain its burden as a matter of law, and reversed the conviction. Such a state of the record is not unusual in the degree of its ambiguity on the issue of "product."

3. As a final criticism, the state of the law under *Durham* requires of the defendant too slender a quantum of evidence of mental disease, to overcome the presumption of sanity. "Some evidence" is the historic rule.¹² As interpreted in our circuit, this has been something akin to a "scintilla." As an illustration of how insignificant "some evidence" could be, one defendant took the witness stand and speculated that he "must have been insane." On cross-examination he testified that he was not insane, but would like to be because he preferred St. Elizabeths Hospital to jail. The court of appeals held that the presumption of sanity was overcome so as to raise the insanity issue, solely by virtue of this testimony.¹³ Such a standard has often brought the issue of responsibility into the case when there was not enough evidence to litigate the issue intelligibly to a jury, and naturally has encouraged surprise tactics by defense counsel. Trials have frequently been chaotic and preparation has lost much of its power to forearm.

Believing that *Durham* and its subsidiary rules had become so capricious and burdensome as to be tolerable no longer, the U.S. Attorney's Office prepared and urged in 1962 a brief legislative act based upon a proposed section of the American Law Institute Model Penal Code.¹⁴ Subsequently, the court of appeals handed down, *en banc*, a unanimous (for this purpose) opinion in *McDonald v. United States*.¹⁵ In this decision, I believe, the law has taken a significant new direction, and much for the better.

THE NEW RULES

In *McDonald v. United States* the court of appeals reversed a conviction of manslaughter for a faulty jury instruction. Important new rules were laid down, which, since they were provided as guidance for a new trial, have stature

⁹ 113 U.S. App. D.C. 318, 307 F. 2d 665 (1962).

¹⁰ *Durham v. United States*, 94 U.S. App. D.C. 228, 240, 214 F. 2d 862, 874 (1954).

¹¹ 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957).

¹² *Davis v. United States*, 160 U.S. 469, 486 (1895); *Durham v. United States*, 94 U.S. App. D.C. 228, 235, 214 F. 2d 862, 869 (1954).

¹³ *Clark v. United States*, 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958).

¹⁴ Model Penal Code, sec. 4.01 (Proposed Draft, 1962).

¹⁵ No. 16,304, D.C. Cir., Oct. 8, 1962.